LAW REFORM

IN

CEYLON:

ITS

HISTORY, PROGRESS

AND

TENDENCY.

BY

A MEMBER

OF THE

CEYLON JUNIOR CIVIL SERVICE.

COLOMBO :—PRINTED AT THE OBSERVER PRESS.

MDCCCLII.

TO THE

HONOURABLE THE PRESIDENT

AND THE

HONOURABLE THE MEMBERS,

OFFICIAL AND UNOFFICIAL,

OF THE

LEGISLATIVE COUNCIL;

TO WHOSE LEGISLATIVE WISDOM

THE BEST INTERESTS OF THIS ISLAND

ARE COMMITTED,—

THE FOLLOWING SHEETS

ARE RESPECTFULLY DEDICATED;

BY

THEIR OBEDIENT, HUMBLE SERVANT,

A MEMBER OF THE

CEYLON JUNIOR CIVIL SERVICE.

PREFACE.

The writer of these pages would have willingly affixed his name to this production, if he thought that that would add either weight or value to his facts and arguments. The probabilities are that it would produce just a contrary effect; for what senior would deign to be dictated to by a junior *in propriâ personâ*; though he might not disdain to listen to an anonymous writer. Perhaps then it will be asked why in the title page the writer indicates the body to which he belongs. Simply for the purpose of assuring the reader that he has no motives of interest to mislead the public. It may again be asked, that as the writer seems to fill a position which admits of direct communication with Government why he did not make his suggestions *there*; instead of coming before the public. The reason is obvious. Upon a matter of this kind not only the Legislature but the public also need enlightenment. No measure of legislation, however sound and good, will be duly appreciated and thankfully received so long as the public mind remains blind to its merits.

The writer is ambitious of gaining no literary reputation, nor has he any pretensions to aspire after any such. He is perfectly conscious that this is but a mere ephemeral publication which can but excite a momentary interest. But he must intimate that these sheets were sent to press, consecutively, as they were written, and therefore he has not had the opportunity of revising, correcting and condensing his material. Inaccuracies of expression, repetitions and diffuseness will, therefore, no doubt, be discovered in various parts of the publication; which he begs, the reader will kindly excuse.

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INTRODUCTION.

The subject which I propose to discuss in the following pages, will not include the whole of the changes or reforms of the law and of the Judicial System, which has from time to time been made in this Island, but the more limited topics of Judicial Establishments, Jurisdiction and Procedure. The suspension of the consideration of the Draft Acts for amending the constitution of the Supreme Court and of the District Courts, and for extending the Jurisdiction of the Courts of Requests, however much to be regretted and deplored is the cause which occasioned it, affords now the advantage and opportunity of considering and discussing the merits of those Acts Whether the changes which these proposed Ordinances contemplate, are in reality what may properly be termed *reforms*, and whether they are calculated to induce a better and a more efficient system of administering Justice; or, whether their introduction is likely to lead to confusion, error, misdecision and oppression, will probably be better perceived and understood after a brief review of the System which stood established before the operation of the Judicial Charter of 1833; the alterations which that Charter introduced, as well as the principles on which such alterations were based; the departure, and the reasons for such departure, from certain of the provisions of that Charter under the Legislative Enactments of 1843; and lastly, the scope and tendency of the further alterations now proposed by the Draft Acts.

In the First Chapter, therefore, I shall attempt to explain the Judicial System of the Island as it stood before the Charter of 1833.

The Second Chapter will contain an account of the changes which that Charter introduced; the principles on which such changes proceeded, and the results which the framers of that Charter contemplated.

The Third Chapter will explain the supposed grounds and reasons which led to a partial departure from the system which had been established under the Charter of 1833, and the general effects of such departure.

In the Fourth Chapter I will enter into the question of the probable results of the proposed changes, should the draft acts pass into law.

I shall conclude with a chapter which will contain a statement of my own views as to the changes required in respect of the constitution of the Courts of this Island, their Jurisdiction and Procedure.

CHAPTER I.

SYSTEM OF JUDICATURE WHICH PREVAILED PRIOR TO THE INTRODUCTION OF THE JUDICIAL CHARTER OF 1833.

MARITIME PROVINCES.

COURTS OF ORIGINAL JURISDICTION.

In stating this subject, it will be necessary to make a distinction between the Maritime and the Kandyan Provinces; for the system which obtained in the latter differed materially from that in the former. The functionaries who discharged Judicial duties, as Judges of original Jurisdiction, in the Maritime Provinces, were, the Sitting and Revenue Magistrates, Justices of the Peace, Provincial Judges and Judges of the Supreme Court. The Sitting Magistrates exercised a limited Civil and Criminal Jurisdiction within certain specified local limits. Each Court was presided over by a single Magistrate, and adjudicated all matters which he was competent to try without the aid of a Jury or Assessors; but in matters of a Criminal nature, whenever any difficulty accrued in the course of the proceedings, he was at liberty to call in another Magistrate to his assistance. (Vide 13th clause of the Instructions in Regulation No. 8 of 1806.) The Jurisdictions, civil and criminal, conferred upon these Courts had no uniformity; some possessed greater powers than others. However, generally, they had Jurisdiction over all minor offences, breaches of the peace and public disorders, with power to fine up to Rds. 50, to imprison for a period not exceeding two months, and to whip not exceeding 50 lashes. Their civil Jurisdiction extended over all suits (excepting Revenue) up to Rds. 100, title to land forming no exception. The proceedings of these Courts were regulated by rules issued from time to time by the Governor (Regulation No. 1 of 1805.) The Magistrates were required to keep Diaries or Journals of Proceedings. They obtained the matter of plaint and of defence from the mouth of the parties or their substitutes whom the parties were at liberty to select without restriction of any kind—heard their witnesses and recorded the substance of their evidence, (for they were not bound to record it at full length,) and decided the causes in a summary manner. Written pleadings did not form the rule of these Courts; but parties were not prohibited from making statements in writing by way of Petition, and they not unfrequently availed themselves of this liberty. No persons were admitted as practitioners in these Courts, but as

free substitution was permitted, and the substitutes were allowed to plead and conduct the causes of their principals, even while these latter were personally present in Court, there sprung up a class of unlicensed and unadmitted Practitioners of a very inferior and unlearned class, who, it may easily be imagined, were not overscrupulous in conducting the causes of those who retained them, and the Judges could not hold them under any efficient control.

From these Courts an appeal was allowed to what were called the Minor Courts of Appeal, in the case of every suit relating to land, without reference to value, and in every other suit, when its value exceeded the sum of Rds. 25. (Reg. No. 9 of 1814) but no appeal was granted from any interlocutary order, except when such order had a definitive effect (Proc. 5 of 1801.) or when it related to Jurisdiction (Proc. 22d of 1801.) From the criminal side there was no appeal. The powers and jurisdictions of these Courts underwent alteration from time to time as exigencies required, and there existed a great want of uniformity; as, sometimes even the powers and jurisdiction so given did not extend alike to all classes of inhabitants. There was also a like want of sameness in the practice of these Courts, owing to much being left to the discretion and regulation of each individual Magistrate. The Magistrate discharged also the duties of a Coroner (*Regulation No* 6 *of* 1823.)

The Revenue Magistrates had cognizance of all cases within their respective territorial Jurisdictions and their decisions were subject to an appeal when the sum exceeded Rds. 300, that is, when the value of the suit did not admit of a resort to the High Court of Appeal, to a Court called "the Minor Court of Appeal for Revenue cases," composed of two or more members nominated and appointed by the Governor; otherwise, to the High Court of Appeal. The practice and procedure of these Courts were of a much more summary kind than those of other Magistrates' Courts, and their proceedings were regulated by certain specific rules laid down for their guidance. (*Regulation No.* 7 *of* 1809. *Regulation No.* 6 *of* 1818.)

Next in order were Justices of the Peace, whose duties and powers, I cannot find clearly defined in any law or Regulation which has been promulgated. The 6th clause of the Regulation No. 1 of 1805 declares "Every Agent of Revenue and commerce and every Assistant shall be a Justice of the Peace for his Province, and, during the absence of the Provincial Judge, a Sitting Magistrate for the part of the Province in which he resides." As Justices of the Peace, Collectors of Revenue exercised, in fact, Judicial powers in criminal matters, investigated complaints, imposed punishments and exercised

generally a kind of arbitrary Jurisdiction, apparently, without any external control. The instructions to the Collectors of Districts, dated the 25th August 1808, after directing them to make frequent circuits through the whole of their respective Provinces, proceed to say "It is by adopting this measure alone that any collector can get a thorough knowledge either of the real character of the Headmen under him or of the real situation of the country over which he presides, that the Judicial power attached to the Collector, ought principally to be made use of."

"In all other instances, generally speaking, where there is a Sitting Magistrate or Provincial Judge, all Judicial decisions ought to be left to them; and the Collector of Revenue, except in very particular instances, ought not to exert such authority, but upon circuit, where from the circumstance of his being on the spot, it gives the people a facility of application, and the Collector an opportunity of obtaining ready information without moving the parties from the villages to which they belong, it appears expedient that in this instance he ought to exercise the Judicial authority vested in him, and settle all such minute differences and broils as may come before him." But what the amount of "Judicial power attached to the Collector" or of "the Judicial authority vested in him" was, appears nowhere explicitly laid down or explained, and the consequence was that these Functionaries exercised a kind of arbitrary and despotic Jurisdiction, not unfrequently inflicting corporal punishment even for breaches of or disobedience to their common and ordinary orders, and such other trivial and venial offences. That the power thus assumed by them was occasionally most oppressively used, there can be no doubt, as the memory of many an old inhabitant will enable him to testify.

Of a higher degree in point of Jurisdiction and power were the Provincial Judges, who also discharged their duties unaided by a Jury or Assessors. They also possessed both a Criminal and Civil Jurisdiction, partly in concurrence with the Sitting and Revenue Magistrates, and partly without such concurrence—their Criminal Jurisdiction extending "over all inferior offences, breaches of the Peace and disorders against the Police, with power to impose a fine not exceeding Rds. 100, imprisonment at hard labour not exceeding three months, and whipping not exceeding 100 lashes;" and the latter, that is the Civil Jurisdiction, extending over cases "when Europeans were parties, up to Rds. 100, and unlimited in cases between natives."

In the Provincial Courts a limited number of Proctors, duly admitted to practice in those Courts, but no others, were allowed to appear and represent parties. Their fees were fixed according to a

regulated scale, and were recoverable from a losing party. The pleadings were in writing, but drawn by any person whom a party chose to employ for the purpose. The Proctors so called to practice in these Courts were, (excepting in the Court of Colombo where persons of superior attainments and legal knowledge appeared) almost all, men of no legal education, and their admission took place without any examination as to their ability and learning; and even a knowledge of the English language was not insisted on. The Judges were unprofessional men belonging to the Civil Service of the Island.

In criminal cases, Proctors were not allowed to appear as counsel for either party. No appeal was open in criminal matters from the decision of these Courts. Appeal also was denied from the Judgments of these Courts in any Civil suit of which the value did not exceed Rds. 200. In cases above that value an appeal was allowed either to a Minor, or to the High Court of Appeal.

The entire Jurisdiction, civil and criminal, which did not fall within the limits assigned to the Magistrates and Provincial Courts as above explained, vested in the Supreme Court. The civil cases were tried by one or other of its Judges without a Jury and without appeal, except to His Majesty in his Privy Council when the sum appealed from exceeded £500 or Rds. 5000. Criminal trials were had with the aid of a Jury, just as at present. The Practitioners before this Court were persons duly admitted; the pleadings were in writing, and drawn in due form, and the procedure bore considerable resemblance to that of the Courts of Westminster. The Supreme Court, by the Charter of 1801, under which it was established, was declared (see clause 29) to be a Court of Equity possessing "full power and authority to administer Justice in a summary manner according to the law then established in Ceylon and in point of Form as nearly as may be, according to the Rules and Proceedings of the High Court of Chancery in Great Britain."

Both the Provincial Courts and the Supreme Court conjointly exercised a Testamentary Jurisdiction.

APPELLATE COURTS.

The Courts of Appeal then in existence were of three kinds, each possessing its own peculiar Jurisdiction. The first class of Courts were designated Minor Courts of Appeal. There were four Courts under this name in various parts of the Island, possessing local Jurisdiction, and composed of two or more of the principal Civil Servants or others. An appeal was allowed to these Courts from the Provincial Courts when the value in dispute was between the sums of

£15 and £30, and from the Sitting Magistrates when it exceeded £1 17 6, or when the matter in dispute related to land. These were a kind of secret tribunals, whose deliberations were carried on in perfect privacy, the very Judge from whom the appeal was taken often sitting as a member. No counsel were permitted to argue in aid of their secret consultations, and, till their decisions were put forth authoritativelv, all the parties concerned were kept in perfect ignorance of their proceedings.

The second Appellate Court was that called the "Minor Court of Appeal for Revenue cases under Rds. 300," which consisted of two or more Civil Servants; and the conduct of its duties was precisely similar to that of the Minor Courts of Appeal.

The third Court was termed "The High Court of Appeal," which took cognizance of all appeals above the value of £30 from all Courts of original Jurisdiction except the Supreme Court. The two Judges of the Supreme Court were members of it, together with the Governor, the Chief Secretary, and the Commissioners of Revenue. Advocates and Proctors of the Supreme Court were allowed to appear and argue before this Court, and the Judgments which it pronounced were, in reality, in most instances, the decisions of the only legal members, the Judges of the Supreme Court.

KANDYAN PROVINCES.

COURTS OF ORIGINAL JURISDICTION.

These consisted of certain local tribunals, namely, that of the Judicial or second Commissioner at Kandy, the Sitting Magistrate's Court of the same, and the Courts of the Superior and Inferior Agents in the Provinces.

Within the local limits of the Judicial Commissioner's District the Commissioner had power to try all Civil suits of all classes of persons except the Military, but his decisions were subject to an appeal to the Governor whenever the object in dispute exceeded the value of Rds. 300. To this Court also appertained a criminal Jurisdiction to try all crimes and offences except treason and homicide, with power to award punishment of any description short of deprivation of life or limb. But it could not order its sentences to be carried into effect whenever they awarded a fine exceeding Rds. 50, imprisonment exceeding four months, or whipping exceeding 100 lashes, without previously obtaining the Governor's confirmation of such sentences, (Instructions to the Judicial Commissioner dated 21st November 1818.) It could also take cognizance of cases of treason and homicide; without, however, having the

right to pass sentence. Its duty in such cases consisted in reporting its opinion on the prisoner's guilt and the punishment to be inflicted, to the Governor for his decision.

The Jurisdiction given to the superior, or otherwise called Accredited Agents in matters criminal, corresponded exactly with that which vested in the Judicial Commissioner. They possessed within their Provinces a full and unlimited Civil Jurisdiction, their decisions being subject to an appeal to the Governor when the value of the suit exceeded Rds. 300, and to the Judicial Commissioner when the value fell between the sums of Rds. 250 and 300.

On the Subordinate Agents and Magistrates was conferred power to try "Petty offences, breaches of the peace and disorders against the Police," and to inflict corporal punishment not exceeding 50 lashes; fine, not exceeding Rds 25; imprisonment not exceeding two months. But the Resident was at liberty to refer cases of a higher nature to them for trial, and they were empowered in such cases to pass provisional decision and sentence awarding corporal punishment not exceeding 100 lashes; fine, not exceeding Rds. 50; or imprisonment not exceeding three months; but such decision and sentence were to remain suspended for the revision of the Resident, and were subject to his approval, disapproval or modification.

Their Civil Jurisdiction was also confined within local limits, and it extended to all cases in matters of debt and contract under the value of Rds. 100, but under a reference from the Resident to any case of the same description up to Rds. 300, in which latter circumstance they could pronounce only a provisional decision, to undergo the revision of the Resident and subject to his confirmation, disallowance or modification. They were not to entertain any question relating to right, title, possession or produce of land, or any that related to succession to personal estates, or marriage, unless by direction of the Resident for enquiry and decision. But with a very jealous care Government expressly reserved to itself what it declared to be an inherent right to rectify errors, redress grievances and reform abuses in all matters whatever, civil, criminal or Political; thus constituting itself the fountain head of Justice; access to which was freely allowed with the utmost liberality. (Instructions to Subordinate Agents dated 30th September 1815.)

APPELLATE COURTS.

The Court of the Judicial Commissioner was also a Court of Appeal, to hear appeals from the Agents of Government in cases wherein land formed the subject of dispute, or personal property which ex-

ceeded Rds. 150 in value. But there was also a like appeal allowed from the same Commissioner's Court to the Governor, in cases of a like nature; thus allowing two stages of appeal from the Agents' Courts, and one from the Commissioner's. In none of the Kandyan Courts, whether of original Jurisdiction or appeal, were practitioners allowed to appear.

Appeal in Criminal cases was altogether shut out from all the Courts above specified as belonging to the Kandyan Provinces, but provision is made by the 44th section of the Proclamation dated 21st November 1818 that "in all cases of treason, murder or homicide, the trial shall be before the Court of the Resident or of the second Commissioner and his Kandyan Assessors, whose opinion as to the guilt of the defendant and the sentence to be passed on any one convicted, is to be reported through the Board of Commissioners, with their opinion also, to His Excellency the Governor, for his determination."

From the above, it will be perceived, that there was one peculiarity attaching to the constitution of the Kandyan Courts. The Judicial Commissioner and the Agents of Government were assisted by at least two Kandyan Assessors for the trial of all cases relating to land, or when the object in dispute exceeded Rds. 100 in value; as also for the trial of all criminal offences except those of inferior description, such as common assaults, petty thefts and breaches of the Peace. When there was a difference of opinion between the majority of Assessors and the Agent of Government, the proceedings were transferred to the Court of the Judicial Commissioner; and in the same manner when a like difference arose between the Judicial Commissioner and the Assessors, the proceedings were transferred to the Collective Board, composed of the first Commissioner, the Judicial Commissioner and the Revenue Commissioner, to report upon the case to the Governor, with whom rested the ultimate decision. This institution is the prototype from which our present Assessorial (or what past experience would incline one not inappropriately to characterize as the Assinine) system was elaborated by the framers of the Charter of 1833 upon the recommendation of Mr. Cameron.

Such was the machinery provided for the administration of Justice in this Island prior to the Charter of 1833—so far as I know and understand the subject. I hope, I have succeeded in explaining it in a sufficiently clear manner to enable the reader to see with distinctness the defects which that charter intended to remedy. That both those systems—that which obtained in the Maritime Provinces and that which stood established in the Kandyan country,—were defective in theory wrong in principle and erroneous in their construction, it would require

no great effort of argument to prove even without reference and appeal to the experience of their working; but if tradition and report can be relied on—for I cannot speak of my own personal experience—and if credit can be given to the now disinterested declarations of those who are able to speak of their own knowledge, the administration of Justice was at that time in a wofully wretched state; injustice and oppression stalked abroad without let or hindrance; ill-paid Judges fattened on corruption; the Inferior Courts of Justice were made places of resort for a kind of gambling litigation, at which fraud, perjury and bribery flourished unchecked; and a set of self-constituted and irresponsible pettyfogging lawyers reaped a harvest of ill-gotten gains sufficient to maintain them comfortably without recourse to any honest labour; and that, without possessing the slightest claim to education, learning or morality. Many of the Inferior Magistrates, in point of learning and legal attainments, did not occupy a position many degrees higher than the Practitioners in their Courts, as the most superficial inspection of their recorded proceedings will readily show. And how otherwise could it be? when the remuneration, which the Government at that time was willing and able to give, could not secure the services of a superior class. However, there was a vast disparity between the salaries and emoluments allotted to the superior Officers of the Revenue Department and the Provincial Judges, and that which was considered adequate to remunerate the Inferior Magistrates; while, a more equable distribution of the total expenditure incurred in salaries might have secured efficiency in every department without material prejudice to any, and have rendered the Inferior Functionaries not so open to temptation. But by some means, fair or foul, some of these latter officers amassed fortunes which few in the Civil Service now, however high, can hope to do, and lived in a style not unbecoming their rank. Ought these officers to have been ever vested with such extensive and irresponsible power without the slightest check or restraint from within or without? Where was the bar that could influence or control, in a moral point of view, the proceedings of the Judges, or from whom the exposure of their misdeeds could be expected? Be the bar that is now in existence ever so bad, it does—it is impossible to deny,—afford that check. Some may feel uneasy under this restraint, from the exposure of their ignorance, caprice, neglect or other misconduct, and these might on that account feel strongly inclined to be relieved of such a pressure, and impute to the bar sins greater than they really are guilty of, and magnify their faults to such an extent as to take away the very hopes of discovering any cure for them whatever except the utter extermination of the entire body. But

more of this hereafter at the proper place. Where was then the Press that would listen to any complaint however well founded against these Courts? None whatever; for, there was no free press then. Where was the appeal whereby a grievance or an injustice could be shown and established, and redress obtained? None, or at least next to none. For, in criminal cases no appeal whatever was allowed, and in civil mattersonly—and that too in a small number—an appeal could be had; but the only Court of Appeal which deserved the name was the High Court, from the circumstance of two of the Judges of the Supreme Court having been its members; and Advocates and Proctors being allowed to plead there. But this was accessible only to a few of the wealthy, others being altogether shut out from it. Appeal was taken away from a considerable number of both the Magistrates' and Provincial Court cases; and when it did lie, it was to a Secret Court of which the Judge from whom the Appeal was carried, was frequently one of the Members Hence it was that the people groaned —but in secret. Government was kept in utter ignorance of the mischief that was being done, but the people presumed that the Government knew and sanctioned it. The powers vested in the Collectors, Judges and Magistrates were so extensive and so utterly without control, that had any of the oppressed dared to speak aloud against their conduct, means would have been easily found to crush them instantly. But the inference which the Executive drew from this forced and unwilling silence was, that the people were content, and that Justice was being most efficiently and promptly administered. However, there was no check to crime; there was no cessation of injuries. The Courts were crowded. The criminal calendar of the Supreme Court at that period, contrasted with the present, will shew that crime has not increased with the population, and that there is now a considerable diminution of offences. As for the other Courts, a conviction or acquittal in them, was but a very doubtful indication of guilt or innocence; and a like remark will apply to their civil cases. Corporal punishment used at that time to be dealt out for all kinds of real or supposed offences with the utmost liberality and good will; and if a census were even now taken of all those who thus suffered and are still alive, I am pretty positive, from what has fallen within my own knowledge, that it would show a tolerably high figure. In illustration of the state of things then in existence, I shall here venture to give but one single anecdote, handed down by tradition and generally believed to be true, probably from the commonness of such practices at that time. A suit is said to have been pending between two individuals in one of the Magistrates' Courts of the Maritime

Provinces, the parties to which each retained a learned substitute who commonly practised in that Court—learned, not in the law, but in the common artifices then usually employed to win a cause. Without regard to the truth or Justice of the client's cause which each espoused to advocate and defend, the one lawyer is said to have determined closely to watch the proceedings of the other in connexion with the Magistrate, not wishing to make any uncalled for sacrifice of money or valuables if possible, in order to secure success. On the morning of the day fixed for the trial, one is said to have been eagerly watching the movements of his opponent, and discovered that this latter had been to the Judge's residence and had enlightened his worship's mind as to the righteousness of his own cause, and had at the same time assisted the Judge in bettering his worldly substance in a trifling degree. He therefore determined not to be outdone, whatever sacrifice that might cost him. But to effect this he found no small difficulty in consequence of his client's poverty and his inability to meet the necessary demands upon his purse. Under these difficulties his own ingenuity suggested to him an accommodation, though a hazardous one. He accordingly furnished the client with a neat bull of his own, of some value, to enable him to propitiate the Judge in his favour. This was done, the cause was enquired into with the appearance of the utmost impartiality, under the conduct of these two sharp practitioners, and of course the bull won the cause, as its value exceeded that of the opposite offering. This no doubt was satisfactory enough;—the scheme succeeded to a miracle, but how to compensate himself for the loss of a valuable beast? inasmuchas the client was too poor to satisfy him on that particular. A sudden thought occurred to him the next day; he boldly walked up to the Judge's house, and claimed of the servants the bull, his property, which they were unlawfully detaining. The answer of course was a refusal without the Judge's orders; so he proceeded immediately to the Court, and openly complained to the Judge of the unjustifiable conduct of his servants. The Judge was taken by surprise, but after some little enquiry, ordered his servants to give up the animal, which he said, had most probably strayed into his premises. The ruse, no doubt, was so far successful, but never did the Practitioner win another cause before the same Court, and he found it absolutely necessary to abandon all practice there, because the Magistrate was unrelenting and unappeasable on any consideration—So the story goes; but whether all the circumstances of it be true or not, the bare existence and belief of it generally, show that there was nothing of improbability attaching to it in reference to the period of its al-

leged occurrence. The sketch above given is, I believe, not overdrawn; nor have I given it with the slightest desire to libel the times or the Government servants of those times, several of whom, there is not the least doubt, were men of the right stamp, of highly honorable character, very considerable talent, and who discharged their duties in the most conscientious manner. But exceptions there were and those not a few, if I am rightly informed; and the evils which sprang up are almost solely attributable to the system. Make it a rule to invest a large body of men with almost absolute, despotic and irresponsible power; put their acts beyond revision, enquiry or correction—and it will be found impossible in the very nature of things, with whatever care selection is made, that abuse and oppression shall not creep in, that carelessness and haste shall not occur in the discharge of duties committed to them; and rashness in dealing with the rights of others, where there is no vigilant supervision. I have tried to pourtray the times in order to draw attention to the probability of like results, should we abandon the safeguards which were subsequently adopted, and revert to the same vicious system, which, after trial and enquiry, was once abandoned as unsound in principle and mischievous in its consequences.

The abolition of compulsory labor by the "Order in Council" and the Judicial Charter of 1833 formed, in my opinion, the most important era in the history of this Island under British Rule. It is thence we may date the independence, from almost a state of slavery, of its inhabitants; freedom from oppression and security of person and property. From that period they have improved rapidly both in intelligence and education, as also in their worldly circumstances. Were it not for these two measures, the Island might have remained stationary even up to the present day. The impulse then given, the independence thus gained, can only be protected and maintained by not abandoning the principles on which both those Acts were passed. But I regret to see a desire gradually springing up and increasing to depart from those principles; and there is much reason for apprehension, that we are now pursuing a downward course, instead of,—if incapable of making an onward progress in the right direction,—at least, of maintaining the position in which we were once placed, not by the local authorities, but by the authorities in England who would appear to have understood the real interests of the Island infinitely better than those who stood immediately and personally connected with it. Unhappily we have still in the Island persons of high standing who enjoyed powed under the old regime, who have still a fond attachment to the abolished and now obsolete system, and are so wedded to it as to consider that the

reforms introduced in 1833, were highly mischievous, that the country was not sufficiently prepared for so much liberality, and that the former system of Government and Judicial administration was the more suited to it, exercising as it did, in the opinion of these, something like a paternal power—*patria potestas*—over its inhabitants. If the Government of that period might be deemed paternal, my impression is, that it exercised its power and authority like a most cruel and severe parent. It armed its servants almost every one of them, with a rod, and left them at free liberty to chastise its children at pleasure, and this they did with right good will. Let us hope that the present Rulers have no sympathy with those, have not the same prejudices and attachments to that obsolete system, and will continue to abide by the enlightened principles which have been once approved and adopted.

Having said thus much on the first head of enquiry which I proposed to myself, I now proceed to the second.

CHAPTER II.

THE JUDICIAL CHARTER OF 1833—CHANGES WHICH IT INTRODUCED—PRINCIPLES ON WHICH SUCH CHANGES WERE ADOPTED—RESULTS WHICH ITS FRAMERS CONTEMPLATED.

Happily for the good Government and the best interests of this Island and its inhabitants, the Secretary of State of the time, thought it fit and desirable (I am not aware on whose recommendation, very probably on that of the retired Judges of the Supreme Court, who must have been most unwilling witnesses of the maladministration of law then prevailing in this Island) to send out a Commission to enquire into the state of the "Administration of the Government of Ceylon" and report thereupon; I believe about the year 1830 or 1831. Of this Commission Mr. Cameron happened to be a member, who, it would appear, though a lawyer, was not one of those technical lawyers of the old school, attached to a beloved artificial system, but one of the modern Jurists, a disciple of the Bentham School, able and willing to take a comprehensive view of things, and capable of framing a scheme of administration based upon natural and common sense principles. Most of the recommendations which he made, and on some of which our Judicial Charter of 1833 was framed, are clearly traceable to the principles propounded in his works, by him who is now almost universally acknowledged to have been one of the greatest Jurists, Bentham. The most important amendments which the British Legislature has recently made in the Law of Evi-

dence, are fruits of the exposure which that eminent Jurist made, of the absurdity of the artificial rules which the technical lawyers had established. The unmeasured ridicule which he threw upon those lawyers; the bitter sarcasms with which he castigated them; the contempt with which he treated them; the boldness with which he exposed their absurdity and sophistry, and the clearness with which he proved the soundness of the rules and principles he contended for and advocated, (though he could not overcome the strong prejudices which existed at the time of the publication of his works) gradually and imperceptibly recommended those principles and rules to the judgment of sound-thinking men, and they are now prevailing over all obstacles. His partisans are still comparatively few; and though few and unable to carry out his principles to their fullest extent at once (though that be the right course to prevent doubt and confusion) are advancing step by step, and will, no doubt, ultimately succeed in obtaining for them universal prevalence.

The course pursued by this Commission on its reaching Ceylon is thus explained by one of its members, Colonel Colebrooke:

"After my arrival at Colombo, and the publication of His Majesty's commission in the English, Cinghalese and Malabar languages, numerous representations in the form of petitions, were addressed to me from different parts of the Island, and several of them were signed by the inhabitants of towns, districts and villages, and by the people of particular classes or castes, with a request that they might be laid before His Majesty. The number of these petitions, and the great variety of topics, to which they referred, precluded the possibility of enquiring into the merits of each particular statement, even if my instructions had authorized me to do so; but I considered that the inhabitants were entitled to attention on subjects deemed by them of importance to their own interests. Where individual complaints had been addressed to the Governor, the practice had been to enquire into the grounds of the complaint through the local authorities, and a record of these investigations, with the Governor's decisions, was kept in the office of the Secretary to Government. When general representations had been made against the laws or regulations of the Island, they were noticed, or not, according to the views that the Governor might take of the subject. There appeared to be no instance, in which the natives had transmitted their complaints to His Majesty's Government, but there was no existing impediment to their doing so. The course therefore adopted by me was to avail myself of the information contained in the petitions in framing a series of interrogatories on all the general topics referred to, and which I

addressed to the Civil officers of Government and the Judicial functionaries throughout the Island. From the multiplicity of the subjects brought to my notice, I found it convenient to divide the enquiry into two branches, the one comprehending the civil Government and institutions of the country, its revenues and all general and statistical information, relating to it; the other specifically referring to the laws and Judicial establishments. From the frequent reference to the same persons on these several subjects of enquiry, and from their practical connection in many instances, it has been impossible to keep them entirely distinct from each other; and in treating them apart, a general reference will be made to all the sources of information acquired, where confirmed by my own observations."

So it would appear, that when people were allowed the opportunity of freely stating their grievances, the will was not wanting to do so; nor did they consider that cause was wanting: neither did apathy and indolence, which are said to be the characteristics of their general habits, offer any obstacle to their seeking redress. Unless therefore, there had been much injustice and much suffering inflicted, it cannot for a moment be imagined that the people would have been roused up so suddenly, to a line of conduct to which till then they were utterly unaccustomed; as they used to look upon their rulers as persons vested with supreme authority over their destinies. The children of the Parental Government did not therefore seem to have had any very great affection for their parent, nor to feel perfectly contented with the treatment they were receiving; nor did they appear by any means inclined to remain under such a parental rule. Besides, under this "patria potestas" the *peculium* which they were allowed to retain of their hard earnings, was so exceedingly small, and so large a proportion of their means was exacted by way of regular revenue, labor or extortion, that on this account also they felt in no small degree dissatisfied. Those who advocate a paternal Government would also establish a kind of Paternal Tribunal, a sort of Domestic Forum, only on a more enlarged scale, giving the sole presiding Judge power to adjudicate matters in similar manner as a parent settles the petty quarrels of his children, that is, after some summary and superficial enquiry, giving one a knock, another a thump, and sending them about their business, without much enquiry as to who was right or who wrong, or whether real Justice was done between party and party, if only he could prevent his being troubled with any further complaints, be their grievances ever so great. These are, what are to be termed Equity and good-conscience Courts, which—unlike Courts of Law which are bound to decide cases according to the law

of the land may act according to each Court's notion of what is equitable; whose decisions are to be final and irreversible whatever be the outrages they commit against law and justice. The Commissioners of Enquiry appear to have entertained no very great predilection for those Paternal Tribunals, but to have recommended every possible protection and safeguard which they could discover to prevent misdecision and injustice, and to place the Courts of Law,—not of Conscience—under the immediate supervision and surveillance of a higher Tribunal; the awe of a watchful public; the check of an efficient bar, and the easy and certain liability to exposure and correction in the event of a mis-use of power, or of incapacity. So the first step which Commissioner Colebrooke recommended, was the establishment of a Free Press. The recommendation was made in these remarkable words—

"In a political point of view the unrestricted operation of the Colonial Press would have a direct tendency to promote good Government in the Island and to diminish the influence of those classes who are interested in upholding the ignorant prejudices of the people, and who retain them in servile dependence on themselves."

The Report of Mr. Commissioner Cameron bearing date the 31st January 1832, professes to have been framed chiefly on the information collected by Colonel Colebrooke by means of interrogatories addressed to Government Servants and several others. Having had, perhaps, good reason to suspect that the Tribunals then in existence were themselves the instruments of considerable injury under the mask and semblance of Justice, he commences his report with these emphatic words:

"The condition of the native inhabitants of the Island of Ceylon imposes upon Government which has their improvement at heart; the necessity not only of providing cheap and accessible Judicatures for the relief of those who have suffered injury, and the punishment of those who have inflicted it, but also *of guarding with peculiar anxiety against the danger that the Judicatures themselves should be employed as the means of perpetrating the injustice which it is the object of their institution to prevent*" He proceeds,

"Those Judicial establishments and the scheme of procedure which I am about to recommend to your Lordship have therefore two principal objects in view, and for the attainment of each of those objects, two distinct sets of means seem to be essential"

The first object is—

"I—To render it as easy as possible for any man to enforce his rights through the medium of a Court of Justice."

"The two sets of means for its attainment are"

"1st. The establishment of a sufficient number of Courts to which the suitor may apply with the least possible expense and delay".

"2nd. Such a constitution of the Courts as will ensure, in the highest possible degree, correctness of decision."

"II—To render it as difficult as possible for any man to inflict injury upon another through the medium of such Courts as have been indicated above.'.

"The two sets of means for its attainments are,"

"1st. A rigorous investigation into the truth of every allegation upon which a Court of Justice is required to lend its aid to a suitor."

"2d. The infliction of punishment upon every suitor who wilfully attempts to mislead the Court."

His first recommendation had for its object the creation of an uniform system of local Judicature throughout the Island. He says "I recommend that so far as regards the Judicial establishment and the procedure according to which its functions are performed, complete uniformity should be introduced throughout the whole Island." This recommendation was adopted in full by the framers of our Charter of 1833, and it seems superfluous to advance any lengthy argument to show its utility. That uniformity is practically better than diversity, prevents doubts and confusion, facilitates procedure and induces correctness, while its absence will often produce the contrary effects, will be obvious to every mind upon the slightest reflection.

The second recommendation, which was also adopted, was to establish "Courts of Original Jurisdiction throughout the Island" having exclusive Jurisdiction over all causes civil and criminal, and all questions of whatever kind in which the intervention of Judicial authority is necessary, which arise within the limits of its district, except such criminal cases as are to be tried before the Supreme Court. As a reason for this recommendation he says "The usual practice of dividing Judicial business among Judicial functionaries according to its nature as civil or criminal, legal or equitable &c, appears to me in all respects much less expedient than the division of it into integral portions according to Districts." This recommendation proceeded strictly on principles which Bentham has tried to inculcate; that is to make a "geographical division of Jurisdiction" instead of a "logical, metaphysical or arbitrary one" and which he terms "division of Jurisdiction on the geographical principle." He argues its utility from its tending to prevent what he called "entanglement of Jurisdictions," and as "saving of the delay, vexation and expense attendant on journeys and demurrage." Further, Mr. Cameron adds "As it is not possible

to mark out the boundaries of contiguous subjects of judication, as precisely as the boundaries of contiguous Districts, many more, and much more complicated questions of Jurisdiction arise under the former plan, by which the time and money of the suitors are fruitlessly consumed."

"This reason applies with the greatest possible force in a country like Ceylon, where the general ignorance of the natives, prevents them from understanding technical distinctions, and where there are no practitioners, except in the Capital, capable of directing one who is searching for a judicial remedy to which Court he should apply, if the choice is made to depend upon such distinctions." This is quite in accordance with Bentham's opinion as will appear from the following quotations.

"Give to one Court cognizance of causes of one description, to another Court cognizance of causes of another description, each to the exclusion of the other; in the first place you lose the benefit of emulation; in the next place you produce, without any use, the danger of collision. On the part of the plaintiff, uncertainty to which of the two Courts he ought to apply, on the occasion of this or that individual cause; on the part of the defendant, uncertainty whether to submit, or not to submit, to the cognizance endeavoured by the plaintiff to be given to the one or the other Court, on the occasion of that individual cause; on the part of each Court, uncertainty whether it ought to take cognizance of this or that sort of cause" (Bentham's Rationale of Judicial Evidence Book 8, cap. 9.) He considers "a diversity of Courts, the fertile source of confusion and injustice." His opinion in short was that "In general, and after allowance made for a few narrow exceptions, there can be no sufficient reason for taking any sort of cause out of the Jurisdiction of the local Court, in any other way than by appeal."

"If there were any such reason, what should it be? Value of the matter in dispute? too great to be entrusted to such inferior, and comparatively untrustworthy hands. But the remedy, and the sufficient remedy lies in appeal, not in refusal of cognizance. When the party who knows the circumstances of the cause, and, against whom the decision is, sees no reason to be dissatisfied with it, is it for the legislator, or the superior Judge, who knows nothing about the individual cause, is it for these strangers to be dissatisfied with it?"

"From whence is it concluded that the Judge is unfit to be trusted with a sum above the mark? he whose fitness for judging of all sums up to the mark is assumed."

The recommendation in question involves another principle as above ex-

pressed by Bentham; the absence of any good and valid ground or reason for a distinction between cases of small value and of large value; that is, of small cause Courts for the trial of the former and superior Courts for the investigation of the latter; if justice only is to be administered in both classes of cases, and for so doing no less skill and no fewer safeguards are required in the former than in the latter. Therefore Mr. Cameron in his report says,

"It is unquestionably in those cases which are usually called trifling; in those causes the correct decision of which is of most importance to the happiness of the people, that every motive *ab extra* which can stimulate the attention of the Judge, and impress him with a sense of responsibility, should be brought to bear upon him."

"Experience had never shewn that all petty litigation is an evil; or that petty injustice, which is a most grievous evil, can be prevented or remedied by any other means. A suit for a sum under £1. 17. 6. may indeed seem an object of contempt to an European Judge. Considering any individual case by itself, he would probably rather pay the amount claimed, than be at the trouble of examining and deciding the question between the parties; but in the eyes of a native of Ceylon of the lower class, such a sum appears, and with good reason, an object of very high importance; an object, the unjust detention of which, is calculated to excite in his mind the most violent animosity against the person who commits the wrong, and the Government which fails to redress it."

"Among all the duties incumbent on the British rulers in the east, it is impossible to name one more imperative that that of providing for the effectual decision by public authority of the disputes arising among the poorer classes, in other words, of providing for those classes the means of carrying on that petty litigation which this preamble" (alluding to the preamble of Regulation No. 9 of 1814 whereby appeal from the Provincial Court is taken away, when the value in dispute did not exceed £15; and the appeal from any other Courts of inferior jurisdiction is taken away when the value in dispute did not exceed £1. 17. 6. excepting in cases "wherein the title to or possession of landed property was directly or indirectly in question") so contemptuously stigmatizes. There is no benefit which a European government can confer upon its Asiatic subjects of the poorer class so valuable, and no means by which it can secure the permanence of its own dominion so honorably and effectually as this, and it is a benefit which none but a European government can confer. There is no way in which such part of the public property as the government might think fit to devote to eleemosynary purposes, can be so bene-

ficially employed as in paying Judicial establishments, by which the poor may obtain really gratuitous justice."

"The misery and resentment of a poor man suffering under an act of injustice are most cruelly aggravated by the contempt with which the legislative and the Judicial powers thus openly treat his misfortunes, and I can conceive no tie which will bind the lower people so strongly to their Government, as a Judicial establishment so contrived as that the *very same attention and discrimination should be employed upon their causes as upon every of their affluent neighbours.*" These will strike the mind of every right thinker, as the views of a most enlightened, liberal and comprehensive mind, capable of taking more than a very contracted view of circumstances and things. The opinions of the Indian Law Commissioners and of Sir E. Perry—(the latter speaking under the advantages of actual experience and trial claims the highest consideration) are quite in correspondence. Sir E. Perry in his letter to the Government of India dated 16th May 1847. (which, together with a Letter addressed to Lord Campbell was published last year in the form of a Pamphlet) says;

"With respect to the Draft Acts of the Law Commission, I have already stated my proposal that the original Draft framed by the Commission in 1843 should be enacted for Bombay, with some slight modifications which I will state immediately. The reasons why I make this proposal are, the original Draft is founded on a broader principle than the revised Draft, and if the new Court presided over by a Supreme Court Jndge, is capable of dispensing justice in cases up to Rupees 600 in amount, it is capable of doing so to all amounts Lawyers will know that this mechanical division of causes on an arbitrary limit of £. s. and d. *is the most flimsy of all distinctions.*" Again in the letter addressed to Lord Campbell, he states—

"But simple cases are not to be defined by the money amount sought to be recovered in them, and the merchant's bill of exchange for £5000, or the demand for rent of a Grosvenor square house, affords no more difficulty to the law tribunal than a promissory note for £10, or the claim for a week's rent on a lodger. To all such cases, therefore, the advantage of dispensing with expensive pre-arranged written pleading is obvious,"

I shall quote but one more authority in support of the same principle from a writer of very considerable reputation, James Mill, who says,

"We recognize only one standard of importance, namely, influence upon human happiness and misery. The small sum of money for which the suit of the poor man is instituted is commonly of much greater importance to him, than the larger sum for which the suit of the

rich man is instituted is to the rich. Again, for one rich man there are thousands and thousands of poor. In the calculation, then, of perfect benevolence, the suits for the small sums are not, as in the calculation of perfect aristocracy, those of the least, or rather of no importance; they are often of a thousand times greater than the suits for the largest sums."

The next recommendation of Mr. Cameron, which was also adopted in the Charter, relates to Assessors, and it runs in these words.

"I recommend that each Court of original jurisdiction shall consist of one Judge and three Assessors."

"That the Assessors shall be chosen as the Jurymen now are in the maritime provinces."

'That the same individuals shall sit as Assessors for one day; and for one day only at a time, unless the Judge, for special reasons to be assigned by him in open Court, shall otherwise direct, or unless the Assessors require time to consider of their verdict, in which case new Assessors shall be impanelled."

"That when the parties have concluded their pleadings, evidence and arguments, the Judge shall sum up the evidence and state his opinion of the law to the Assessors."

"Who shall thereupon give such verdict as any two of them can agree upon."

"Which verdict shall be immediately recorded by the registrar, but shall not prevent the Judge from giving a contrary decision, if he thinks fit."

The reasons which he assigns for this recommendation are as follows;

"A Jury, considered as the organ of judicial decision, is an institution which it would be very difficult to defend. But considered as a portion of the public placed in an official station, which secures to it the respect of the Judge, armed with power to interrogate the Judge and the witnesses, and thus to acquire a complete knowledge of the cause, compelled by penalties to be present in Court, and compelled to attend to the proceedings by the necessity of pronouncing a public opinion upon them, it is invaluable."

"It is invaluable, I think, every where, but in our Indian possessions it is, when coupled with the effective appeal which I shall hereafter recommend, the only check and the only stimulus which can be applied to a Judge placed in a situation remote from a European public, and necessarily almost insensible to the opinion of the native public, with whom he does not associate."

I shall show in its proper place, from high authority, that this recommendation is erroneous in principle, and its adoption has been

unproductive of the results which were contemplated, but on the contrary has given rise to considerable evils which it would be well to obviate, providing at the same time, if possible, a more effective check on the Judge, of a kindred nature.

The seven succeeding recommendations of the Commissioner, relate to procedure; but need not be noticed here, as they can be conveniently considered under their more appropriate head, the 5th Chapter.

The 11th, 12th and 13th recommendations have reference to the abolition of all Stamp and Court fees, (but were not adopted by the framers of the Charter,) substituting in their place a fine to be imposed on any party deemed to be "guilty of an attempt to pervert or obstruct the course of justice." However sound and just the principles of these recommendations be, founded as they are on weighty authority, it will be difficult to persuade our own, or any other legislature existing in the British dominions, to act on them at present. This must therefore be left to a more enlightened period. I shall therefore not unnecessarily consume space in proving their utility and supporting them by authorities.

The 14th recommendation is a most important one. It has been fully embodied in the Charter with its cognate recommendations, being the 15th, 16th, 17th and 18th, all tending to constitute a Court of Appeal, accessible to all without restriction. I shall quote them in full.

"I recommend that an appellate Jurisdiction of the most comprehensive kind over all the Courts of original Jurisdiction in all parts of the Island shall be vested in a Circuit Court of appeal, which shall consist of one Judge of the Supreme Court and three Assessors, which Assessors shall be chosen in the same way and shall perform the same functions as the Assessors in the Courts of original jurisdiction.

"15th, I recommend that the Supreme Court shall consist of three Judges, a Chief Justice and two Puisne Judges, who shall however never sit together, except for the decision of such points of law as any of them may have thought it necessary to reserve in deciding the cases submitted to them on their circuits, under the 18th and 19th recommendations.

"16, I recommend that, for the purposes of the Appellate Jurisdiction mentioned in the 14th recommendation, the whole Island shall be divided into three circuits" (the number of circuits stands now increased) "Colombo being the central point where the three circuits meet."

"17th, I recommend that a Judge of the Supreme Court shall go on each circuit twice every year, but so that there shall be always one Judge of that Court remaining in Colombo, and shall remain

such places in his circuit and for so long a period at each place as may be necessary for the attainment of substantial justice."

"18, I recommend that such Judge shall hear in the Circuit Court of Appeal, all applications for redress against all decisions, whether interlocutory or final, of the Courts of original Jurisdiction, and shall according to what the justice of the case may require, try the cause over again wholly or in part, or re-hear the arguments of the parties upon points of law, and shall do generally whatever may be necessary for the attainment of substantial justice."

The reasons assigned for these recommendations are—

"The supervision of a competent public and that of a competent appellate Jurisdiction, are, I believe, the only means by which Courts of original Jurisdiction are rendered in any country fitting instruments of Judicature."

"Your Lordship will not therefore suppose that I mean to cast any reflection upon the gentlemen who preside in the local Courts of Ceylon, when I say, that it is contrary to all our experience of human nature that they should be able to find in the recess of their own minds a sufficient motive for the exertion of that unremitting attention which is necessary for the investigation and decision of the matters which come before them, and of that imperturbable patience which can alone control the movements of indignation which the importunity, folly, impertinence and knavery of Indian suitors and Indian witnesses are calculated to excite."

Every one who has any experience of our Courts will readily subscribe to the truth of the above observations. He proceeds,

"The expediency of local Judicatures, always ready to receive the complaints of the people, cannot be disputed, provided, first, that the opinion of a public whom the Judge respects, can be brought to bear upon him; for unless this can be done, his Court is an open Court only in name, and all the evils of secret Judicature may be expected."

"Secondly, that there be some means of preserving the unity of the law, which cannot fail to be impaired by the decisions of a number of independent Judges, even though they should be animated solely by that public spirit which is kept alive by the substantial publicity of the tribunals."

"The latter purpose might perhaps be obtained at the cheapest rate by means of an appellate tribunal resident at Colombo, to which the records of cases tried by the Courts of original Jurisdiction might be transmitted by the post; but such a tribunal could not be effectual, even for this purpose, unless a much greater degree of method re-

gulated the proceedings of the local Court than is now the case, and it would be almost powerless for the still more important purpose of impressing upon the local Judge the consciousness of unremitting supervision; and upon the suitors in this Court the assurance that their just complaints will be attended to and redressed."

"This will, I hope, be accomplished as completely as the state of society in Ceylon will permit, by the recommendations respecting Assessors, and by sending the appellate Judge periodically to the places where the causes were originally tried, and thus giving the parties and their witnesses the same cheap and easy access to him as they had to the Judge of original jurisdiction."

In the mode which I have prescribed to myself, I shall now proceed to adduce authorities of high repute in favor of the principles of these recommendations, or at least of that which declares "that in all cases, the losing party should have every facility for appealing from the decision of the tribunals having original jurisdiction."

A circuit appeal Court is altogether a new device and is opposed to opinion in high quarters. Its results, in practice, as I will hereafter show, have been any thing but satisfactory. In like manner an appeal from every order of a Court of original jurisdiction is without precedent or authority, and is attended with so much inconvenience and mischief that a limitation in this respect would be extremely desirable. But before I do so, I shall just give Mr. Cameron's opinion as to the value of the appellate Courts which were superseded by the one which the Charter established on his recommendation. He states in his Report,

"The proceedings of the local Judges are very inefficiently controlled by appellate judicatures."

"There are four minor Courts of Appeal, one at Colombo, one at Jaffna, one at Trincomalie and one at Galle."

"Their constitution is still more defective than that of the Courts of original jurisdiction. The Judges who preside in them, like those whose decisions they are appointed to correct, have no education adapted to their functions; they sit without Jury or Assessors, and their proceedings attract less attention than those of the Courts of original jurisdiction. The minor Court of Appeal at Colombo may be taken as an example. The Judges who sit in it are four in number, so their responsibility would be quartered, were it not so small as to be practically indivisible. They are the Provincial Judge, the Sitting Magistrate (two of the functionaries from whom the appeal lies) the Commissioner of Revenue, and the Collector of Customs, all persons whose time ought to be fully occupied with other duties."

"The high Court of appeal is better constituted than the Minor Courts of appeal, so far as regards competency for the decision of legal questions, inasmuch as the two Judges of the Supreme Court are members of it. The other members are the Governor, the Chief Secretary, and the Commisioner of Revenue, who, as far as regards any legitimate purposes of Judicature, are superfluous, and whose time ought to be occupied with other duties."

"This Court is furnished by the 92nd section of the Charter of 1801, with very ample powers for correcting the mistakes and abuses of the subordinate jurisdictions; but as it sits always at Colombo, its judgments must in general be founded upon the records transmitted from the Courts in which the suits have been originally decided, as the distance of most of these Courts from Colombo must make the bringing of witnesses thither an operation so difficult and expensive as to be beyond the means of ordinary suitors."

"When, therefore, I consider the general ignorance and dishonesty of their native legal advisers, together with the servility of both towards the Europeans in authority over them, it seems to me that the only mode of combining that unity which is everywhere essential to an appellate jurisdiction, considered as the ultimate expounder of the law, with that ubiquity which in Ceylon it must possess, in order to be effectually accessible to the native suitors, and effectually to control the local judicatures, is to send one appeal Court on circuit through the whole Island to hear and determine appeals in causes of all kinds; and this is accordingly the measure which your Lordship will find recommended in its proper place."

Let us now see how far Bentham supports these views. The following are from him.

"In case of appeal, which in a case of this sort" (he is speaking of decision without external evidence) "ought ever to be allowed, to guard against ultimate misdecision, let it be incumbent on the Judge, if so required, to officiate in the character of a deposing witness, and in that character state the facts, subject to counter interrogation, exactly in the same manner as any other witness."

"Even in the first instance" (that is in case "the only perceptions on which the decision concerning the fact is grounded, are perceptions obtained by the Judge himself, without any report made to him by any other person, in the character of a percipient witness") "if the judicatory lies as it ought if possible to be so constructed as to admit and contain an audience, in pronouncing his decision, the Judge might and ought to deliver; in his character of percipient witness, in the face of that audience, the facts which that decision takes for its grounds."

"Many, as will be seen, are the cases in which to help form the ground of decision, cognizance of this or that matter of fact is, under every system of law, obtained, in the way of immediate perception, by men occupied in the exercise of judicial functions; but in these cases, perception constituting but a part of the ground of decision, and forming no more than a sort of supplement to testimony, they come not under the head of decision without evidence."

Under the head of "Publicity and Privacy" he says,

"The faculty of appeal may be apt to present itself as an effectual succedaneum to publicity in judicature. In many countries, under the Rome-sprung system in general" (hence the secrecy of our former Minor Courts of Appeal) "under Anglican law in some instances, it is the actual, and in some, the only one."

"The utility of appeal in general, its efficacy in regard to the particular points here in question, will depend in no small degree upon the arrangements made in relation to that branch of procedure; a detail which belongs not to this work" (Rationale of Judicial Evidence.)

"But that the faculty of appeal, however conducted, cannot operate in any such way as to supersede the demand for publicity in the collection of testimony, may even in this place be made sufficiently evident by various considerations."

"Punishment or disapprobation experienced or apprehended from the Judge above, in virtue of the appeal, operates, even without publicity, as a check and remedy more or less effective against misconduct (whether through mental weakness, improbity or negligence) in the Judge below. But the Judge above, where is the check upon misconduct on his part in any shape? What possible check so effectual as publicity? and if the Court above is at the highest stage, what other possible check is afforded by the nature of things."

"Appeals without publicity, are an aggravation, rather than a remedy; they serve but to lengthen the succession, the dull and useless compound, of despotism, procrastination, precipitation, caprice and negligence."

One of the reasons which induced the introduction of Assessors to the appellate Court, was to secure the publicity above referred to. He also recommends appeal as a test for the ascertainment of the qualifications of Judges of original jurisdiction.

"Number of appeals from decisions grounded on the question of fact; distinguishing between the cases in which the decision of the subordinate judicatory was, by the superordinate, affirmed purely and simply, and those in which it was either reversed or modified: and in cases of divers appeals grounded on the same original decision,

and presented to different judicatories; taking cognizance one after another of the same fact,—showing the number of such successive appeals."

"If in each instance, the evidence be exactly the same, and presented in the same shape; then upon the supposition of consummate wisdom and probity on the part of the judicatory ultimately resorted to in each case, together with sufficient ability in each instance, on the part of the losing side, to carry the cause before an ulterior judicatory; all these assumptions being made, the proportion between affirmed and reversed or modified, would exhibit the degree of aptitude, in all shapes taken together, on the part of the respective subordinate judicatories." Refuse appeal therefore, and the subordinate judicatories will remain secure from any exposure of their incompetency or inaptitude, should any such exist."

Mr. Cameron's views stand still more strongly supported by what Mr. James Mill, has said on the subject (see article Jurisprudence in the Encyclopædia Britannica.)

"Of the use of *appeal* as a security against the misconduct of the Judge, there is the less occasion to adduce any proof, because it seems to be fully recognised by the practice of nations."

"One thing, however, which is most recognised by that practice is, that if it is necessary in one sort of causes, so it is in every other, without exception. Not a single reason can be given why it should exist in one set of cases, which is not equally strong to prove that it should exist in every other.

"It is instructive to observe the cases in which it has been supposed that it ought to exist, and the cases in which it has been supposed that it might be omitted. The cases in which it has been thought necessary, are those which concern property of considerable value. Those in which it has been dispensed with, are those which concern property of inconsiderable value. The first set of cases are those which are of importance to the aristocratical class, the second are those which are of no importance to that class. It is the aristocratical class who have made the laws: they have accordingly declared that the suits which were important to them should have the benefit of appeal; the suits not important to them should not have the benefit of appeal."

"We recognize only one standard of importance, namely, influence upon human happiness and misery. The small sum of money for which the suit of the poor man is instituted is commonly of much greater importance to him, than the larger sum for which the suit of the rich man is instituted to the rich. Again, for one rich man there are thousands and thousands of poor. In the calculation, then of per-

fect benevolence, the suits for the small sums, are not, as in the calculation of perfect aristocracy, those of the least, or rather no importance, they are of ten thousand times greater importance than the suits for the largest sums."

"If an appeal ought to be had; how many *stages* should there be of appeal? This question, we imagine, is easily answered. If you go for a second judgment, you should, if possible, go to the very best source; and if you go at once to the best source, why go any further?"

Sir E. Perry seems to be of a like opinion. He says in his letter to the Government of India:

"The modifications on the Commissioners' plan which I would desire to see introduced are, first to place the Court under the superintendence of a Judge of equal rank and emoluments with the Judges of the Supreme Court. He ought I think, to be a member of the Supreme Court Bench; and if, as I pointed out in a former Minute, all the civil law business of the Presidency was transacted before a single Judge in the first instance, and the appeal lay to the Bench of three Judges, exactly the same check upon misdecision as now exists in England would be introduced for the first time to India." He here does not give the least hint of a restriction or limitation of appeal though the Court of original jurisdiction is to be presided over by one of the Judges of the Supreme Court.

The 19th and 20th recommendations of Mr. Cameron relate to the criminal jurisdiction of the Supreme Court as at present exercised, and the 21st advises that the Supreme Court should have no other original jurisdiction than the criminal jurisdiction so given.

The 22nd recommendation which proceeds to say, "that the Judges of the Supreme Court, whether at Colombo or on circuit, shall receive application in writing from the Judges of original jurisdiction for advice upon all matters of law and practice, and shall return answers in writing thereto," is clearly and manifestly wrong in principle. For, to give an opinion, without discussion and argument, simply on the application of a Judge of original jurisdiction, who tries to supply his lack of learning from a superior source, instead of searching and finding it out for himself; and then again possibly to sit in judgment in appeal upon a decision pronounced upon such previously expressed opinion, is obviously a most objectionable course of procedure as it is nothing more or less than the appellate Judge reviewing his own opinion—the judgment originally given being virtually the judgment of the appellate Judge himself. Besides, this would enable every Judge of original jurisdiction to divest himself of all responsibility in the decision of any point of law that might come before him, by merely

taking the opinion of the Supreme Court and acting in conformity with it, and thus taking upon himself the determination of facts only.

The 23d bears upon the power to be given to the Supreme Court to issue mandates &c; and the Charter has made ample provision in in that respect, accordingly.

The 24th recommendation is of no material importance to notice; but the 25th, which is the last, as it has been followed in the Charter, and its operation depends on the contingency of comprehensive circuits to be made by the Supreme Court; I shall quote at length.

"I recommend that the Judges of the Supreme Court shall look over the records of the Court of original Jurisdicton, and in case they shall observe that the law has been laid down differently, or that the practice has varied in the different Courts of original jurisdiction, shall take a note thereof, and shall consult together thereon, and shall draw up a draft of such a declaratory law as the case may seem to them to require, and submit the same to the Governor, who shall thereupon pass, with the usual legislative forms, such law as the case may seem to him and to those who may partake with him in the legislative function to require, without prejudice however to the right of the Governor, and such persons so partaking with him in the legislative function, to legislate upon these, as upon all other subjects, without such recommendation"

The requirements of the charter in respect of the above recommendation are contained in its 48th clause.

Having thus briefly stated the various recommendations made by Mr. Commissioner Cameron, the reasons which he advanced for each of those recommendations, as also the opinions of others of high and indisputable authority so far as they go to support the principles on which these recommendations are founded; I shall now proceed to give a short outline of the Charter of 1833, whereby most of those recommendations were carried into effect. Several of the recommendations were rejected by the then Secretary of State for the Colonies as inexpedient and not likely to prove practically useful, (these it will not be necessary to notice) and some have been but partially followed.

The charter of 1833, in the first place, establishes a Supreme Court for the entire Island with three Judges, having an original criminal Jurisdiction to try all crimes and offences which the King's Advocate or Deputy King's Advocate shall elect to prosecute before such Court. (Clauses 5 and 40.) Hence it will be seen that the Supreme Court is vested with a concurrent jurisdiction with the District Courts to try any offence however trivial, provided the public prosecutor chooses

to bring it before that Court. But these trials must be heard with a Jury. This was the only original jurisdiction which vested in the Supreme Court. It had no other original Civil or Criminal Jurisdiction, except the power of issuing some of, what are called the *prerogative writs*. The Criminal Jurisdiction of the Supreme Court was to be exercised in the District of Colombo and in Circuits alone. For this purpose the Island was divided into a certain number of Circuits (Clause 18th) exclusive of the 'District of Colombo.'

The Governor was then authorized to subdivide these circuits, with the concurrence of the Judges of the Supreme court, into as many Districts as circumstances might seem to require (Clause 19th.) In each of these Districts and in the District of Colombo was to be established one court of Original jurisdiction to have and determine all suits in which the defendant or defendants shall be resident within the District, or the act, matter or thing in respect of which such suit is brought, shall have been done within such district.

It was to have also a Criminal Jurisdiction, to enquire of all criminal causes committed wholly or in part within the district, and try all criminal offences which shall not be punishable with Death or Transportation or Banishment or Imprisonment for more than twelve calendar months, or by whipping exceeding one hundred lashes, and by fine exceeding ten pounds. So the District Courts, under the charter, possessed the whole of the original Civil Jurisdiction, including Testamentary, Matrimonial and Revenue, and a Criminal Jurisdiction in concurrence with the Supreme Court within certain very indefinite limits, as there was no existing Criminal Code belonging to the Island which clearly defined what are the offences which fell within the punishments which the District Courts were empowered to inflict. The power given by the 25th Clause to enquire into all crimes and offences of whatever nature was supposed to vest in these Courts the duties now exercised by coroners and Justices of the Peace. The constitution of these courts was to be in entire accordance with Mr. Cameron's recommendations, the Assessors always forming a component part of them; so that in the investigation of a criminal offence, even when beyond the limits of their jurisdiction, the Assessors were to be associated with the Judge—a most inconvenient mode of proceeding upon such an enquiry, as was proved in practice.

Such was the constitution of Original courts; and by the 17th Clause of the Charter the Supreme Court was empowered to admit and enrol Advocates and Proctors to practice in that court, after examination by one or more of its Judges; and the admission and enrolment of Advocates or Proctors for the District Courts were left to be regulated

by General Rules and orders to be made by the same court (Clauses 17 and 20.)

The 30th Clause makes important provision to secure publicity of Proceedings in the District Courts, and it is well deserving of being cited in full.

"And we further direct and appoint that every final sentence or judgment of the said District Courts respectively and that every interlocutory order of the said courts having the effect of a final sentence or judgment and that every order of any such court having the effect of postponing the final decision of any cause or Prosecution there pending, and any other order which to the Judge of any such court may appear of adequate importance shall by such Judge be pronounced in Open Court and that such Judge shall in all such cases state in the presence and hearing of the Assessors beforementioned what are the questions of Law and of Fact which have arisen for Adjudication and which are to be decided upon any such occasion together with his opinion upon every such question with the grounds and reason of every such opinion and that every such Assessor shall also in open court and in the presence and hearing of the Judge and the other Assessors declare his opinion and deliver his vote upon each and every question which the Judge shall have previously declared to have arisen for adjudication whether such questions shall relate to any matter of Law or to any matter of fact. Provided nevertheless that in case of any difference of opinion between any such Judge and the majority or the whole of such Assessors upon any question of Law or of fact depending before any such District Court the opinion of such Judge shall prevail and shall be taken as the sentence Judgment or order of the whole Court. But in every such case a Record shall be made and preserved among the Records of the said court of the questions declared by the Judge to have arisen for adjudication and of the vote of such Judge and of every such Assessor upon each such question."

Having thus disposed of Original Tribunals, the Charter proceeds to establish one Appellate tribunal for the whole Island—the Supreme Court—directing the hearing of appeals on circuit, half yearly (excepting in Colombo) at particular Civil sessions to be holden by the said court, by some one of its three Judges (clauses 31 and 32.) At the hearing of such appeals three Assessors were to be associated with the Judge. The 35th, 37th and 38th clauses define the mode in which appeals, both civil and criminal, are to be heard, and how judgment is to be pronounced. These clauses run thus:

"And we do further direct and appoint that at every civil sessions

of the said Supreme Court so to be holden as aforesaid on every such circuit the said court shall proceed to hear and determine all Appeals which may be then depending from any sentence, Judgment, Decree or order of any district court within the limits of such circuit, and to affirm reverse correct alter and vary every such sentence Judgment Decree or order according to law, and if necessary to remand to the district court for further hearing or for the admission of any further evidence any cause suit or action, in which any such appeal as aforesaid shall have been brought and upon hearing every such appeal it shall also be competent to the said Supreme Court to receive and admit or to exclude and reject new evidence touching the matters at issue in any such original cause suit or Action as justice may require."

"And we do further direct declare and appoint that the Judge of the Supreme Court holding any such civil sessions thereof as aforesaid on any such circuit shall in open court state and declare in the presence and hearing of the Assessors beforementioned what are the questions of law and of Fact arising for adjudication upon every Appeal brought before the said Supreme Court at such sessions and which are then to be decided and shall then pronounce his opinion upon every such question with the grounds and reasons of every such opinion, and that every such Assessor shall thereupon also in open court and in the presence and hearing of such Judge and the other Assessors declare his opinion and deliver his vote upon such and every question which the Judge shall have previously declared to have arisen for adjudication whether such question shall relate to any matter of law or any matter of fact. And in case of any difference of opinion between any such Judge and the majority or the whole of such Assessors upon any question of law or of fact depending upon such Appeal, the opinion of such Judge shall prevail and shall be taken as the sentence, judgement or order of the whole court but in every such case a Record shall be made and preserved among the Records of the said Supreme Court, of the questions declared by the Judge to have arisen for Adjudication and of the vote of such Judge and of every such Assessor upon every such question."

"And we do further direct ordain and appoint that at every criminal sessions of the said Supreme Court to be holden on any such circuit as aforesaid such court shall proceed to hear and determine all Appeals which may be then depending from any sentence or judgement pronounced by any district court within the limits of any such circuit in any criminal prosecution and to affirm reverse correct alter and vary every such sentence and judgment according to law. And upon hearing of every such Appeal it shall also be competent to the said Supreme

Court to receive and admit or to exclude and reject new evidence touching the matters at issue in any such original prosecution as justice may require."

The 47th Clause authorizes a Judge of the Supreme Court on circuit to reserve questions of law, pleading, evidence or practice of doubt or difficulty for the decision of the Judges collectively at general sessions to be holden at Colombo.

Clause 52 allows an Appeal to His Majesty in Privy Council from the Supreme Court, in any suit above the value of £ 500; reserving however by the 53d clause to His Majesty, a right to entertain any appeal of whatsoever kind, when he deemed it fit to do so.

Such were the principal and important provisions of the Charter made in accordance with Mr. Cameron's recommendations. The Rules of procedure framed by the Judges of the Supreme Court to give effect to the Provisions of the Charter require the district judges not only to pronounce their judgments in open Court, but also direct such judgments to be recorded stating the grounds on which they proceed, while no such rule of this last mentioned description applied to judgments pronounced by the Supreme Court itself.

It would be both tedious and unprofitable to enter into a detail of the rules of Procedure and of Pleading which have been enacted by the Supreme Court at various periods for the district courts, and the Tables of Fees which it has framed as payable to the practitioners of those courts. The rules themselves are pretty voluminous and complicated, and they certainly introduced a system of pleading and procedure fraught with a great many technicalities which rendered the objects which the Charter had in view (the administration of speedy, accessible and cheap justice) almost utterly nugatory. Written pleadings, motions, notices, arrests, interpleaders, postponements, appeals from every order, judgment and ruling, however unimportant, (which last however is equally imputable to the Charter itself) the liberty allowed to the practioners, to argue, answer, reply at any length upon any point of law or fact, and in every case, civil or criminal, however trivial, admitted of so much delay and expence, and rendered the pleadings and proceedings so voluminous, intricate and lengthy, that cases however simple took sometimes years before they could come to a hearing and final decision; whenever one of the parties desired so to prolong proceedings. Thus the courts became clogged with business, and that business fell into considerable arrear; the Supreme Court itself was inundated with Appeals, and found that the liberty of appeal was considerably abused. The only body that seemed to thrive and prosper under the system appeared to be the profession.

Every one else was dissatisfied; for, the suitor naturally thought that tardy and expensive justice was even worse than cheap injustice. The very involved proceedings in the district courts, the attempt to carry out a system of special pleading, by means of Proctors of whom most did not in the least understand or comprehend it; the artificial system of procedure which gave room to all kinds of motions and applications, left such ample opportunity to delay and to defeat a party upon pure technicalities, that the obtainment of justice became a matter of simple probabilities, of which the chances were overwhelmingly against it. A decision in the district court by no means assured the successful party of the safety of his cause. The technical system found so much favour with the Supreme Court that no body knew what flaw, what mismanagement might not be discovered in so much complicated proceedings by the ingenuity of counsel employed to argue in appeal. The finding of a district court, even of a matter of fact upon conflicting evidence, was not safe. With such finding there was nothing to prevent the Judge of the Appellate Court interfering, to any extent. I do not mean here to say that it was not a wise provision of the Charter to have allowed an appeal from a Court of Original Jurisdiction upon a matter of fact, but I venture to declare that it is not a wise or prudeut course for the appellate judge to set aside the finding of such a court and substitute another, unless such finding be against evidence or be grounded on insufficient evidence. The interference of the Supreme Court would be perfectly justifiable in cases similar to those in which a Superior Court of England would grant a new trial, notwithstanding the finding of a Jury, in a civil suit, and nothing short of this could justify its interference, in my opinion. To guess at the truth of evidence heard before another court, merely upon reading that evidence as recorded, is an extremely hazardous attempt; nor do I believe, that the framers of the charter contemplated any such course, but allowed the appeal with the view of enabling the Supreme Court, whenever a doubt appeared as to the correctness of the finding, to rehear the evidence already taken, or to take additional evidence, and then decide. The effect of such interference was that every party defeated in the district court, whether upon a point of fact or law, took the chance of an appeal; though he did not see his way through clearly, nor could make any certain calculation as to what the ultimate result would be. Thus the liberty of appeal was grossly misused, and the Supreme Court itself felt uncomfortable under the burden of its labours, which in a great measure it brought upon itself; while confidence in the lower tribunals was very considerably shaken. Independent of this,

it is no less true, that much of the confusion, delay, mistake and mismanagement was also attributable to the imperfections of those who were appointed to administer justice in the district courts. How could men who never read or understood law, Rules of pleading and evidence, be expected to work out a technical system and mete out justice according to law? It was quite a hap-hazard work with them. They groped in the dark; and if they happened to stumble over some impediment, intentionally or accidentally placed in their way, it was no matter for wonder. Another evil that added still more to this embarassment was the inadequacy of most of the establishments, either by the smallness of the number of officers allotted to them, or the want of sufficient qualifications on the part of such officers to perform the duties of their respective offices with efficiency and dispatch. Most of these officers had been drafted out to the District Court establishments from the abolished Courts of Magistrates and Provincial Judges, and were accustomed to a most imperfect method of conducting business.

It will hence be perceived that matters, as they then stood required amendment; the evils were obvious and palpable, the grievances of suitors great, and both the Government and the Legislature felt it to be their duty to provide a remedy and afford relief. Now let us see the mode which they adopted and pursued to grant this relief; and this brings me to the third Head of my enquiry.

CHAPTER III.

SUPPOSED GROUNDS AND REASONS, THAT LED TO A PARTIAL DEVIATION FROM THE CHARTER OF 1853 UNDER THE LEGISLATIVE ENACTMENTS OF 1843—EFFECTS OF SUCH DEPARTURE.

No doubt the state of things as above described required a remedy, and an effective remedy. The hardships imposed upon the litigant, the expense, the delay, the trouble, the uncertainty were too great and apparent to be denied or overlooked. A case in the District Court, in point of duration could occasionally, nay often, enter into competition with a chancery suit. Frequently even a period of 10 or 12 years did not put a final termination to a suit. Our legislators therefore bestirred themselves to seek for a remedy, and to bestow on the Island another instalment of Law reform; but utterly forgetful of the duty of enquiry into the causes and origin of the existing evils and the obligation to abide by the real reforms which had already been introduced upon good and sound principles, approved by all enlightened law reformers, they cast their eyes abroad into foreign lands to see how things were being done there, and very naturally

their eyes rested on the mother country—mother country as regards Europeans and the ruling country as regards natives—England. In England they saw four descriptions of Judicial Offices which had no existence here, Justices of the Peace, Coroners, Police Magistrates and Commissioners of the Courts of Requests, possessing various powers and discharging several duties relating to the administration of justice as assigned to each class; with some benefit to the public. However, they bestowed no thought and made no enquiry as to how they came to exist there, and the circumstances which maintained them. Our then legislators, at least those who originated the legislation of 1843 in this respect, no great jurists evidently, had most probably a natural predilection and attachment for the institutions which existed in their own country, and never dreamt of questioning the wisdom which established them—an act of impiety which they would not for the world perpetrate, particularly at so great a distance from the land of their birth, when every reminiscence and association of their earlier years made them almost blind to the defects of those things which had long obtained and continued there.

It was for more philosophic minds, those who proceeded upon fixed principles, uninfluenced by any existing prejudices and attachments, to pursue a different course. With our then legislators, love of country and attachment to old institutions predominated and they cared not to enquire into the reasons which led to the abolition of our former system, but went headlong to engraft upon the charter system another utterly incompatible with its acknowledged principles and leading to the same confusion, uncertainty and misdecision which the former aimed to obviate and prevent.

I shall now proceed to notice the alterations and amendments which the legislation of 1843 introduced, in order to see how far they are compatible with the true principles of law reform, and wherein they transgress the rules which true law reformers seek to enforce and establish.

One of the Ordinances passed in that year was "to provide for the better holding of Inquests" and so far as this Act goes, it makes no infringment of the rules on which Mr Cameron grounded his recommendations. If any radical defect is to be found in the Charter of 1833, it is its study of over-simplicity. It conferred upon one Court the whole of the jurisdiction, civil, criminal &c. which in any way stood connected with legal enquiry and administration arising within a district, and with jealous care prevented there being any more than one legal functionary in each district, and at the head of each Court. No confusion, no collision or conflict, no uncertainty

could by any possibility be expected by the appointment of a Coroner or Deputy Coroners to each of the districts, and therefore the Ordinance which created these officers, prescribed the various duties and directed the mode of their proceedings, did by no means affect the principles of the Charter, and might therefore be safely pronounced to be an improvement. If in the course of an enquiry instituted by a Coroner, an offence be discovered, it must be one which must be prosecuted before the Supreme Court, and can have no relation to the criminal jurisdiction of the local Courts as limited by the Charter.

Another of the Ordinances of this year created Justices of the Peace, or at least conferred on the Governor the power to create them with limited powers. Within the limitation of power as defined in the Ordinance, that is, to enquire and commit for trial before the District or Supreme Court criminal offenders; to arrest and detain them; and generally to take measures to preserve the peace; but with no jurisdiction to try or punish; this may also be rightly deemed a proper and beneficial amendment of the Charter, which is not liable to produce any evil by way of collision of jurisdiction, or uncertainty. It was, in my opinion, a mistake to have confined the exercise of every power in reference to a criminal offender to one functionary in a district, by the Charter, though it was a wise precaution not to give a divided jurisdiction to two or more functionaries to try and punish within the same district, excepting in the few offences which were made triable before the Supreme Court. When restricted to one, unavoidable absence, sickness or other cause left a district totally unprotected, without any functionary having power even to issue an urgent process, or to institute an enquiry into a serious offence that demanded instant preliminary investigation. This Ordinance therefore may safely be declared a beneficial piece of legislation.

Another of the legislative Acts of the year was the one to "alter and amend in certain respects the constitution of the Supreme Court, the power of the Judges thereof and the manner of proceeding therein. This Ordinance simply makes some important improvements on the Charter of 1833, in perfect consistency with its principles, supplies some of its omissions, removes certain doubts which seemed to arise from a strict interpretation of its provisions, obviates some unnecessary restrictions which it apparently imposed, and may be generally considered as a very useful piece of law reform. It seems unnecessary to enter into its merits. It infringes none of the principles on which the Charter was based.

Akin to the above is the Ordinance No. 12 "to make certain alterations in the constitution of the District Courts."

There are many things in this Ordinance which cannot be viewed in the light of true reforms. The first clause authorizes the Governor to appoint more than one District Judge to one Court. There appears to have been no urgent call or necessity for such a course; the creation of more than one Judge of original jurisdiction to one Court. If the business arising in a District Court was too much for speedy despatch by one Judge, a re-division of the district was the natural remedy. The unity of the law could be better preserved while one Judge decided all the cases coming before a Court than when two determine cases simultaneously, one independent of the other. It was however supposed, I believe, that by establishing more Courts with a single Judge to each, an additional expense would be incurred to furnish them with establishments; but this consideration should have had no weight, if it infringed an important principle. The power given to the Governor by this clause, however, has never been exercised, and, I think, wisely. If it had been; in one and the same Court, one might have seen probably, one Judge lay down the law one way, and the other another way; one construe a rule of Practice or an Ordinance differently from the other; one giving implicit credence and perhaps commending a witness for his truthfulness; while the same witness when called before the other is discredited and his evidence rejected as false. When a like contrariety happens in distant tribunals situate in two different districts it is not productive of so much mischief; as the suitors and practitioners can guide themselves according to the opinion entertained by each Court if they do not consider it worth their while to incur the expenses of an appeal to test their correctness, reconcile the difference, and produce uniformity. If any such provision as the appointment of an additional Judge was at all necessary, an Assistant or Deputy Judge in complete subordination to the principal Judge, to conduct easy and routine business under this latter's guidance, instruction and suspervision would have been far preferable. This is what Mr. James Mill suggests.

"As the judgment seat should never be empty, for the need of staying injustice is not confined to times and seasons, and as one Judge may be sometimes ill, sometimes called to a distance even by the duties of his office, provision ought to be made to supply his place. For this purpose, the proper expedient is a deputy. That the deputy should well perform his duty, the best security is that he should be chosen and employed by the Judge, the Judge being responsible for the acts of the deputy as his own. Whatever it be which the Judge cannot do, or cannot conveniently do, in that he may employ his deputy. If there is a great influx of causes; the deputy may be em-

ployed in some of the least complex and difficult. If there is any business not of first rate importance requiring the presence of the Judge at a distance, the delegation of the deputy or deputies is the proper resource."

The second clause is open to still graver objections. In the first portion, it proceeds to re-assign the limits of the criminal jurisdiction of District Courts in these words "Each of the said Courts shall have full power and authority to enquire of all crimes and offences whatsoever committed wholly or in part within the district to which such Court may belong and which shall not according to any law now or hereafter to be in force within this Island, be punishable with death or transportation or banishment or imprisonment with or without hard labour for more than 12 calendar months or by whipping exceeding fifty lashes or by fine exceeding twenty pounds." The change consists here simply in giving more power to fine and less power to lash, but the jurisdiction has been left as ill defined as before, and I should be glad to know whether there is one learned lawyer in the Island, the Judges of the Supreme Court inclusive, who is capable of explaining what specific crimes or offences (excepting a very few mentioned in our local laws) fall within the jurisdiction of the District Court and not triable also by the Police Court, or what ought only to be tried before the Supreme Court.

The latter part of the same clause introduces an inconvenient restriction which never existed before. For, it goes on to say, "It shall not be competent for any District Court to try any person for any crime or offence who shall not have been committed for trial before such Court by some competent Justice of the Peace or unless an information in the name of the Queen's Advocate and signed by the Queen's Advocate or some Deputy Queen's Advocate empowered to act within such District shall be exhibited in such Court against such person." Now, the object which Mr. Cameron always kept steadily in view was to give full liberty to every person who felt himself aggrieved by an injury to have immediate access to the Judge who had the cognizance of his cause, and obtain any relief to which he might be entitled, without intermediate delay, expense or trouble. This requirement entirely debars such a course. In the first place the injured party is obliged to apply to a Justice of the Peace, the accused is to be brought up before him, a preliminary enquiry is to be gone through, and in the event of a committal, to lodge another plaint for the purpose of a trial before the District Court. This course creates a prolongation of the investigation, the inconvenience of repeated attendances of parties and witnesses and consequent trouble and expense. Moreover, the business

and trouble of the Judge himself is unnecessarily and uselessly increased, and impartial enquiry and adjudication rendered doubtful. In many districts the Justice of the Peace whose duty it is to make this preliminary enquiry and take proceedings is the very individual who fills the office of Police Magistrate and of District Judge. Often he will find the complaint overcharged and exaggerated, and the offence to be one triable before the Police Court when reduced to its proper magnitude. In such a case he will have to refer the complainant to the Police Court, and his labour is lost; for he will have as Police Magistrate to enter upon a fresh trial of the cause. If the case however be found to be one which ought to be tried before the District Court; still, he will be obliged as the Judge of that Court to rehear the evidence; and that with a previous bias arising from conclusions drawn from a former enquiry, which will often lead to superficial investigation and hasty conviction from which a prisoner ought to be protected. Even when these last mentioned disadvantages have no existence; still, the repeated attendance of parties and witnesses is in itself an evil; the delay creates opportunity for tampering with witnesses and the defeat of justice. This therefore is no improvement, but must be injurious in its operation.

The first part of the 3d clause which authorizes the prosecution of offences before the District Court without the intervention of the Queen's Advocate, is a beneficial amendment of the Charter which confined the limits of such prosecution to "breaches of the Peace, Petty assaults and other Minor offences of the like nature;" but the latter part of the clause which empowers the Queen's Advocate to intervene whenever he thinks fit and stop a prosecution is highly objectionable. If the intervention was for the purpose of promoting the ends of justice and of making the prosecution effectual, then it certainly would deserve praise; but the power thus given can also be perverted for the purpose of preventing a party from obtaining criminal justice. Under a similar power thus conferred on the Queen's Advocate, I have known of an instance in which the Queen's Advocate actually interfered and prevented the prosecution of a toll-renter though he was openly and daily employed in exacting illegal toll. So soon as a plaint was entered, in came the Deputy to the Queen's Advocate and stopped the prosecution, without the remotest intention of carrying it on himself, but for the purpose of securing the Government from loss, by extending his protection to the party about to be prosecuted, who otherwise under the peculiar nature of his contract with Government, would have been entitled to demand compensation. The clause in question, therefore, should have gone further and given to

the private prosecutor liberty to proceed with the prosecution if the Queen's Advocate neglected to take steps within reasonable time. The power thus given to the public prosecutor is that which the 49th clause of the Charter expressly took away from the Supreme Court in these words.

"It shall not be lawful for the said Supreme Court nor for any Judge thereof in any case to grant an Injunction to prevent any person from suing or prosecuting a suit in any District Court or to prevent any party to any suit, in any District Court from appealing or prosecuting an Appeal to any Court of Appeal, or to prevent any party to any suit in any Court of Original Jurisdiction, or in any Court of Appeal from insisting upon any ground of Action, Defence or Appeal."

In Council, this provision of the Ordinance was, I believe, objected to, as investing the Queen's Advocate with too extensive a power of which he might possibly make an abusive use; but the answer returned to this objection was, that that would be presuming the probable misconduct of a high public officer, while none such was ever likely to occur. This answer contains an argument which cannot safely have any weight with the legislator. Never should the legislature spare one restraint, one single check calculated to secure good conduct, on the presumed virtuous conduct of an officer entrusted with a weighty and important duty, if for want of such restraint or check there is the least possibility of the occurrence of such misconduct which must be left without correction and without punishment. Hence it is that the Charter conferred the liberty of appeal on so extensive a scale and without limitation, and prevented prohibition even by the Supreme Court on any ground whatsoever.

The 5th clause of the Ordinance enacts a penalty for proceeding in a District Court in any suit which could have been brought in a Court of Requests, by way of loss of all costs incurred, when the judgment is in favor of Plaintiff; and by giving the defendant double costs when judgment is entered in favor of this latter. If the legislature declared that in the former event plaintiff shall recover no more costs than he could have recovered from the defendant in the Court of Requests, it would have been something reasonable and sufficient to deter a party from unnecessarily resorting to the District Court; but there appears to be no good reason for treating a man who does so, almost like a criminal and offender and inflicting upon upon him a punishment as a delinquent whether his claim was a just one or not. It would have been very considerably better to have prohibited entirely the resort to a District Court in such a case.

This therefore looks very much like random legislation; whim occupying the seat of reason and principle.

The clauses from 6th to 12th require no particular notice. The 13th clause empowers the Judge to state his opinion either before or after Assessors, while the Charter required him always to pre-intimate it. This was intended, I suppose, to prevent (when the Judge really wished the assistance of a free and candid opinion on the part of the Assessors) the giving of a mere mechanical assent, which had grown to be a common habit and practice. There is nothing objectionable in the provision, although this course is calculated to place the unfortunate Assessors occasionally in the awkward predicament of making a random guess, which however the Judge need not adopt if contrary to his own impression. If it confirms his, of course, it gives him more confidence as to his being correct. The 14th clause makes a very wholesome provision, enabling the Court to examine parties to a suit and to punish for any false statement. The remaining clauses contain nothing very material to our present enquiry.

The next Ordinance of 1843 which deserves notice, is the 11th entitled "An Ordinance to allow appeal to be heard with consent of parties at Colombo and to allow in certain cases an appeal to the collective Court from the decision of a single Judge of the Supreme Court &c." This is an Ordinance which can be spoken of in language of the highest commendation, as things then stood. The first clause of it allows liberty to hear appeals in Colombo instead of on circuit, by consent of parties. When I come to the 4th head of my subject, I think I shall be able to prove, almost to a demonstration, that all appeals should be heard in Colombo, and that there should be no Circuit Court of Appeal.

The second clause enjoined on the Supreme Court the duty of entering on the "records of their judgments, the grounds and reasons thereof" As regards District Courts, this duty was imposed on them by a Rule which the Judges of the Supreme Court had laid down on that behalf, but they had failed to impose a like obligation on themselves (which would show that it is much easier to prescribe duties to others than to recognize our own) and very often omitted to perform a like task. A judgment without a single ground or reason was utterly valueless to settle any point of law, and unsatisfactory, inasmuch as it does not show how it was arrived at. By some strange mistake the provisions of this clause as well as those of the next, by defect of wording, were confined to appeals heard at Colombo, though it was never so intended. As this clause gives reason in full, for its enactment, I shall give it at length:

2. "And whereas by the Charter of King William the Fourth dated the 18th day of February 1833 the Judge of the Supreme Court holding civil sessions thereof is only required to state in open Court and in the hearing of the Assessors associated with him the questions arising for adjudication, and his opinion, and the grounds and reasons of his opinion thereupon; and it is only in case of a difference of opinion between the Judge and the Assessors that any record of such questions or of the vote of the Judge and Assessors is required. And whereas District Judges cannot conveniently attend at every sessions of the Supreme Court at which appeals from their decisions are heard, more especially when such appeals are heard at Colombo under the provisions of the preceding clause, but it is highly expedient that they should be accurately informed of the grounds and reasons of every reversal, modification or alteration, and in certain cases of every affirmation of their decisions. It is therefore hereby further enacted that whenever the Supreme Court or any Judge thereof sitting with three Assessors at Colombo upon the hearing of any appeal from any District Court in any other than its criminal jurisdiction shall reverse, modify or alter the decision of such District Court, the grounds and reasons of such reversal, modification or alteration shall be entered in the record of the judgment, decree or order of the said Supreme Court or such Judge thereof, and whenever the Supreme Court or any such Judge thereof shall at the hearing of any such appeal as aforesaid affirm the decision of the District Court the grounds and reasons of such affirmation shall in like manner be entered in such record as aforesaid in every case where the decision of the District Court shall appear from the record of such District Court to have been given upon any point of Law or Practice which shall have been contested in such District Court or where such affirmation shall proceed upon any ground not stated in the Record of the District Court as the ground upon which the decision thereof shall have been given."

The Third clause grants an appeal from the judgment of one appellate Judge to the Collective Court when the grounds and reasons given by a single Judge are bad in law. Prior to the passing of this Ordinance, a judgment delivered by the Appeal Court, even by a single Judge of it, was final, except in the very small class of cases appealable to the Queen in Council, and whether bad in law or not, was assumed to be correct. This clause also I shall cite at length.

3. "And it is further enacted that it shall be lawful for any party who shall be dissatisfied with the grounds and reasons so entered in the record as aforesaid upon the hearing of any appeal by the Supreme Court on circuit or by a Judge thereof sitting at Colombo with three

Assessors by reason of their being considered erroneous in Law in a matter or matters substantially affecting the merits of the case to appeal from the Judgment Decree or order founded on such grounds and reasons by Petition to the Judges of the Supreme Court collectively at their General Sessions assigning specially in such petition the alleged error or errors of Law contained in such grounds and reasons and praying that the Judgment Decree or order may be revised corrected varied or altered by reason of such alleged error or errors in law and the said judges at such general sessions shall hear determine and dispose of such appeals according to law and shall enter in the record of their Judgment Decree or Order the reasons and grounds thereof. Provided always that no such Appeal shall be allowed or entertained unless the error or errors complained of shall be clearly and distinctly stated in the Petition of Appeal and a duly admitted Advocate of the Supreme Court shall have endorsed thereon a Certificate that in his opinion such error or errors are a matter or matters substantially affecting the merits of the case and that the Judgment Decrees or order appealed against ought to be reversed corrected varied or altered by reason of such error or errors nor unless the party or parties Appellant shall have lodged their Petition of appeal with the Registrar or some Deputy Registrar of the Supreme Court within twenty days after the date of the judgment decree or order against which such party or parties is or are desirous to appeal exclusive of the day on which such judgment decree or order appealed against was given and of the day of filing such Petition. And the said Judges of the Supreme Court shall not unless they shall in some special cause to the contrary hear any such Appeal unless a duly admitted Advocate of the Supreme Court shall be present and prepared to argue the same at such time as the same shall come on for hearing."

This clause is hampered with so many restrictions as to lead one to the belief that some interested party must have insidiously introduced them for the purpose of throwing as many impediments as possible in the way of the appeal which it purports to allow. If the errors complained of are to be clearly and distinctly stated and moreover required to be certified by an Advocate of the Supreme Court, why should there have been introduced the further prerequisite of an argument in absence of "some special cause" which may mean any thing or nothing. This however creates two stages of Appeal, objectionable therefore on principle as explained by Bentham &c.; but the provision of a second stage of appeal was found absolutely necessary to maintain the unity of the law so far as is

practicable. So long as a Circuit Court of Appeal exists, nothing prevents a Judge from laying down a different rule of law from his brother Judge or Judges, or in fact all the three Judges entertaining three different opinions on one and the same point of law. So, though the court of appeal was one, there was no impediment to diversity, and practically it led to the creation of perplexity and to the embarassment of the judges of original jurisdiction. Hence the suggestion for a second stage of appeal in order to secure uniformity. But I shall shew in my concluding chapter that if circuits be discontinued this necessity will no longer exist, and appeals can be beneficially reduced to one single stage. The remaining portion of this Ordinance is of no consequence to our present subject.

The two Ordinances, which introduced a radical change into the system of Judicature which stood established by the Charter; which totally and entirely departed from the principles of true law reform, on which, Mr. Cameron based his recommendations; which reproduced and brought into life and action the abolished Magistrates' Courts under different names and titles, are the 10th and 11th of 1843, establishing Courts of Requests and Police courts. So far as constitution and jurisdiction went, we had under the Charter already reached a point which the most ardent and most enlightened modern law reformer could wish to attain. It hardly admitted of any improvement in this respect; although a slight change without infringing principles might have been beneficial. It must be constantly borne in mind that no true law reformer, no sound jurist (none, indeed, but a technical lawyer) acknowledges the existence of a reason or a necessity for establishing a distinction between small causes and those of a large amount, or for the creation of two separate judicatures for the trial of causes belonging to each of those classes. True it is that those, in England and in India, who are zealous to advance reform, having to encounter very considerable opposition, to overcome long existing prejudices and vested interests, to combat against bigotry and dogmatism; are on that account compelled to accept (notwithstanding their avowed opinions and principles) a small and contracted measure of reform at a time, and to establish courts constituted according to their system with simple precedure; but, contrary to their own ideas, with limited jurisdiction; for the purpose of convincing the public and the legislature that there is no impracticability in their scheme. From time to time they obtain for these courts, (notwithstanding the opposition of their opponents, and the obstructions thrown in their way by false friends, who have joined their ranks as law reformers for the mere purpose of impeding their

progress and grant to them as little as possible) an increase of jurisdiction for local courts. Their avowed aim is to obtain for these courts the entire jurisdiction within local limits, leaving the Superior courts simply as courts of appeal.* The measures which they introduce into legislation with this object are often interfered with by unskilful hands; and provisions, bad in principle, are thrust in, to prevent their working with good effect; but still they persevere and are daily gaining ground. Whoever has closely watched their proceedings, and has studied the principles they act on must have marked this. But our legislature seems to have had no clear notion of this, or to have been in the least aware of the progress we had made; and they took to imitation without understanding the system. They swept away

* I am glad to be able to confirm the truth of the view above taken by a passage in No. 772 of the Jurist of 25th October last, which I have just received.

"The lawyers have been, until lately, backward in the cause of law reform; at least, that cannot now be imputed to them, for pamphlet after pamphlet now issues from the press, bearing the name of some member of the Profession, urging law reform with abundance of energy.

"For ourselves, we are almost wearied of the subject, and we conclude that our readers are also; therefore we would not touch upon it, were it not that it is one, that, as professional men, they must consider; because, the public having at length taken it up, reforms, and large reforms, must and will be made, and it behoves the Profession to give them all the aid of experience and judgment. That the Judicial procedure of the country is in a very unsettled state, all men are agreed. But how to re-settle it is the difficulty—a difficulty not diminished by the circumstance, as regards the common law at least, that it would be premature to give to the county courts a universal original jurisdiction at common law, and to give them a commensurate code of procedure; while it is very uncertain whether any efforts or any improved procedure can now retain for the superior Courts their original jurisdiction. To us it appears that the time for so doing has passed away, and that but a few years will elapse before it will become necessary for the country courts to be put on such a footing as to transact all the original common law business of the country, and to convert the superior courts into purely appeal courts. If eight or ten years ago the procedure of the superior courts had been substantially simplified, so as to divest it of the expense and delay of which the public complained, probably county courts would have no more been thought of. But county courts have been allowed to be formed; the current of business and public favour has set in towards them; the people have, in fact, begun to accustom themselves to local courts; we doubt whether it is now possible, by any reform, to turn the current back. More, we doubt whether it would not now be wiser in the Legislature to adapt the county court to deal with all original business, and to remodel the superior courts, so as to convert them into one or more appeal Courts."

and cast to the winds every principle of true reform; destroyed and effaced the broad land marks which had been raised to prevent confusion, doubt, uncertainty, misdecision, caprice and corruption, and having achieved all this they congratulated themselves with having introduced, as they thought, a very large amount of law reform. Let us keep steadily in view the broad and sound principles of the reforms of 1833; for it is thus alone we can steer clear of complete shipwreck.

Principle 1st. Division of Jurisdiction on the geographical principle in place of the mechanical or metaphysical principle.

„ 2nd. The abolition of the distinction between cases of small and large amount.

„ 3rd. Universal appeal, or the grant of unlimited appeal to all suitors and without restriction.

„ 4th. The creation of a bar and securing publicity as a check on, and an assistance to, the Judge, and to aid the suitors to conduct their causes in an efficient manner, for the purposes of justice.

„ 5th. The control and supervision of a Court of Appeal to correct all mistakes and errors and to prevent misconduct, haste and neglect.

„ 6th. Uniformity of Judicature and Procedure; and unity of the law, requiring of the courts to administer justice according to law; and in case of supposed error, the permission of revision and correction by the one Appellate Court.

„ 7th. The prevention of conflict and collision of Jurisdictions, and ready accessibility to judicial tribunals.

Let us now see how far the Provisions of those Ordinances transgressed these rules. To take first No. 10 which creates Courts of Request. It establishes small cause Courts to be presided over by one Judge, without jury or assessors, of which the jurisdiction is thus defined "to hear and determine in a summary way and according to *equity and good conscience*" (mind, not according to law) "all actions and plaints and suits for the payment and recovery of any debts demands damages or matter not exceeding Five Pounds in value except the matter in question shall relate to the title of any lands or tenements or *to any thing whereby rights in future may be bound.*" There is this further exception in the 11th Clause. "That nothing in this Ordinance shall extend to any debt being the disputed balance of an unsettled account originally exceeding Five pounds" The creation of such a jurisdiction is a total rejection of the 1st 2nd 6th and 7th rules and principles above noted; and its working

has proved abundantly mischievous. Many a case has occurred in which a party could not know which of the Courts of Original Jurisdiction he ought to resort to. For instance, one trespasses upon your land, appropriates its produce, without precisely informing you upon what alleged right he does so. You go to the Court of Requests for damages under £5; but a question as to the title to the property is raised and you are then driven from this court to the district court, and that with loss. Suppose, to avoid any such misfortune, you at once resort to the District Court; there possibly the defendant disclaims any title to the property, but only claims the profits, and the question turns upon the truth of such a defence: Here Plaintiff, even when successful, loses his costs, and when defeated has to pay a penalty by way of double costs for a mere mistake of jurisdiction. Take another case: A party is either slandered, libelled, or his wife or daughter is seduced, or he himself has been falsely prosecuted, and he has to sue for damages;—for such actions are here triable before Courts of Requests though very prudently excluded from the jurisdiction given to the county courts in England in 1846. Perhaps, estimating his damages according to the intensity of his injured feelings, and also knowing the almost absolute necessity of professional assistance to prosecute effectually such a case, he brings it before the District Court laying his damages above £5; but the court eventually awards him a damage below that sum; and he loses his right to recover costs, which perhaps exceed the sum given to him as compensation by way of damages. In fact, I have known instances wherein parties, who have been to the Court of Requests and their claims struck off for alleged want of jurisdiction, have been refused costs in a District Court in obtaining judgment there, in the same causes, on the ground that the Court of Requests had jurisdiction in the matters. Such are the difficulties and losses which a division of original jurisdiction causes. The exception introduced by the words "any thing whereby rights in future may be barred" is to a great extent unintelligible: it is a metaphysical division of jurisdiction the exact demarkation of which it is difficult to see. If a matter passes into what is called *res judicata* (an adjudication upon merits) it concludes the rights of parties in the cause, and no future discussion of the same claim is allowed to take place. Does this exception include such a case? Jurisdiction, therefore, as thus defined, is extremely faulty, and is liable to lead to many mistakes. The 21 objection to this clause is, its requirement to decide "according to equity and good conscience" instead of according to law. Every man is bound, or at least presumed, to know the laws of his coun-

try, and is expected to conform his conduct thereto; but it is no inconsiderable hardship to be obliged to divine what are the rules of equity and good conscience which gain favor in the breast of a Judge. This, in reality, is a power to decide according to no fixed rule; that is, arbitrarily and even capriciously. The "equity" here meant is not, of course, that which is administered in the High Court of Chancery in England, which may be as well known and understood as the common law of that country; but a mere vague notion or feeling of what is right or wrong, which, perhaps, no two people possess alike. I am aware that this provision of the Ordinance is a mere copy from the country court Act in England, but is not on that account the less objectionable, and it has been found fault with even there. To shew this, I shall cite a passage from a very valuable Periodical, the Law Review, which advocates all measures of Law Reform, and to which the most eminent Law Reformers, including some of the Judges of the Superior Courts in England, contribute. In No. 11. of that Journal page 179, speaking of Courts of Requests, the writer says.

"Too little time has elapsed to enable us to make any statement drawn from actual results, sufficient to enable our readers to form an opinion as to the probable efficiency of the new law. During the few weeks the experiment has been tried, it has, however, been shown that the practice of defrauding tradesmen, founded upon the impunity with which such frauds were accompanied, had become very general. It may be a subject of regret that with respect to debts not exceeding £20 it should have been found necessary to substitute an arbitrary Judicial discretion for known and well defined principles of jurisprudence. In a commercial community, however, this appears to be a less evil than the absence of any available remedy for the recovery of debts small and unimportant when considered singly but of great importance in their aggregate amount. The benefit of strictly legal and uniform decisions with respect to small claims, could not have been obtained without an extensive machinery, to defray the expence of which the country would not be prepared until it had learnt to prefer the certainty of positive law to the uncertainty of judicial discretion. This possible inconvenience will, no doubt, be in a great measure obviated by confining the summary jurisdiction given by the Act, to persons familiar by previous habits and by actual practice, with the principles of the common law." How many of this latter description have we in the Island in these courts? Very few indeed.

The 18th clause of this Ordinance prohibits the appearance of counsel, but allows a substitute to appear when the Commissioner is

satisfied that there exists some good and sufficient cause why such party should not be required to attend in person;" and when such substitute is allowed to appear for any party no costs incurred in respect of such appearance is to be made payable by the opposite party. This infringes the 4th principle which Mr. Cameron tried to establish in his scheme, and is moreover obviously objectionable as leaving it optional with the Judge, whether to allow substitution or not. For, to compel the merchant, the shopkeeper, the druggist, the surgeon &c. personally to recover their small claims, and to give attendance in court from day to day for such a purpose to the neglect of their business and consequent loss is a hardship of no small magnitude. It is not every respectable female, nor indeed every respectable male that will be willing to visit these courts and personally conduct his or her cause to recover a trifling claim or debt; and such would rather forego a right and put up with an injury than, do so. As to denial of professional assistance to a party, it may be better discussed under the 4th Head when we come to examine the Draft Act which gives increased jurisdiction to these courts.

No appeal is allowed from these courts, and that destroys the security for correctness of decision which Mr. Cameron sought to insure, on the 3rd principle I have mentioned; but it allows the Supreme Court on review, to set aside or correct the proceedings of these courts on six different grounds, all of which are of the most indefinite and vague description, and calculated to mislead or embarass a party.

1st. "For incompetency of the court in respect of excess of jurisdiction."

2nd. "When the case has been already tried or forms the subject of a trial pending in some other competent court" (a very probable event when Tribunals are established with concurrent jurisdictions. The Charter did not allow any such.)

3d. "For incompetency of the court in respect of the Commissioner himself as that either the Commissioner or his near kinsman" (how near?) "had an interest in the cause." (An objection which ought to be taken *in limine* and not after enquiry and decision, thus placing the Commissioner in an awkward position.)

"4th. For malice or corruption on the part of the commissioner" (a most difficult thing to prove on a Review, and if proveable a very good cause for dimissal by government.)

5th. "For gross irregularity in the proceedings." (Who can positively say what amounts to gross irregularity, and what is a slight irregularity? This is something similar to the *lata culpa* and *levis*

supra of the Civil law, which learned ingenuity has in vain tried clearly to distinguish.)

6th. "On account of the admission of illegal or incompetent evidence, or of the rejection as illegal of legal and competent evidence." Such is the substitution in the place of that comprehensive Appeal which the Charter allowed, and a most pitiful substitution it is. It will be seen that no correction of any mistake in law is allowed, or redress given for any injustice inflicted under such mistake; for a conscience and Equity Judge might set the law at defiance and make his own conscience the law-giver to him; nor would such a liberty have been of much avail to the suitor where professional assistance was denied to him to discover such mistake and misdecision thereupon. It is also mere mockery, in absence of such aid, to give a party a right to call for a Review on account of the reception of illegal evidence or the refusal to admit legal evidence; when it must be known that very few of those who resort to these court have ever studied Starkie or Taylor on the subject, or even our local Ordinances in respect of it. The fact is, no suitor, or at least very few, are able to say when the court has erred under any of those six heads, and when they have good cause for application for a Review. Nor are they able to discover the difference between an Appeal and a Review, and when they do take a case in Review, it is a mere formal blind act, a random proceeding, and they feel surprised when the Proceedings are returned with the entry that the Supreme Court sees no ground for interference. This, of course, impresses in the mind of the suitor, when he is positively assured by those who ought to know it that the Commissioner has erred in law, that the decision of these courts however faulty are final, and be the injustice they commit ever so great, there is no redress to be obtained. This produces silence and apparent contentment; for why complain, when your complaint cannot be listened to? But hence is derived the arguments of the Advocates of this measure and of its extension: "we hear no complaints," a very plausible one indeed! Shut out appeal, prevent correction, bar the discovery and detection of misdecision, refuse to give the means and opportunity for complaint, shut out the public (I do not mean that public on whose ears the matter which is transacted before them falls as a dead letter, but the public, the profession, who are able to discover a blunder or an arbitrary proceeding) and from these draw consolation by exclaiming "the system works without complaint; it works admirably, and every body is satisfied." Nor does the Supreme Court seem to entertain any distinct notions as to how far it has a right to interfere. Sometimes the Judges venture to correct even a mis-

[illegible] point of law, but at others they refuse to do so. One Judge sometimes goes a little further than another. Clearly they have no such right under the Ordinance, which in this respect is not very unlike the county courts Acts in England. The Judges of the Superior Courts there have decided that they had no power to correct a country court on a point of law. Every thing is now in a state of uncertainty, where none existed before, when legislation proceeded upon principle. Are the law Reformers in England satisfied with the uncontrolled power given to the county courts there, though publicity, reporting and free discussion is a matter of course there, and no small check on the Judge; and has not the evil been felt even there? The following is from the Law Review No. 14 page 266: Speaking of county and superior courts,

"The most difficult grievance to deal with is the absence of the power of appeal. We feel that were it conferred the superior courts would be almost overwhelmed with applications upon matters which it would be better for the party fancying himself aggrieved should not be disturbed." (Poor reasoning this; how so? Who is to determine whether it is a fancy or reality except the Appellate Court? If fancy, he will suffer for it in costs) "Still there is something almost intolerable in having to submit to what we consider legalized injustice. The feeling of indignation it arouses is one of the fiercest character, and will find some channel or other wherein to expend itself—If shut out from an appeal to a regularly constituted court of justice, a man will bring his case before one much less competent to judge of its merits, and the public at large will be called upon to sit in judgment on decisions which, *from their being arbitrary* will be almost presumed to be unjust—We have witnessed all this actually take place in the metropolis a very few weeks ago, when we might have found a tavern turned into a Court of Appeal, and the Judges personified by a host of tradesmen who considered themselves aggrieved by the principle involved in the decision complained against."

The present county courts in England are far superior to the courts of Requests which existed at the period of the enactment of the Ordinance in question. Just to give the reader a notion of the Proceedings of these courts, I shall insert here the report of two cases taken from Hutton's Court of Requests, a most amusing work.

"XI. A Judge may quit the line of justice."

"It is an established opinion that "there is no general rule without an exception." This maxim holds good in equity. Every man ought to have his own, and the bench ought to assist him in recovering it. But there are cases, though they rarely occur, where the bench ought

to act against the injured, and even assist the culprit. This step is out of the reach of law, and can only be attained by equity. Law knows no attribute but that of justice; equity can introduce mercy. Law gives a man his right; equity sees cause to deprive him of it."

"The mind may be softened by lenitives as well as the body. A master knows when to apply them to both with a prospect of success. But there are a few instances where they have no more effect on the body than upon iron, and where persuasion will have no more effect upon the mind than oil upon adamant."

"A person sued a poor old infirm man. The debt was just."

"*Court.*—It appears from the circumstances before us that this man is not master of one penny; he never will be able to earn one; he possesses no property; there is nothing he can call his own, but age, sickness and poverty; he is one of those few that a thief cannot plunder; he never will eat but at the expense of another. It is remarked of age and infirmity, that a man has "one foot in the grave;" but this miserable object may be fairly said to have two. We wish you to withdraw the action."

"*Plaintiff.*—The money is my due, and I will not withdraw it."

"*Court.*—His non-payment arises from inability, not from obstinacy; and this inability will never be removed. It is cruel to punish a man for not doing what he is unable to do. We may as well attempt to strike money out of a flint as out of him who has none. As a few weeks, at the utmost, will finish his wretched existence, and as common humanity forbids us to suffer him to die in prison under our warrant, we shall set the payments as low as the court can allow, and protract the first for three months, by which time he will, in all likelihood, be removed to that place where stern justice never frowns through the features of a creditor."

"LXXVIII. The Stamp."

"Things are unfavourably circumstanced when law and equity directly oppose each other, so that one of them must fall. The only question then to be considered is, which must be sacrificed? We should reasonably suppose that equity ought to stand upon an everlasting basis."

"Should the weary and sleepy traveller retire to the corner of a field for repose, and while he sleeps, the farmer cut off his retreat by surrounding him with a hedge of thorns, the law, says that the farmer has a right to make his hedge where he pleases, and the other none to destroy it. Is the traveller, then, to perish because the law must be kept? But if the law will vindicate the farmer in erecting the fence, equity will the traveller in breaking it down. Upon what unfavo-

rable ground, then, does the Commissioner stand, who both ought and wishes to adhere to the laws of his country, but is obliged to break them? He must either relinquish conscience or law. A point like this even unconnected with the lawyer, would bear an everlasting dispute, because both sides seem right. The weak and absurd minister who brings him in this situation by introducing an act to infringe the powers of equity, ought to be deprived of his political existence, and have his works sent after him. It is allowed on all hands, that the expenses of Government must be supplied; but it must also be allowed, that the consequences of an act should be seen and its evils avoided. Because a case is *law*, does it follow it is *right*? When this contrariety appears, it brings with it no alternative; decision must lie in the breast of equity."

"A Plaintiff possessed a note of hand, not upon stamped paper, given by the defendant for £5. 6. 0. and payable by one shilling a week. Thirty weeks being due, he sued for thirty shillings. An attorney pleaded for the defendant, with an air of decisive triumph, that a note without a stamp could not, by act of parliament, be admitted as evidence in any court. That the note annihilated itself; that the whole debt of £5. 6. 0. might stand without it; and that the Plaintiff might sue for £1. 19. 11. which must comprehend the whole. *Court.*—No law ought to set aside an evidence which can elucidate a fact. If a Judge shut his eyes against information, he shuts them against justice. Our oath does not oblige us to proceed according to law, but good conscience. A Commissioner must decide as he is convinced. An act of parliament cannot convert wrong into right. This note, even without a stamp, convinces our consciences of two things—that a certain sum was agreed between the parties as a debt, and that a shilling a week should be the mode of payment. Neither side can break either of these articles without injustice, then what right has law or the bench? If convinced that the agreement is founded in equity, how can we reconcile it to ourselves to destroy it? The note proves both, neither doth any contradiction arise against it, except an act which proves nothing but weakness in the minister and necessity in the state. Should we destroy the debt, and be asked afterwards, whether we thought it just, and the bargain fair, we should answer in the affirmative. Should we again be asked why we did not give it to the owner, we could find no answer but the blush of a culprit."

"The same arguments hold good with regard to receipts, which we may also consider a tax upon justice. Should a man give a receipt without a stamp, and afterwards make a second claim, though we leave pains and penalties to superior Courts, yet, being convinced that the debt was paid, the suit would be discharged."

"Though it has not been the practice of this Court to divide a debt, except the contract for such division was made in writing, yet why may not a verbal division hold good? If £5. 6. 0. is owing by one man to another, and they verbally agree that the money shall be paid by instalments, neither of them can justly dissolve the agreement; consequently the stamp is out of the question; they ought to be supported, and the Court to lend their assistance in discharging the debt."

"As law cannot bind conscience, and as we remain bound by the oaths of rectitude, we must decide for the plaintiff, and express our regret that an act of the legislature should clash with equity."

The other Ordinance to which reference has already been made is the 10th of 1843 "for the establishment of Police Courts" These form criminal Courts having power "to hear, determine and dispose of in a summary manner all crimes and offences committed wholly or in part within their respective districts and not punishable by imprisonment with or without hard labour for a longer period than three months, or by fine exceeding five pounds, or by public or private whipping exceeding twenty lashes" These Courts are to be presided over by one Magistrate and to decide cases without the aid of a Jury or Assessors, but a Review by the Supreme Court was permitted in order to set aside or correct the proceedings precisely on the same six grounds which have been already quoted in respect of the Courts of Requests; and therefore the objections which have been before urged in reference to them will be equally applicable here. The criminal jurisdiction of these Courts is so indistinctly marked that they now dispose of almost all criminal cases arising within a district except those triable before the Supreme Court, and very few indeed are the cases sent to the District Courts for trial; thus leaving these latter Courts in name only Courts of criminal jurisdiction. The Ordinance, it will be perceived, does not authorize the Supreme Court to correct any error in law, and I remember one of the Judges of that Court declaring once that it had no such power given. It was a case in which a Review was sought against the sentence passed by a Magistrate for refusing to hire out a conveyance by one who kept carriages for hire, without prepayment of hire, which he demanded as a certain security from loss. The Advocate who appeared for the sentenced party was prepared, I believe, to produce a heap of bills which the convicted party was unable to recover, and to shew that the conviction was against law; but he was told that the correction of the law did not fall within the province of review. However, some of the Judges do I believe venture to assume jurisdiction, notwithstanding the want of power, and set

aside proceedings for mistakes in law; thus proving the mischief of the denial of an appeal. These, the Police Courts, are, without doubt, not unfrequently very arbitrary in their adjudications, often inflicting heavy and even corporal punishments for trifling offences or supposed offences; and, occasionally, people thus suffer grievous injustice at their hands, for which they can obtain no redress. I shall just relate a case which fell within my own knowledge. I remember to have heard a European overseer complaining at Kandy to his employer—on this latter's return from Colombo after some stay there—that he had been sentenced to pay a fine of £2 for detaining for a week, a bullock which had been tied for trespass on his employer's property. The circumstances, he stated, and which no doubt were correct, were these—After the bullock was tied for trespass, people were sent to the Village Headman to request his attendance in order to assess damages and receive the bullock in charge; but he was not to be found. On the expiration of eight days, the owner complained to the Magistrate of this detention; the Overseer was summoned for what was deemed to be a criminal offence, and the Judge, not listening to the explanation given by this latter, and refusing to hear the evidence which he offered to produce in order to substantiate his defence, fined him £2., and in failure of payment, to imprisonment. He however paid the fine and asked for no Review. On his being questioned why he did not do this latter, his answer was a very natural and intelligible one, which it would do well for our legislators who frame laws for the ignorant and the unlearned to bear in mind. "How could I know that the Magistrate was wrong and that he did not decide according to law?" Even if he had demanded a Review, it is doubtful whether the Supreme Court would have been justified in interfering with the decision, unless it were brought within the category of "gross irregularity in the Proceedings" which, by construction, may perhaps be allowed to admit any thing. Here the Magistrate imagined that to be a criminal offence which in reality was not one. All that the owner of the animal had a right to, was a civil action for the recovery of the animal, and damages, if any. This shews also the absurdity of allowing the liberty of a Review or an appeal from a Court where Practitioners are not allowed to appear, and are therefore not to be found. For legal advice, a party will sometimes be obliged to travel some 20 or 30 miles to a place where a District Court exists, and then perhaps find the remedy worse than the mischief, on account of the expense. Only in a very few excepted cases are Advocates and Proctors allowed to appear in these Courts, as prescribed by the 16th clause which runs thus:

"And it is further enacted, that no Advocate or Proctor or person of

any description shall be permitted to appear in any such court on behalf of any complainant except the Queen's Advocate or some Deputy Queen's Advocate empowered to act within the District or some person duly authorized by writing under the hand of the Queen's Advocate or of such Deputy Queen's Advocate, or of the Government Agent or Assistant Government Agent or of the Collector or Controller of Customs of the district and no Advocate or Proctor or other person shall be permitted to appear therein on behalf of any defendant except in cases where some Advocate or Proctor shall appear on the opposite side."

Doubts soon began to prevail as to the real extent of jurisdiction conferred on the Police Courts, and it was found necessary to legislate again to remove these doubts. This legislation proved however to be no removal of doubts but an extension of jurisdiction. The Ordinance No. 2 of 1845 was passed, and by the 3d clause of it, it was declared that in certain cases therein specified when one of two punishments is, and the other is not within the jurisdiction of this Court according to any legislative Act in force within the Island, it shall be lawful for the Court to exercise jurisdiction over such an offence and to inflict the full amount of punishment provided by such act.

The 5th clause extends the jurisdiction further in these words—

"And it is further enacted that every Police Court which shall have cognizance of an offence upon the commission thereof for the first time by the offender shall have like cognizance of such offence upon any subsequent commission thereof by the same offender and shall have full power and authority to impose any punishment to which such offender shall be liable whether the same would otherwise be beyond the jurisdiction of such court or not."

The 7th clause authorizes the Queen's Advocate to sanction prosecution, before these Courts for breach of the Revenue laws or of any enactment making penal any act which is not *malum in se* and not cognizable by a Police Court by reason of the amount of punishment. But in such a case the Court is empowered to award only that punishment which fell strictly within the jurisdiction originally given to it.

Thus, it will be be seen, that under the legislation of 1843 there came into existence three criminal courts of original jurisdiction within the same local limits of a district, each having a concurrent jurisdiction up to a certain point, but the immediate superior Court excluding its inferior after that limit is past—a limit the ascertainment of which is often extremely difficult. It also brought into being two civil courts possessing original jurisdiction, with concurrent power to hear causes of a certain class, but one having the exclusive right to hear the remainder, the classification however being too indefinite to prevent error and uncertainty.

The establishments of these Minor Courts led to the abolition of some of the District Courts which, consequently, destroyed the facility of access to some of those latter courts, to those who have occasion to resort thither, increasing thereby their expenses and creating discontent. It is therefore now felt necessary to legislate again, to remove these acknowledged evils; and hence the draft acts. This therefore brings me to the next topic in my list.

CHAPTER IV.

FURTHER CHANGES NOW PROPOSED BY THE DRAFT ACTS—PROBABLE CONSEQUENCES, SHOULD THEY PASS INTO LAW.

The Draft Ordinances which it would be necessary for me to notice, and which stand connected with the subject which I have proposed to discuss, are the following:

"To amend in certain respects the constitution of the Supreme Court."

"To amend the constitution of the District Courts," and

"To extend the Jurisdiction of the Courts of Requests and to make certain other provisions concerning the same."

In considering these I shall feel it my duty to express my approbation of some of their provisions, while I shall be bound to express my disapprobation of others, giving at the same time my reasons for so viewing them, in order that the reader may form his own opinion as regards their merits.

I shall commence with that "To amend in certain respects the constitution of the Supreme Court."

Its first clause makes provision for monthly criminal sessions at Colombo. This proceeds upon the obvious principle that every man who is to be brought to trial, should be so brought as early as is found practicable. Imprisonment pending trial is an unavoidable evil, and in fact amounts to the infliction of punishment upon presumption of guilt, which may not always prove correct. This evil, it is the duty of the legislature to diminish as far as possible; for the detention in prison of a man who may possibly prove to be innocent, should be as short as circumstances permit. The crowding of the jails and the expenses attendant thereon are considerations of but secondary importance, when compared with the primary principle above mentioned. No doubt, if this provision could be extended to other places also, it would be equally beneficial and beneficient, but I shall hereafter have to urge the desirableness and necessity of keeping the Judges of the Supreme Court as much as pos-

sible in Colombo in order to form a constantly sitting Court of Appeal, composed of more members than one.

The clauses from the 2d to the 7th inclusive I find no reason to animadvert on.

The 8th is an important clause which requires all appeals to be heard in Colombo instead of on circuit, but declares, that "it shall be lawful for a Judge sitting at Colombo at his own instance or upon the application of any party in any such appeal to order that the same shall be heard by the Supreme Court on the circuit wherein the District Court is situated from the judgment or order thereof such appeal has been taken."

This abolishes a circuit Court of appeal, almost completely; and let us enquire whether this will prove a beneficial change or is to be considered of a contrary character.

The reasons which it was supposed rendered a Court of Appeal necessary were these—

1. To "impress upon the local Judge the consciousness of unremitting supervision."

2. To "impress upon the suitors in this Court the assurance that their just complaints will be attended to and redressed."

3. To allow "the parties and their witnesses the same cheap and easy access to the Appellate Judge as they had to the Judge of original jurisdiction."

4. "To enable the Judges of the Supreme Court to look over the records of the District Courts; and draft declaratory laws, when they consider such desirable."

These are the only reasons that I can find for the recommendation of a circuit Court of appeal.

The consciousness of unremitting supervision will be equally impressed upon the local Judge, without any reference to the place where the appeal is heard, if there be a comprehensive appeal allowed from all his decisions. Under existing circumstances he is not bound to, nor does he in fact in many an instance, give his attendance at such sessions to listen to any animadversions that may happen to be passed upon his proceedings. It will be found that the supervision will be much more effectual and unremitting when appeals are heard at Colombo; when the Judges of appeal will be enabled to bestow more time and attention on their task than they can do in the hurry and haste of a circuit where every day consumed adds to the expenses of Government.

The same remarks will apply to the impression supposed to be made on the minds of the suitors. The hearing and decision of their just complaints and the redress given to them will be equally felt, from

whatever place they proceed, when the intelligence is communicated to them. Their personal presence in court is utterly unnecessary for such a purpose, as the vast majority of them cannot understand the proceedings or arguments and are no better than mere idle spectators. If they are determined to be such for no profitable purpose, surely the public ought not to be saddled with an expense to gratify and indulge a mere whim of theirs, but they themselves personally must bear the cost of it.

The 3d is an excellent reason when the Supreme Court considers it necessary to hear evidence. But this is hardly ever done. If it sees occasion for a rehearing or for further evidence, it generally remits the case to the original court. But here the saving part of the clause will still leave secure the applicability of a circuit to such a case.

As for the Judges of the Supreme Court examining the Records of the District Courts in order to discover any diversity of law or practice, it is never done; and if they did it, it would prove a very useless piece of work. To wade through, indiscriminately, all the records of a court would require a vast consumption of time; and even then, the Judges are not likely to discover any thing more than they are able to do now by perusing the files that are sent in Appeal. So far therefore as these reasons go no argument arises in favour of a circuit court.

Now let us look to the disadvantages of such a course.

1. Delay in the hearing. The circuit takes place once in six months and that evidently is too long a period to keep a party from obtaining any benefit from the judgment he has obtained. If the Appellate Court consider it necessary to remit such a case for a rehearing, there will occur another 6 or 12 months' delay, and so on. This delay is often taken advantage of by a losing party and institutes an appeal even when no good cause for so doing exists; simply, to obtain time sufficient to alienate his own and his securities' property and thus defeat the judgment creditor—Hence it occurs, that on the day of the hearing of the appeal the appellant frequently neither appears in person nor by counsel; the respondent occasionally doing both for the purpose of punishing the appellant, at least with some further costs.

2dly. It often leads to superficial examination and decision of a cause. A Judge on circuit is obliged to read through his cases rapidly; making short notes to refresh his memory at the hearing; and also to hear them in rapid succession; while a like movement goes on among the counsel. Often the counsel are not retained till the eleventh hour, and then they slur over such cases and are naturally anxious to return home as soon as possible instead of spending their time and money by delay on circuit.

3dly. The want of ready access to books both on the part of the Judges and on the part of the practitioners. It is well enough to say that the Judges ought to carry sufficient law in their heads; but if such a possibility existed, their extensive law libraries can be of no earthly utility to them; and the sooner they convert them into money, as a certain learned District Judge once did, the better it will be for their pecuniary interests. Suppose they could carry the whole of their libraries with them, and the Practitioners were also equally willing to incur the expence of so doing with theirs; (which however has not been hitherto usual) still, to arrange these books, to refer to and consider authorities, require much time, which a Circuit sitting rarely admits, when the court has to travel from one district to another at periods fixed close upon each other, in order to avoid any very considerable expense to the public treasury.

4th. The absence of a sufficient bar for the purposes of selection. If three Advocates appear, then, the pleading falls exclusively to those, but one may prove to be more than a match against both the others put together. If the amount of business does not attract any Advocate to a district, parties must then rest satisfied with even the much inferior advocacy of Proctors. I mean no disrespect to the Proctors, but speak in a general way. Exceptions there must be here as in every other case; but, as oral pleaders, the one body is presumed to be superior to the other.

5th. Misdecisions arising from all the four last mentioned causes.

Now let us examine the benefits of a Metropolitan Appeal Court.

1st. Speedy determination and the consequent check it offers to appeals purely for the purposes of delay, and the benefits it thus confers on the successful party.

2nd. The prevention of the 2d. 3rd and 4th evils above mentioned and the security thereby afforded against misdecision.

3rd. Its cheapness. It not unfrequently happens now, in cases of importance, that parties not only pay the fees of counsel but actually defray their travelling expenses and subsistence money during the required time, in order to secure their attendance; which at times amount to no inconsiderable sum.

But the benefit and advantages of the plan will depend entirely upon the maintenance of a bar in the local courts. This is the only effectual and attainable agency through which a suitor can open a communication between himself and the Metropolitan Proctor or Advocate. It is through this medium also he can transmit information, settle the retainer and make necessary remittances. Destroy this agency, and it will prove a virtual denial of all appeal. Not only will

the suitor not know whether he has any good ground for appeal; but even if he discovers it by the exercise of his natural acumen he will be still at a loss how to secure the necessary services at the Metropolis.

There will be still another indispensable requisite; the means of making remittances to Colombo. The local Cutcherries now grant no private drafts. This indulgence ought to be opened to suitors, and it can be attended with no great inconvenience, as remittances of public treasure are from time to time now made from these places to the General Treasury at Colombo.

The 9th clause corrects an oversight made in the Ordinance No. 11 of 1845 in respect of Appeal to the Collective Court; but I think there should be now no such appeals. I shall discuss that subject at greater length elsewhere.

The above views are supportable by the authority of Mill. He says in his article on jurisprudence:

"It thus appears, that for every thing which is required to be done by the appellate judicature, nothing whatever is required, as a foundation, but certain papers. The presence is not required either of parties or of witnesses."

"As it is of no great consequence in a country in which the means of communication are tolerably provided, whether papers have to be transmitted 50 or 500 miles, the distance, even though considerable, of the seat of the appellate jurisdiction is a matter of very little importance. The object, then, is to get the best seat, that is the best public. The best public, generally speaking, is in the capital. The capital, then is the proper seat of all appellate jurisdiction. And that there should be one Judge, and one Judge only in each court of Appeal, is proved by exactly the same reasons as those which apply to the courts of primary jurisdiction" I agree that one Judge should read, hear and decide the appeal. But when there are three belonging to the same court, if it is beneficial to have only one stage of Appeal as Mr. Mill himself argues it is, in order to maintain uniformity of decision upon points of law and practice, the judgments, at least as many as possible, should be pronounced in the presence of more than one Judge and in the hearing of all three whenever practicable.

The 10th Clause dispenses with the necessity of Assessors; but with this proviso:

"Provided always, that it shall be lawful for the Judge of the Supreme Court sitting in Colombo or on circuit in any cause or matter wherein it has heretofore been necessary to have Assessors at

his own instance or upon the application of any party in such cause or matter to order the attendance of Assessors, at the hearing and decision of the same; and thereupon such cause or matter shall be heard and decided in such and the same manner as if this clause had not been enacted."

I see no good reason even for this exception. It cannot be supposed that the Assessors are for the purpose of instructing the Judges in the general laws of the land. If the question turns upon a local law or local custom, confined to a place, sect or denomination, then, it should be proved by evidence at the original hearing, and its existence or non-existence found in the same manner as any other fact. The only case in which the Assessors can be of use to the Appellate Court is as a jury when the Judge takes evidence on circuit; to assist him in the finding of a fact which perhaps he will not be able to do so well as *they*, under his guidance and advice; if the Judge neither understands the native language nor is intimately acquainted with the habits and customs of the native inhabitants. Would it not therefore be perferable to try such a cause with a jury of 3 or 5 than with Assessors performing like functions as those which now belong to them? This subject will be further considered presently. This Ordinance may be generally pronounced to be a good measure of Law Reform, proceeding upon correct principles.

The Ordinance which I next propose to notice is the one "to Amend the constitution of the District Court." It consists of but one provision, the same that is contained in the 10th clause of the Ordinance last noticed, with the difference of its being applicable to District Courts—the abolition of assessors,—but with a like exception as is contained in that clause, that is, the discretion left to the Judge to use them when he sees good reason for so doing.

The advantages contemplated by the institution of Assessors were these:

1st. "As a portion of the public placed in an official station, which secures to it the respect of the Judge; armed with power to interrogate the Judge and the witnesses, and thus to acquire a complete knowledge of the case, compelled by penalties to be present in court, and compelled to attend to the proceedings by the necessity of pronouncing a public opinion on them," it was thought, "Assessors would be invaluable."

2dly. That a "difference of opinion between the Judge and the Assessors may form a very reasonable motive in the mind of a party for an appeal."

These are the only two reasons I find given by Mr. Cameron for

his recommendation to associate Assessors with the Judge. The duties they were expected to perform were: that after the Judge should have summed up the evidence, and stated his opinion of the law to the Assessors, they should then give such verdict as any two of them could agree upon; which verdict was to be immediately recorded, but was not to prevent the Judge from giving a contrary decision. The reason, Mr. Cameron gives, why the opinion of the Judge should prevail is "that when a Judge, checked by the presence of a jury, differs from a jury, the presumption is very much in favor of the opinion entertained by the Judge, and that therefore his opinion ought to govern the decision, subject to correction by the appellate jurisdiction." Now according to Mr. Cameron's own argument, in case of a difference, the presumption is very much in favour of the opinion entertained by the Judge; if so, why should such a difference form a very reasonable motive in the mind of a party for an appeal? In case of such a difference, the one or the other opinion must be the correct one. The judge's is presumed to be the correct one; and is it fair towards a party to impel him to an appeal by furnishing him with a motive, while, had it not been for this difference, he would not have thought of an appeal; and thus make him perhaps incur unnecessary expenses? Independently of a motive arising out of such a difference, if a party feels assured that the Judge has mis-judged his cause, he will always appeal, if that liberty be allowed him. Perhaps it will be said, this difference of opinion is well calculated to raise a doubt in the mind of the appellate judge as to the soundness of the decision and to assist him to come to a correct conclusion as to which was the right opinion. No doubt it may have the effect of creating a doubt, where none otherwise would have existed; but I am by no means prepared to grant that the appellate judge will be better able by the existence of this difference to come to a right conclusion, if there was nothing else in the proceedings and evidence, excepting the difference in question, that furnished material or argument to arrive at such a conclusion. I have sometimes seen an appellate judge affirm the original decision, but divide costs between the parties, because of the existence of this difference of opinion in the original court. But this surely is a positive evil. The decision is either wrong or right. Affirmation proceeds, upon this latter supposition, and surely the successful, the partially successful party, as regards costs; might reasonably complain "I am not the party bound to suffer for the defective machinery you have set up and which furnished a motive to the other party to Appeal." It is notorious that the advantages which Mr. Cameron anticipated

did not, in experience, follow. The Assessors do not insure greater publicity to the proceedings. A Judge can say to the Assessors as few words as he may deem proper, though he would feel bound to record his reasons and opinion in full; as the record may possibly go before the Appellate Judge; and because recordation is enjoined and is made compulsory upon him, and he might at any time be called upon to do so. Moreover Assessors have been found to be no check upon the Judge and they generally perform almost a mechanical duty, without the least bestowment of thought or attention, considering their duty fully discharged by encouraging the Judge with a blind assent; that is, when no bias or other sinister motive influences their minds. The Judges, having discovered, that if uniformly much weight be given to the opinion of Assessors on the presumption of their superior ability to form a correct opinion as to facts and if decision be pronounced thereon, the Assessors do become subject to external corrupt influences, seldom now call for their opinion without previously expressing their own. They are chosen from all classes of people, poor and rich, without much enquiry into character, respectability or intelligence, in order to lighten the burden of gratuitous services falling heavily and oppressively upon a few. Nine are the number who are summoned to serve a week, and of this number perhaps 2 or 3 absent themselves upon various excuses. It is practically impossible to keep these remaining few from communicating with suitors or suitors from having free access to them. Thence, it has been in many instances discovered that Assessors' minds had been influenced by previous communication with parties. Hence the reluctance to make use of them more, than is at present done. Besides, when a court proceeds to judgment, upon an opinion given by the assessors previous to the expression of the Judge's own opinion, the unsuccessful party having full confidence in the Judge's impartiality but not of the Assessors, and believing that the assessors led his opinion, appear always dissatisfied with the decision.

Another consideration, which tells against the system is, that the Judge himself may occasionally feel relieved of a portion of the weight of responsibility for a decision of which he in reality is the sole author, by dividing the same with the assessors on the ground of their concurrence; thus making him less anxious for a strict and rigid investigation. Such a division of responsibility is contrary to principle. Mr. Mill observes, and very reasonably,

"It is a great security, both for diligent and for upright conduct in the Judge, that he occupy *singly* the judgment seat. When a man

knows that the whole credit and reward of what is done well, the whole punishment and disgrace of what is done ill, belong to himself, the motive to good conduct is exceedingly increased. When a man hopes that he can shuffle off the blame of negligence, the blame of unfairness, or fix a part of it on another, the uncertainty of the punishment operates, as we have already seen, to the diminution, and almost to the extinction of its preventive force. Certain common, and even proverbial expressions, mark the general experience of that indifference with which a duty that belongs in common to many is apt to be performed. "What is every body's business is no body's." This is as true in the family as in the state; as true in judicature as in ordinary life."

The New York code also proceeds upon this principle.

"That in all courts, except the appellate, there be but a single Judge."

According to sound principle therefore, the Judge should be left to decide a case with the whole weight of responsibility resting upon himself and on himself alone; and thus incurring the full measure of censure arising from misdecision, both of fact and of law. But is not publicity sacrificed by the absence of this adjunct body? Is it not at least greatly impaired? I think not. If a comprehensive appeal be allowed, a bar—a respectable, intelligent and independent bar, not such a one as existed before the Charter of 1833, and which Mr. Cameron characterized as "servile," the Judge for his own sake and character will in open court explain the grounds of his decision, the reasons which led him to his conclusion and the law on which he grounded it, for the purpose of deterring the defeated party from a useless appeal and for the purpose of gaining confidence for himself. But I admit there may happen to be cases which may not be safely left in the hands of a Judge solely—Every rule has its exceptions and too great a generalization, in the study of over-simplicity, often leads to error. There are two classes of cases which form the exception: first, cases in which the facts involved are beyond his personal skill to find: secondly, cases in which either party mistrusts his impartiality and want of bias.

The first class may include cases in which damages of a particular kind are to be assessed, as for seduction, slander &c. wherein damages must vary according to the rank, circumstances &c. of the parties; or cases wherein the facts involved are of a scientific kind and peculiarly belonging to the technical branch of any trade or calling; and then persons of skill, where nice matters in any trade or other employment form the subject of enquiry; and "persons of respectability

to decide upon the amount of compensation in actions for infraction of rights where restitution is impossible" would be desirable,

The second class of cases will comprise all in which one or the other party suspects a bias in the mind of the Judge, arising, from some cause. As nothing so much secures the confidence of the public in the Tribunals of justice as the consciousness of their sufficiency and impartiality; in both the above classes of cases, if any of the parties apply for a jury to find the facts, it should, in all reason, be granted to them, leaving still the province of the law exclusively in the hands of the Judge. No voluntary mistake of this latter is he likely to commit as the appellate remedy will then be perfectly applicable always. In a portion of the cases belonging to the first class, special jurors will be necessary, who will have to be summoned. In all the rest a selection may easily be made of 3 or 5 men from the bystanders, of whom there must be many daily in every court, of respectability and intelligence, who, when so chosen, will enter upon their duty with impartial minds, and will not feel it any great inconvenience or hardship. To fill up a jury in England resort is occasionally had to what is called a *tales*, and this is therefore no novelty. To facts found by a jury the Judge should be required to apply thé law and pronounce a decision thereupon; but with liberty to record his own opinion as to the finding of the facts, and the reasons, if any, for any difference of opinion, that it may be of avail in the event of an appeal. In the county courts in England a similar liberty is allowed to a party to apply for a jury, but this application is so seldom made, that the cases tried by these courts with the aid of a Jury do not amount to even one half per cent, if I rightly remember what I have read on the subject.

Assessors moreover are a positive clog and impediment in the way of despatch and speed. Pleadings which the Judge had read previously are to be explained to them; and issues to be tried, stated. The Judge might entertain a clear and decided opinion on a point of law, evidence or fact, but is now utterly unable to prevent the lengthy arguments of counsel on those points, who would contend that their address has for its object not only the producing a conviction in the Judge's mind but the persuasion of the assessors to a like opinion with themselves. To the system I am about to suggest, if assessors be continued, they will prove a very considerable obstacle and a hindrance in its proper working. The abolition of assessors therefore I consider a very great improvement. Mr. Cameron, it would seem, found the system existing in Kandy and adopted it with some modification, without much consideration or thought. In Kandy

it was indispensable, as the law then stood, the Kandian law never having been reduced into writing and its ascertainment depending entirely on information to be derived from intelligent men. The Judges therefore constantly required advice and suggestion, without which, they could not proceed. The case now is quite otherwise. The Kandyan law so far as it can be known, is now to be found in print, which is a sufficient guide to the Judge in all matters of doubt and difficulty. If the point required to be ascertained cannot be so found, still, evidence of the law may be received for the purposes of decision. Therefore I see no reason for the retention of the Assessorial system even in the Kandyan Provinces. There the Magistrates' Courts and the Commissioners' Courts are already dispensing justice without such aid, which goes to show, that there is no absolute necessity for its existence even there.

The whole of my previous facts arguments and authorities will have already impressed the mind of the reader with the conviction that it would be impossible for me, holding the opinions I do, to approve of the provisions contained in the Draft Ordinance "to extend the jurisdiction of the Courts of Requests and to make certain other provisions concerning the same." As this Ordinance proceeds upon recommendations emanating from a high and authoritative quarter; and those recommendations would appear to have received the entire approbation of the Executive; and further, as the Ordinance itself has been carefully and most skilfully framed by one who, to the no inconsiderable loss of the Ceylon Public, is now no more; and whose universally acknowledged talents and abilities I always admired, beside the personal esteem and regard which I ever felt towards him; it would ill become me to speak of this law except in language the most guarded and sober and not calculated to give offence in any quarter. But if the principles for which I have been hitherto contending be correct and sound, it cannot but be said, that this Ordinance violates them to a greater extent than any other law which has been passed since the Charter of 1833. I shall notice the most prominent features of this proposed law, in succession, stating at the same time as clearly as I can, the objections I have to offer to them, and the reasons for such objections.

The 2d Clause gives the Governor the power of appointing an additional Commissioner to the same Court. The objections I have already urged elsewhere (p. 39.) in respect of a similar provision with reference to the District Courts, are equally applicable to this; a repetition of them therefore becomes utterly unnecessary. In short it is objectionable as tending to destroy unity and uniformity of law and practice.

The 3d Clause retains these courts as Tribunals of "equity and good conscience" and extends their jurisdiction by authorizing them to determine all suits in respect of immoveable property not exceeding Seven Pounds and Ten Shillings in value, and in respect of moveable property not exceeding Fifteen Pounds in value; save and except the Courts of Requests for Colombo, Galle, Jaffna and Kandy, which are to be vested with jurisdiction to determine immovable property suits, should they not exceed £7. 10s. in value, and suits relating to moveable property, under the value of £25.

The authorities who advised extension of jurisdiction in the manner above mentioned, have put forth their recommendations dogmatically, without assigning one solitary reason for the change. So, what were the reasons, facts, arguments or principles which induced them to suggest these alterations, must be a matter of pure conjecture. The first anomaly apparent upon the face of this clause is the want of uniformity even in the jurisdiction given to this class of Courts. Their real property jurisdiction is uniform, but in respect of personal property, four of the Courts, situate in the principal towns are to possess jurisdiction to the extent of £10 above the others; just in the same way as things were before 1833 and condemned by Mr. Cameron. Mark what vests a Court with jurisdiction; the residence of the defendant or defendants within the territorial jurisdiction of the Court, or, when "the act matter or thing in respect of which any such plaint shall be brought shall have been done or performed within such jurisdiction." Hence it will easily be perceived, that in respect of moveable property, uncertainty of jurisdiction may arise between any two of the Courts. Take the case of the Colombo District and any other which lies contiguous to it; say Caltura—suppose an action is entered against one for the recovery of £20 in the Court of Requests of Colombo, assuming that the defendant is residing in that district or that the defendant had contracted the loan within that jurisdiction, plaintiff himself being a resident of Colombo. The defendant perhaps, either because plaintiff wilfully selected the wrong tribunal for his personal convenience or because he wants delay, or for the mere purpose of vexation, truly or falsely, asserts that his residence is within the district of Caltura, or that the loan was contracted there and that therefore in this matter he is liable only to be sued in the District Court of Caltura, and that plaintiff had wrongly sued him in Colombo in order to avoid the delay and expense of a trial in the District Court. Here then a collateral issue will have to be tried first for the purpose of determining jurisdiction; and the temptation thrown in the way of the defendant to take such an objection is not a little, when the choice is

between a superior and an inferior Court, for the purpose of his defence, and professional assistance is to a certainty available in the one and not in the other. Nor is the temptation less which operates in the mind of the plaintiff to have his action tried at Colombo, when, perhaps, it ought properly to be tried at Caltura—for the purpose of depriving the defendant of the benefit of legal assistance which might probably lead to plaintiff's defeat or cause delay.

Another distinction which a provision of the clause goes to establish is, between moveable and immoveable property—the *res mobiles et immobiles* of the civil law—in relation to jurisdiction, and giving a more contracted jurisdiction in respect of the latter. What the civil law determined to be a moveable and what an immoveable is, in many instances, not so clear as one would be led to suppose simply from the literal signification of the words, and questions of very considerable difficulty might arise (Vide Voet. Lib. I. Tit. VIII § 11, 13, 14, 15, 16 and 17.) Instead of immoveable had it said "right title possession or produce of land" as used in some of the old Regulations, the matter probably would be attended with less difficulty. The division however is too indistinct to prevent uncertainty and doubt.

Another source of contention that will arise from this limitation of jurisdiction in reference to immoveable property, would be a want of agreement between parties as to the real value of the object of a suit. When such a suit is brought in the District Court the defendant will, in many an instance, attempt to prove the property to be below the value of £7. 10. 0. in order to deprive the plaintiff of his costs, or cast him in double costs; and when the plaint is lodged in the Court of Requests, he will in like manner try to give it a higher value in order to withdraw it from the jurisdiction of that Court and thus defeat the plaintiff for once; and such a question will have to be enquired into first, to ascertain whether the Court has jurisdiction to entertain the cause. As to the actual value of a piece of landed property, witnesses who are called will no doubt give differing opinions, this being a point on which even men of ordinary probity will without much remorse of conscience, speak without scrupulous regard to truth; and Courts will thus be placed in a state of difficulty as to the decision of this question. This evil was, in experience, felt during the existence of Magistrates' Courts and created no small confusion and loss. Many a case that was taken to these Courts was dismissed as for want of jurisdiction—perhaps, the Magistrate himself being glad enough to be relieved from the trouble of trying the cause, on such a plea. The course pursued then was to issue a Commission to assess value. But this is both expensive and is open to grave objection.

Another evil it will produce will be a conflict of jurisdiction. While one party endeavours to have his cause tried in one Tribunal the other perhaps will be equally anxious to have it tried in another. Suppose a person to be in possession of a parcel of land of the value of £20, and he is disturbed by another in its possession; a dispute arises and there is a scramble, as usual. The usurper, probably without the knowledge of his opponent, lodges his plaint in the Court of Requests claiming a quarter of the land, estimating its value at £5. In the mean while the other party institutes his claim, to the entire land and damages, in the District Court, putting a value of £20 upon the land. Now which of these cases ought to give way to the other; both parties being either plaintiff or defendant in both Courts about the same subject matter of dispute. Is priority of institution to decide the point? No, for the claim in the District Court is for the entire property and is above the jurisdiction of the Minor Court. But on reference to the 12th clause of the Ordinance it will be seen that the Supreme Court is empowered to *set aside* (these words are not used in this clause, but they ought to have been, to apply to a case like the one in question to which the words "reverse, correct, alter and vary" are not strictly applicable) a judgment of the Court of Requests when the case "forms the subject of a trial pending in some other competent Court." Now the District Court is another competent Court, and therefore I suppose, the case in the Minor Court must fail even after judgment, in appeal. But a plaintiff might for this express purpose, at any period before decision, go and institute his claim in the District Court in order to defeat his opponent in the Minor Court.

Thus then will occur under the provisions of this clause, all that confusion, uncertainty, conflict, mistake, delay and loss which Mr. Cameron studied to avoid and which the provisions of the Charter did actually remove, so far as jurisdiction was concerned.

Now, it is impossible, I find, to make any conjecture, satisfactory to my mind, on what reason, or upon what principle, these alterations proceed. Why should all these Courts have the same real property jurisdiction, and not as regards personal property? Is it because, it has been by some means ascertained, that the love and appreciation of real property by the inhabitants of every district is equal and alike, but vary when applied to personal property, so that, the appreciation in which the latter property is held by the inhabitants of the four excepted districts is 2-5th less than that of the inhabitants of the others? Or is it because £15 in one district is equivalent to £20 in another? The very enunciation of such principles is suffi-

cient to show their absurdity, and therefore it cannot be supposed that the legislation proceeds upon any such principles. Then what other? Perhaps the capacities of all the Commissioners in the Island, as real property lawyers, are calculated equal, inasmuch as none of them have hitherto, as Commissioners, enjoyed the practice and privilege of adjudicating land causes; but the ability of the four Commissioners who are to possess a greater jurisdiction in respect of moveable property compared with that of others who are placed on a lower gradient, has been ascertained to be, as 5 to 3. How ascertained? Perhaps from the circumstance of the former having transacted a larger quantum of business. However, the soundness of this principle fails to satisfy one's mind. Men's capacities are not to be measured thus. We cannot therefore make the most distant guess as to what are the principles of this piece of legislation. Further, what was the rule which dictated this limitation of £7. 10, 0., £15. and £25? This arrangement will throw more than 9-10th of the civil litigation in the Island into these Courts. If Government were to call for a return of all cases under the above value, instituted within a year in the Courts of Requests and the District Courts of the entire Island, they would, I am pretty certain, find that such will be the case. The Colombo District, taken by itself, might perhaps form an exception on account of the comparative wealth of its population. But that is not a fair way of making an estimate. As the legislation is for the whole Island, we are bound to take the legal statistics of the entire Island into consideration. Now, if it be assumed that these Courts are capable of satisfactorily determining 9-10th of the cases, what should prevent their disposing of the remaining 1-10th? Does the increased value create any difficulty? The absurdity of such an idea has already been shown. The questions which are likely to arise in the excepted 1-10th, must be almost identical with those that arise in the lower 9-10ths; and unless the legislature contemplates impunity as regards misdecision in reference to this latter—the more important when their aggregate value is considered—reason fails to suggest any ground for this limitation. Perhaps it will be said that the simple practice and pleading of these Courts form a bar to the excepted 1-10th being heard there The fallacy of this supposition I shall have hereafter to shew when I come to the head "Practice." The provisions of this clause, are therefore, vicious, as tending to produce perplexity and confusion, and as grounded on no sound principle. Besides, is this legislation to be final as regards jurisdiction or not? It does not look final, but as prospective of an advance or retreat as experience may suggest. Is it just, is it reasonable to be so constantly expe-

rimenting according to the notions which prevail in the legislature periodically as its members are changed and as its new advisers suggest? From 0 to £7. 10. 0. and from £5 to £15 and £25 is certainly a bold leap; and what I would be delighted to see is, that the legislature make one grand effort and clear the whole ground at once in order to regain the position in which the Charter had placed jurisdiction and from which they most mistakenly allowed themselves to fall back in 1843. Experience elsewhere, has shown that this is not an impracticability, nor is likely to be attended with failure in the working. In a Pamphlet entitled "Thoughts on the present state of legal Establishments in Ireland," quoted in the Law Review No. xxii page 243 is the following passage,

"The somewhat analogous" (analogous to county courts in England) "civil Bill Court of the assistant barrister in Ireland has from the period of its establishment been gradually advancing in importance and utility. There has also been a progressive increase of its jurisdiction; the court is presided over by a Judge appointed by the crown; the jurisdiction now extends to questions involving the nicest points of law and equity, titles to property, cases of wills, intestacies, ejectments, besides contracts and debts of all kinds, if below a certain sum. Indeed every form of action as given by the Civil Bill Court, except slander, libel, criminal conversation and breach of promise of marriage. The proceedings in the Civil Bill Court are free from the technicalities thought necessary in the Superior Courts while they do not afford the same facilities to dishonesty. A greater variety of defence in equity is also given in the Civil Bill Court. The actions allowed to be taken for debt in this Court are found extremely useful to the public; but the jurisdiction of this Court is limited to sums not exceeding £50.

"*Upon what just principle this limitation is continued, it is difficult to conceive.* To be able to obtain justice in an easy, expeditious and cheap manner is a right which every man should possess in all well-ordered states; but in Ireland justice is withheld from him if his case is of such an amount, or of such a nature, as is supposed will pay the ruinous expenses of passing it through the superior Courts. The toll there to be paid acts constantly as an exclusion from the seat of justice. It must either be asserted (which the public voice would deny) that cases under £50 decided upon in the Civil Bill Courts of the assistant Barristers' and Petty Sessions Courts, are not therein carefully and satisfactorily adjudged, or it must be admitted that great injustice is done in subjecting cases of £50 and upwards to a jurisdiction so disproportionately expensive, so uncertain from technicalities, fictions, and old forms, and so harassingly tedious to suitors." If the

limit of £50 can be beneficially reached in all cases, and not excepted, it is proved beyond doubt that jurisdiction may be indefinitely given to the same court, though using a simple and natural system of pleading and procedure.

Upon the clauses from 4 to 10 inclusive, there is nothing particular to be said, being mere matter of detail, practice and explanation in connection with the 3d clause. The 11th clause is important and is as follows.

"11. And it is enacted that no person whatever shall be permitted to appear and act for or on behalf of any party in any suit or proceeding before any Court of Requests unless the Commissioner shall be satisfied that there exists some good and sufficient cause why such party should not be required to attend in person. And no Advocate or Proctor shall be permitted to appear for or on behalf of any party, nor except by leave of the Court, shall be entitled to be heard to argue any question as counsel in any suit or proceeding before any Court of Requests. Provided always, that in every case instituted before any such court in which the crown shall be a party interested, it shall be competent for the Queen's Advocate or any Deputy Queen's Advocate empowered to act within the district, or the Government Agent or Assistant Government Agent, or the Collector or Controller of Customs of the District, or any person authorized in that behalf by writing under the hand of the Queen's Advocate or of any such Deputy Queen's Advocate, or of the Government Agent, Assistant Government Agent or Collector of Customs of the district, to appear and represent the Crown in such case. Provided, further, that where any person shall be allowed to appear as aforesaid for any party to a suit and where any Advocate or Proctor shall be permitted to argue any question as aforesaid, no costs incurred in respect thereof shall be made payable by the opposite party." So,

1st.—It prohibits the appearance of a party by substitute, except by permission of the Commissioner.

2d.—A like prohibition is laid upon Advocates' or Proctors' appearance at all on behalf of a party, that is, as his substitute, and it also prevents their appearing as counsel to argue any question except by leave of the Court.

3rd.—From the above general rules, it excepts certain Government Officers or their nominees for the purpose of representing the interests of the Crown.

4th.—Costs are not allowed even when substitution shall have been permitted or when counsel have had leave to argue.

To the first prohibition no objection would lie, if unrestricted liberty

were allowed to appear by Proctor or Advocate; but in absence of this, all the objections that I have already urged against a similar provision in the Ordinance No. 10 of 1843 will apply with considerable additional force, as this present Ordinance covers a much larger number of suits, by its proposed increase of jurisdiction.

Under the second prohibition even when counsel may be allowed to appear, it is not with liberty to interrogate a witness either in chief or by way of cross-examination, but only to argue a question as counsel. So a party will be debarred from availing himself of a very important and effective part of the duty of counsel in more than 9-10th of the civil cases of this Island; and even this limited liberty will prove to be utterly nugatory,—a mere delusion and mock-liberality, when it is considered that the exclusion proposed will have the ultimate effect of completely extinguishing the local bar, except in the principal capital, Colombo, where the Court of Appeal sits. Of course, at every court station where there is not also a District Court, no Proctor or Advocate will ever think of establishing himself on the very faint probability of his being allowed to argue a point on behalf of a party—unless he previously makes up his mind to starve—and what party will ever venture, on the bare possibility of such an indulgence to transport a Practitioner from a distant place, at the expense of fees, travelling charges and subsistence money, when he cannot recover a farthing of it from the opposite party? In reference to these Courts therefore, the indulgence promised amounts absolutely to nothing.

In those stations where a District Court also is found established, what will be the amount of certain business which will be found to maintain a bar, or anything deserving that name? In the District Courts, at most stations, perhaps there will be something between 30 and 50 cases instituted within the year, if so many; and even should Proctors be retained in all these, what would be the share falling to the lot of each, to enable him to take out a yearly licence of £3 and to maintain himself and family? Unless therefore they determine to pursue the calling as beggars, or make up their minds to watch eagerly for business during the day and betake themselves to some less reputable employment at night, the local bar must be utterly gone. The inevitable effect of this clause, therefore, is the almost total extinction of the bar, except in Colombo, and a denial of legal advice to all suitors both in the Courts of Requests and District Courts, with the above small exception of Colombo.

The existence of an educated bar has been always considered, in every civilized country, as essential to protect rights, to prevent injury and oppression; as a security against mis-decision, and as pro-

motive of the best interests of the public. The abuse of its powers and the evils which have arisen in connection therewith should not create the desire of destroying the entire body, and, together with it, all the benefits which that body is calculated and is able to promote; but rather a desire, if possible, to eradicate the causes which give origin to these evils, leaving the body itself in existence, for good only. If this latter course be found impossible, and their evil deeds preponderate over the good; then, and then only, ought recourse to be had to the measure of extermination; and even then, it would be prudent to consider beforehand, whether the removal of the checks and restraints and other benefits arising from the presence of professional men are not likely to produce greater evils than are now received at their hands. The best informed have always maintained "that the legal profession is of the utmost importance to the public, and that it is essential to the best interests of the state; that the lawyer should be amply supported and placed in an honourable and eminent position." Remunerate it inadequately, and place it in a degraded and wretched position, and it would be better to have none at all.

First.—Then, let us see the benefits which a bar can confer:

Second.—The evils arising from its existence, and whether these evils are irremediable, and, whether the bar cannot be made to exist, apart from such evils,

Third.—What other evils are likely to arise from the extinction of a local bar.

First.—The benefits of having a bar.

It is of material assistance to the Bench, to have the law ascertained, to have witnesses interrogated, its attention called to every material point in a case which might otherwise probably escape notice. Bentham, who was not blind to the misdeeds of all descriptions of lawyers, and who was by no means slow in exposing and censuring those misdeeds, never for a moment dreamt of suggesting the desirableness of sweeping away all lawyers and pleaders, or of excluding them from any court, or from giving service in any particular class of cases. His mind was too philosophic not to see the mischief of such a suggestion, nor could any such crude idea ever enter his brain. It remained for pseudo-reformers of a very modern date who joined the ranks of his true followers and disciples to go, as it is called, "the whole hog" and prove themselves what are termed out-and-out reformers, a kind of wild ultra-radicals, like members of the French Political school, who cry out for change and alteration without exactly knowing what they want or what they suggest. Now, let us see what philosophic Bentham says of the use of Professional men for the purpose of

Interrogation, "considered as a security for the trust-worthiness of testimony." In answering the question "By whom ought interrogation to be performable" he observes,

"And by whom is it likely to be exercised with good effect? Answer: By every person in whom suitable *will* and *power* are likely to be found conjoined. *Will*, the product of adequate *interest*, in the most extensive sense of the word; *power*, consisting in the present case, of appropriate information, accompanied with adequate ability of the intellectual kind."

"Of the occasional admission of a person in the character of an assistant to the party (supposing it a case in which admission may with propriety be given to the party himself) the necessity stands demonstrated by the following causes of infirmity and relative incapacity under which a party is liable to labour: 1.—Infirmity from immaturity of age, or superannuation. 2.—Bodily indisposition. 3.—Mental imbecility. 4.—Inexperience. 5.—Natural timidity. 6.—Female bashfulness. 7.—Lowness of station in either sex."

"True it is that there sits a Judge, whose duty (it may be said) is on this occasion as on others, to act as an Advocate, not indeed on either side, but on both."

"But on the part of an Advocate, to enable him to fulfil his duty in an adequate manner, two endowments are necessary: appropriate information in all its plenitude, and the zeal that is necessary to turn it to full account. On the part of a Judge, neither requisite (in a measure sufficient for all causes, or even for the general sum of causes) can on any sufficient ground be expected, much less both."

"Of a substitute to the party, the necessity is co-extensive with the cases where the attendance of the party is either in the *physical* or the *prudential* sense impracticable."

"On the occasion here in question, as on other judicial occasions, the necessity of giving admission to a professional advocate is indicated by the following considerations."

1. "An adequately qualified non-professional and gratuitous assistant or substitute would not always be to be had."

2. "In so far as appropriate learning is necessary (and all the art as well as the power of the profession has been employed for ages in rendering that necessity as universal and great as possible), a non-professional assistant or substitute would very seldom be adequately qualified."

"Besides those which, as above, are the result of artifice, two other advantages are, on the occasion in question, naturally attendant on the intervention of the professional, in contradistinction to the non-

professional advocate's advantages which may be reckoned as such, even with reference to the cause of justice."

"But for this resource, a wrong-doer may, to the prejudice of the party wronged, possess on this occasion two advantages of a very oppressive nature: the advantage of the strong over the weak in mind; and the advantage of the high over the low in station. In a cause of a doubtful or intricate nature nothing but such a union of talent and zealous probity, as would be too great to expect with reason, on the part of an ordinary judge, more especially of a juryman, can prevent these advantages (even in a separate state, much more when united,) from operating in a degree highly dangerous to justice. But, unless in case of a species of corruption, which is not of the number of those over which fashion throws its veil, the advocate is the same to all, to low as well as high."

Unfortunately, however, in this supposition is included the being in a condition to purchase such high-priced assistance: and the great majority of those who have need of justice, are far from being in that condition.

"But of the assistance of a professional advocate to the cause of justice, the utility is grounded in the nature of things: whereas the abuse thus characterized by the name of *brow-beating*, is not, as will be seen, altogether without remedy. Brow-beating is that art of offence which never can be committed by any advocate who has not the Judge for his accomplice."

So, it will be seen, that Bentham's regret is not that Professional assistance is at all available, but that it is not practically available to the poor suitor also, on account of the expence. Further, he was not blind to the value of a Professional man for the purpose of interrogation which this clause of the Ordinance totally denies, nor did he think that in reason an ordinary Judge should be considered fully adequate to act as counsel for both parties.

Another advantage of the bar is the service it renders as a check upon the bench. A Judge is as much a human being as any other man and is subject to like infirmities as others, from some of which, none can be exempt. One is hasty, another negligent, a third is capricious and arbitrary, a fourth by his peculiar temperament naturally given to sympathies and antipathies, and another perhaps is so exceedingly good natured and complying as to be subject to be prevailed on by importunity to grant that which Justice does not warrant. Is not an independent bar a check upon these—a bar that is ever watchful to expose error or mistake, to point out a fault, and, if not attended to, ready to bring the proceedings before a higher tribunal, when

the folly of the Legislature does not prevent such a course? If any body denies this, all that I can say is, that I should be very much disposed to doubt the sufficiency of his experience or the depth of his discernment.

Now let us see the advantages of a bar to parties to whom they render services. A counsel is presumed to assist his client in instructing him generally as to the conduct of his cause; to tell him what evidence would be necessary to prove the issues; which facts it would be necessary to established in order to rebut the cause of the opposite side; and generally to obtain from his client all information to lay the grounds for a cross-examination of witnesses.

A counsel will further be useful as being able to state to the court clearly and intelligibly, divested of all irrelevancies, and in a succint manner, his client's cause of action or matter of defence, so as to enable the court, assisted by counsel on both sides, to settle the issues.

The permission to appear by Proctor will be of further service, as enabling a party quietly to pursue his own business and calling, while the former, as his agent, transacts the whole of his business in court.

So both by way of aid to the Judge, as a check upon him, and by way of assistance and relief to the client, the Practitioner may be pronounced to be highly useful. The proposed law proceeds upon the presumption, that the Judge, unsupported by information and aid, is always sufficient for all these duties. Though a Judge is assumed to be fully adequate for all these duties, and to be willing to perform them efficiently and impartially, still, none that possesses the least acquaintance with history will willingly subscribe to this opinion, unless under the influence of some motive other than the deductions of experience. A Judge is supposed to act as counsel for both parties. But how many Judges, and that in the most civilized countries, notwithstanding the checks and restraints placed upon them, have been only the Advocates for the stronger party? Judges are supposed to be incorruptible. When the existing checks had no place, how many proved themselves liable to this vice? Even a Bacon was not above temptation in this way.

In the second place let us examine the objections offered against the existing local bar, and see whether they are so fatal as to seal its doom; and whether the evils complained of are not remediable without the excision of the body itself, for only, "immedicabile vulnus ense recidendum est."

It is objected that they are a source of the greatest expence to

suitors who employ them; that they exact larger fees than they ought, and in order to do so, they delay and prolong proceedings in a suit, and become ultimately the cause of ruin to litigants.

It is admitted that the objection is partially correct, though not universally. But whence the ability, and the consequent evil? First; special pleading and technical procedure. Secondly; what Bentham terms the Fee-gathering system—a system which stands established by the Rules framed by the Judges of the Supreme Court and the Tables of fees they have laid down; and it is an inevitable evil, consequent upon such a system. At one time this system in England extended not only to Practioners, but also to the Judges; and its pernicious consequences were deeply felt by society both with reference to Judges and practitioners, and led to its almost total abolition as regards the former. Is the temptation, which British Judges could not resist, and under which they perpetrated abuses, amassed wrong, and introduced injustice, to be supposed resistible by the humble Practitioners of this Island; and if some of them fall victims to it, are the whole to be utterly cast away as a pest to society!

Say to a Proctor that he will be allowed so much for a "motion of course," so much for every "special motion," a certain fee for every letter written, for every necessary consultation with his client and for every "other necessary business;" make it his interest to have the trial postponed from time to time, as the increase of his fees depends upon such a course, why, the natural bent of his inclination will always prove to be to create occasion for such services and not to bring proceedings soon to an end. Besides, these fees, or instances for fees, are so uncertain that, there are not to be found two Secretaries who tax bills alike; and if the same Bill were to be put into the hands of even two of the Judges of the Supreme Court for a like purpose, I am pretty certain, they would not be found to tax alike. What one considers to be a necessary motion or business will not be considered so by another. Suppose that the Judges of the Supreme Court were told that they were not to be remunerated by fixed salaries but that they would be paid so much for every motion heard, for every appeal decided, so much for the reading of the depositions of a witness, a fee for every postponed hearing and further argument, a fee for consulting their brother Judges upon any difficulty in the case, can one doubt that much evil would ensue; that the Judges would not be so averse to appeals as they now are, and would more willingly listen to motions, and that the length of proceedings would not be so much complained of? Apply the same supposition to the Colonial Secretary, and tell him that his business will hereafter be

remunerated by a "Table of Fees," that for every letter he writes, for every signature he affixes to a document, for every consultation with the Governor, he will be allowed a certain fee: you will soon find the business multiply in his hands, and the Governor will soon find himself pestered in no small degree with consultations. Would, in either of these two last mentioned cases, any reasonable man suggest that the Appellate Judges should be got rid of, the court abolished, and the Colonial Secretary and his Office dealt with in a like manner? Yet this is the course sometimes pursued here. Is a District Judge or are the practioners in his court not fit to perform their duties aright? the sage suggestion is, abolish the court—that is the only safe remedy, or rather the radical cure. So the court is abolished and the inhabitants of a district are punished for the inadequacy of the Government-appointed functionary and persons admitted by the Supreme Court to practise; as if the court stood established for the special benefit of Judge & Co. (as Bentham would call the body) and not of the inhabitants. What follows? The bar scatter and find settlement in some of the neighbouring courts, and the Judge reduced to a lower Judicial Functionary, without any reduction of emoluments, administers what is supposed to be justice without the control of an appeal. Then of course, the evil is buried and hidden, and those who recommended the abolition congratulate themselves on having completely eradicated an evil. If the inhabitants had a voice in the matter, would they not naturally call for a more capable Judge or a better bar, and protest against *their* being punished for *others'* offences. But Government is supreme, and its advisers are considered to be sages that cannot err.

Perhaps it will be loudly exclaimed that I am very illiberal in my notions, and my observations are extremely uncharitable; that no Judge is capable of the conduct, I suppose, under the temptation and influence of fees, and that it is by no means at all a probable occurrence. But I have not said all this without Book or note. The system existed in England, and let us hear from Bentham how it worked. He observes,—

"In as populous a neighbourhood as that of the metropolis the power attached to the Office of Justice of the Peace had been converted, it was thought, into an instrument of trade: the multitude of the fees receivable in the course of a day, in a sort of court in which vacations are unknown, made up for the smallness of them taken singly. In the Country at large, so moderate is the rate, so elevated for the most part the situation of the person invested with that office, it is not in the nature of things that the emolument derivable from it in

this space should, in any point of view, be an object of regard. But in the populous neighbourhood of the metropolis, it had for a long time been to such a degree an object of regard, as to have attracted and placed in that commanding situation persons by whom it was regarded not merely as an object of desire, but as a necessary source of livelihood, serving in this respect in lieu of a profession or trade."

As a cure for this evil, a certain fixed salary was proposed; on which, he says.

"Nobody in this instance made a doubt of the corruptive tendency of the retribution presented in the shape of fees; to no one was it ever matter of doubt, that, in some way or other, for the sake of the money attached to the business, magistrates of the description in question contrived somehow or other to make business; to no one was it ever matter of doubt, but that (however it might be in respect of delay) fictitious, vexatious and expensive to a degree calling loudly for the correcting hand of the legislator, was the result. But, whatever may have been the proportion of business made for their own benefit by these unlearned magistrates, it never could have been great enough to approach to a competition with the proportion regularly and from the beginning of things, manufactured by their learned superiors and superintendents, compared with the fictitious vexation regularly inflicted by the courts of technical procedure,—inflicted with the utmost regularity, without danger of punishment, without fear of reproach, with undefined power of punishment of their own creation for their protection against reproach,—punishment denounced or destined to be the severer, the juster and better merited than reproach with this, the utmost vexation attached to any profit, ever made, or capable of being made, by any one of those unlearned magistrates, was a Fleeblite."

"Proportioned, at least with an exactness sufficient to the present purpose—proportioned to the mischief suffered on the one part, has been the emolument received on the other, while the unlearned magistrate has been picking it up by shillings, his learned superior has been sweeping it in by pounds. Between them, to whom are we to look for the real trading justice? On the one part we see the prodigiously greater share of the profit, on the other the whole of the odium, and the exclusive possession of the name."

"The trading justice, so called, made business; admitted. But (to say no more of profits, and quantities and proportions) what means, what instruments did he employ to make it? By what aggravation did he ever *add* to the degree and species of improbity, without which the effect could not have been produced? What did he ever

do towards nursing ignorance, towards generating misconception, towards confounding and obliterating in the public mind the very idea of true justice? When did he ever refuse a hearing to both parties, or to either? When did he ever condemn a man unheard? In what instance is his tribunal removed, by his contrivance out of the reach of those whose fate is attached to their attendance on it? When did he refuse, refuse to all men, so much as a shew of justice, for four, for six, for twelve whole months together? In what instance did he ever keep parties for months and years upon the rack, while men in partnership and confederacy with him were loading them with vexation and expence by papers in which a small portion of unnecessary sense was drowned in a sea composed of surplusage, nonsense, and lies? In what instance did he ever to the dismay and ruin of the suitor, break the faith pledged to him by the legislator, by a decision in which no regard was so much as professed to be paid to the merits of the cause? By what jargon did he ever befoul and corrupt the language of common sense and reason? By what lies, under the name of fiction, did he ever defile his own lips, or compel suitors and their agents to defile theirs?

"Thus it is, under the imperfect hold which the regard for justice and consistency hath as yet obtained over the human mind. Combined with weakness, improbity becomes an object of contempt, combined with honor, the same improbity becomes an object of veneration. Acting on a petty scale, the unsuccessful robber mounts the gallows under his own name; acting in a great scale the successful robber, translates robber into king or emperor, and seats himself on a throne.—The man who without office or power, obtains money by false pretences is called a swindler, and under the name and pretence of temporary, consigned to perpetual banishment, (not to speak of slavery:) the man who, in office, and with power for his protection, obtains the same money by pretences equally false, is styled a Judge, and beholds for his benefit mendacity softened with fiction, and extortion converted into law."

"Every motion of course, that has been made is signed by the Advocate, in attestation of his having made it: attestation of his having received the fee charged by the attorney to the client."

"Every motion that has not been made, but is charged to the client as having been made, is also signed by the advocate: viz. in attestation of his having made it, as well as of his having received his fee for it."

"Made or not made, they are alike useless: mere pretences, false pretences for extracting money out of the pocket of the distressed

suitor, to put it into the pockets of the barrister, the attorney, the Judge's proteges, and eventually the Judge. Pretence of speaking, is false in many of them; pretence of thinking, is false in all of this."

"So successfully has this fee-gathering system acted in the production of one of these results which it has converted into the actual order of judicature, viz. *delay*, that we shall see the same suit, which under the natural system, regularly occupies on an average a space of a few minutes, occupying with equal regularity, under the fee-collecting system, a space of some hundreds, not to say thousands of times that magnitude. So successfully again has it acted in the production of another of those seeds of judicature, *denial of justice*, that (as to all remedies other than such as are applied by criminal suit) we shall find from six to about nine-tenths of the people in England fixed by it to a state of perpetual outlawry."

"But in the nature of things, it was scarce possible that in the situation in question, and with the powers inseparable from it, power should not be possessed of adding either to the quantum of the fee, or to the number of occasions, on which it comes to be exacted."

"What a blessing, could Judges have contented themselves with increasing fees in a direct and open way, without making business, or at any rate, without making delay for the sake of making business."

"The mischief became much greater, the opposition of interest to duty much more strenuous and disastrous when a given sum was raised by multiplying the occasions of receiving fees than when it was raised by adding to the quantum of this or that fee. By merely adding to the quantum of this or that fee, no other mischief would have been produced than what would have been produced by the addition thus made to the quantum of the expence, But by adding to the number of the occasions, corresponding additions were made, inevitably made, to the vexation and delay over and above the additions made to the expense."

"Unfortunately, it became, on various accounts, easier, much easier, to add to the number of the occasions on which fees came to be exacted, than to add to the quantum of each fee. Additions to the quantum of each fee could not escape notice and would be apt to produce complaint. What did not come under notice could not produce complaint: and the occasions of realizing addition to the quantity of writing manufactured, or number or duration of other acts done,—in a word, to the quantity of business rendered necessary to be done; and thence to the number of the fees exacted on the occasion of it,—might very easily, and on a variety of undetectible, though false, pretences, be augmented almost without stint. Accordingly, under this system, the Judges, to the power, added the effectual inducement,

to produce fiction, vexation, expense, and delay, (or more briefly, to make business) in a quantity almost without limit, and continually tending to increase the vexation, expense and delay, for the sake of the profit extractible, in the shape of fees, from the expense. Hence the production of vexation, expense, delay and official profit, became the real, and in a manner the sole ends of judicature, profit the ultimate end, expense and delay, so many intermediate ends, the production of the vexation, not an aid, but a collateral result."

"Had not collateral mischief been attributory to the profit (or what came to the same thing, inseparably attached to the production of it) it might not have been any man's study to produce any part of that collateral mischief: but being either contributory to the profit, or inseparably attached to the production of it, it becomes every man's interest, and consequently every man's study to produce them to the greatest amount possible."

Now does he attribute all this to the innate corruption of the individual, his dishonest disposition, his want of moral sense? By no means: for he declares,

"The fault lies not in the individual, nor in any peculiar taint of impropity seated in the bosom of the individual, but in the system itself, the system into which he enters, and under which he acts. Amend the system, you amend the individual. Render it his interest to pursue the ends of justice, the ends of justice will be pursued; the ends of judicature will be brought to a coincidence with the ends of justice."

Now what is the remedy he suggests?

"If the system (mind not the fee-gathering body) be an *immedicabile vulnus* in the excision of it lies an indispensable part of the remedy, we need not go far, it stares every man in the face" (in the face of our legislators it does not, though.) To this latter suggestion, however Mr. Mill, the editor of Bentham's works, adds the following very sensible remark:

"For want of the requisite limitations and exceptions, the most salutary rules may be carried too far and mis-applied. It is only in so far as it may be in a man's power to multiply fees, by multiplying occasions for fees, that the principal reason for the abolition of fees has place. In other respects it is of use that reward should keep pace as close as possible with service. The closer it keeps pace with service, the more it sweetens service; and alacrity, instead of disgust is the result." I shall take advantage of these excellent observations in making suggestions for counsel's fees in the closing chapter.

In this objection therefore we see nothing that indicates the necessity for a measure which would have the tendency of extinguishing the bar.

Another objection to the local bar is, their supposed inadequacy for the important duties required at their hands, and which lawyers generally are presumed capable of performing in an efficient manner.

This also is partially true, and it is of necessity as far as the present; but not an evil likely to be permanent or ever-continuing. The creation of a bar, at once, where none existed before, or at least none which deserved the name, was not a practicable task. "Rome was not built in a day." The materials first selected for the formation of a bar were necessarily of a very indifferent kind; for well-finished materials were not at the time forthcoming or obtainable. Hence the Supreme Court Judges first admitted almost every one that applied without examination, without due enquiry, simply upon recommendations made by District Judges. But many of the individuals so admitted were found to be utterly inadequate to perform their duties and fulfil their engagements aright; and a step in advance was therefore taken requiring examination before admission. This examination however, was not a very strict one; for, such would have excluded all candidates then: a tolerable knowledge of the rules of Practice and local legislative acts was considered a sufficient qualification. In course of time, and as technicalities and special pleading were countenanced and increased, as objections were allowed to be taken to pleadings, and a world of argument to be lost upon a pure nicety of legal distinction or legal defect, the Judges of the Supreme Court discovered that suitors were made unjustly to suffer for the deficiencies and shortcomings of their Proctor or their Advocate and that they required men with sharper intellects (not sharpers, mind.) Hence they required persons seeking admission to pass an apprenticeship and a strict and rigid examination; another step in the right direction. This of course, created expense to the parties seeking admission, (for few able men could consent to take an apprentice without a premium or fee) a patient waiting for a long term; practice and employment in a Practitioner's office and reading to enable one to stand the test of an examination. Under this system a few, in a very short period, came forth who could well compete even with lawyers bred in England; at least such as we have had the fortune of seeing as yet in the Island. The framer of the Ordinance in question was such a one, and a pity it is, that he was made the workman to forge the weapon with which his brethren are to be slaughtered. So it would appear, that in point of legal learning and professional aptitude the bar has

been progressing: the lapse of time has not been sufficient, totally to exclude the crude subjects first admitted; but age, competition, &c. will gradually drive them off the stage; and before very long—provided a fair remuneration for trouble, and promotion for qualification and merit, be allowed to prevail—the local bar will prove to be an efficient body. The bar should always be made the stepping stone to the Bench, and as good conduct with learning will be made the grounds of selection, it will operate most beneficially upon the body and dissuade them from pursuing courses that may materially affect their personal interests. The above are facts, and I must leave the impartial reader of his own knowledge, to say, how far they are correct; but the means of proving them is not open to me, for who is to try the issue?

A further objection urged is, that Practitioners originate false litigation and so involve parties in ruin. I am not prepared to admit or deny this; for, opportunities of personally ascertaining the fact I have had none. But this much I am able to assert safely, that the absence of a bar is not likely to reduce such litigation. Take for instance, the number of suits or plaints now instituted and entered in the Police Courts and Courts of Requests, and see whether they are less in number that those that used to be brought before the District Courts prior to the establishment of the former, and you will find that they are not a bit less, if not more, though from the former Courts the bar is utterly excluded. How comes this result? Either the bar did not instigate uncalled-for litigation, or others have sprung up in these Minor Courts who are doing what the former are supposed to have done. Either supposition will be a sufficient answer to this objection, with this difference in favor of a bar, that this body falls under the vigilance and control of the Judges, while the others must always remain hidden and unassailable.

It is again objected that the bar will prove a grave impediment in the way of speedy decision and despatch of business. This must depend entirely upon the rules under which they are permitted to practice. If counsel are to be heard at length and in every point which they propose to argue, and upon every objection they may choose to take, then the objection has, no doubt, very considerable weight; but the very clause under consideration makes a salutary restriction to guard against the evil; that they "shall not be entitled to be heard to argue except by leave." They had better be allowed to suggest the necessity of an address and argument and the Court to over-rule it, if it saw no difficulty or necessity, and if the Court errs, appeal is the natural and prompt remedy. They ought, however, always to cross-examine witnesses. Besides, the absence of Assessors will dispense with the addresses explanatory of the Pleadings and evidence.

Objection is again made that they are likely to mislead unlearned Judges, suggest incorrect law, and thus awe them by fear of an appeal, into incorrect decision; in fact, they would practice *brow-beating* towards these Judges even as they are in the habit of doing to witnesses.

This is the objection which I feel the most difficult to deal with. To protect the majesty and dignity of the Bench, to allow calmness and serenity to prevail there, it certainly is the bounden duty of the legislature to make ample provision. Left to their common sense, those Judges are more likely to do justice than when confusion is caused in their brains on subjects of which they know nothing. I admit the full weight of the objection and my utter inability to meet it. But I will venture to hint and to throw out but one simple query. In such case whom is it your duty to get rid of? the Practitioners or the Judges; the law or common sense? Is there no mode of allowing both an existence in these Courts? Is a man possessing both law and common sense such a rare animal in this Island, that the necessary remedy cannot be had.

The last objection I have heard mentioned is this, that a bar in this Island is politically inexpedient. That may possibly be, but we are not now dealing with a political question but the best mode of administering justice. Standing independent of Government, they may have shewn some restiveness, some obstinacy; evinced a desire after radicalism and a love of false popularity; but opposition, when that opposition cannot be the cause of positive evil, is, I think it will be admitted, beneficial. If it were not for the standing and ever continuing opposition in the British Legislature, would it have passed the wholesome and salutary laws and measures which it has done? The bar in Ceylon, comparatively, is too insignificant a body to inflict any injury on the British Rule or Government of this Island. Let them vapor for a while, take objections, suggest errors, point out misdeeds; it will be all the better. Make them all dependents on Government; that will be a positive evil. An independent and intelligent public is a great blessing to every country. The bar goes to the formation of one. Do not therefore demolish it.

These are the only objections I have heard urged against the existence of a local bar, except one other of a very absurd nature; that they suggest appeals from Tribunals of original jurisdiction. If they frivolously appeal, the Appellate Court might well exercise its power of punishment as it occasionally now does. To permit appeal and deny advice is a monstrous piece of injustice; the placing of a prize in an inaccessible position.

Let us now proceed to enquire what evils are likely to arise from the non-existence of a bar.

First.—Misdecision both on matters of law and matters of practice The laws in this country are multifarious, and the uncertainty in which they are involved is made the theme of loud complaint by the uninitiated and even by the English Lawyer and Barrister who finds it almost a sealed letter to him, on his first entrance upon business. If a Judge be left solely to his personal exertions for its discovery, it will not be denied, I think, he will pretty frequently err, and thus be the instrument of injustice. It is in vain to say, after the bar is driven off the field, the parties may still have their remedy by appeal; for appeal proceeds upon the supposition of error, and how is a party who is no lawyer to discover this error in the mazes and entanglements in which people say this is to be searched for? Besides is it not better to make the first decision correct so far as that is practicable, than the second, which must cost additional expence and trouble? A Judge is in like manner left to discover the truth of an alleged fact by his own talent and industry. He must himself look for matter to ground a cross-examination upon, to sift out what is true from a mass of evidence partly true and partly false; to elicit all the facts that may be in the knowledge of a witness; to instruct him how to supply deficiencies; to prevent the production of irrelevancies; and to do in fact all the services now rendered by counsel at trial, and some rendered before trial. Is he adequate, in point of industry, in point of previous information, for all this? Is a party always able to assist him efficiently in this search? No, certainly not. If so, is it too much to say, errors of fact are also liable often to occur, from which no redress can be had? A Practitioner, though he may be one of humble qualifications and of no great pretensions, will often suggest or hint the existence of a fact on which a Judge is able to ground an effectual and searching cross-examination. A party seldom does so. When allowed to cross-examine, he generally begins with some irrelevant questions; and when he thus proceeds, the Judge stops him, thinking that he has no better to put and it is mere waste of time to allow him to proceed.

Secondly.—It will have the tendency of introducing into every court, a very objectionable and unlearned class of private advisers to parties. This is an evil which existed before the Charter of 1833, and why may it not occur again? Parties are often helpless without advice; they will have to pay for this advice whether good or bad, and be deceived and duped every way. The very officers of courts will begin to sell advice, in the place of regular practitioners. You will see,—as

those who remember olden-times are still able to say,—the Interpreters, Clerks and Secretaries giving audience of a morning to hundreds and fifties of suitors, and coming to courts attended by as large a retinue of clients and followers as ever graced the train of a Roman Senator or Patrician.—These evils are considerably abated now, and the suitor generally resorts to his legitimate adviser, the Proctor, and if he is fleeced there it is partly his own fault, and not of inevitable necessity.—His bill can be taxed and every item of charge examined. But where there is no check, every body charges as he likes, and according to the proportion of influence which he leads the party to believe he possesses, to guide the decision of his case. A capital harvest of gain will flow in to all such, but mostly to court officers. Is it at all desirable to pollute the seats of Justice by the admission of these mal-practices into them? I believe there are no two bodies generally speaking, so hostile and antagonistic to each other as Proctors and Interpreters of courts; the one speaks evil of the other with right good will.

So when you take a comprehensive view of the subject: the benefits, the existing evils, the probabilities of future evil, the practicable remedies, and the possibility to remove abuse, the conclusion to be drawn is, that the measure proposed is neither a wise nor a beneficial one. This provision will prove to work viciously in its results.

The next provision to be found in this clause is, that when a substitute is allowed to appear, or when an Advocate or Proctor is permitted to argue, no costs incurred in respect of such appearance are to be made payable by the opposite party.

There appears to be no just reason for the denial of necessary and unavoidable costs. It proceeds even further than the provisions of the English County Court Acts of 1846 and 1850. The provision of the 91st Clause of the Act of 1846 is thus explained in the Law Review, No. XI. P. 176.

"The 91st Section is obscurely worded. The meaning of it seems to be this that a party may *appear* by an attorney, or may appear by a barrister instructed by an attorney, or he may, by the leave of the court, appear by a non-professional Agent; but that neither attorney, barrister, nor agent can *argue* a case without the leave of the Judge; that non-professional agents are not to have or recover any costs; that no higher fee than £1. 3. 6. is to be allowed as the fee of a barrister; an attorney, nothing, unless the demand amount to 40s, and not more than 10s unless the demand exceeds £5, nor more than 15s. in any case, and that fees of counsel and attorneys are not to be allowed on taxation, in the case of a plaintiff where

less than £5. is recovered, or in the case of a defendant, where less than £5 is claimed, nor in any case except by order of the Judge."

The provision in our Ordinance is simply a copy without improvement; but certainly with omissions which formed exceptions in the original that render it the more objectionable. One does an injury to me; I seek redress, but cannot obtain it without professional assistance, and even the very Judge to whom I apply pronounces my application reasonable and thinks that debate and argument are necessary to the ascertainment of my right. I accordingly pay for the assistance I obtain, in order to establish my just claim, but am denied the recovery of expenses so unavoidably incurred, from the party who injures me; and I, the innocent, am punished for the benefit of the guilty. Now any one who has but two grains, or even less, of common sense within him, must see, that this is most palpable injustice. One might just as well come and knock to pieces my garden gate, and when I complain of it, offer me the materials to make a new one, and say: "You must make it the best way you can or get it made by another at your own expence." Might I not very reasonably remonstrate: "I am no carpenter, and, probably, in attempting to make a gate I shall spoil the very material or at least run the risk of so doing. Besides, though I may prove a rude workman, I have other business to attend to, the neglect of which for the doing of this job, will be a much more considerable loss to me." If I spoke thus, would I not be speaking as a reasonable man? Now, substitute for the breaking of the gate, the injury to a suitor; for the material to make the gate, the actual loss sustained from the injury; for the carpenter, the lawyer: and the parallel will be complete and no real difference will be perceived to exist between the two cases. The correctness of this reasoning must be obvious even to a child's judgment. If I, instead of employing a common house-carpenter to make the gate, employed a first rate cabinet maker, then I may be reasonably denied the high charges, and be offered a reasonable sum, for which the work could have been done. Yet wise law-givers would not listen to such reasoning. The wisdom of the British Parliament has laid down the rule, and we will do well to copy it, for what are we compared with such an august body? But even in England they do not seem to bow to such wisdom. Hear the Law Review, No. XIV. P. 245.

"To render the County Courts satisfactory to the suitor, he ought to be relieved from the burden of conducting his case in person. We have already shown the trouble and expense imposed upon him in bringing it to a hearing, while the fee allowed for professional advo-

cany is, if he required it at all, insufficient to procure that assistance which he ought in justice to be provided with. We protest against this, not so much for the sake of the profession as for the benefit of the public. The interests of a class must at once give way to the welfare of a community; and if by a salutary reform the fees of the lawyers are diminished, to resist it on this account would be an act of the greatest selfishness and dishonesty. It is, however, idle to suppose that it is an advantage to a suitor to deprive him of the power of receiving costs fairly incurred in prosecuting his claim, and a moderate scale of fees ought at once to be arranged, which would enable claimants in the County Court at the cost of the defendant, to employ an attorney to manage the case throughout, if they felt it to be their interest to do so."

The only other clause of this Ordinance which seems to require notice is the 12th which permits appeal, to a certain extent, a considerable deviation from the Ordinance now in force in respect of courts of Requests and evidently an imitation of a provision of the county court act of last year. It runs thus:

"And it is enacted that any party in a suit or proceeding before the said courts may appeal to the Supreme Court from any decree or order of the said courts for any error in law substantially affecting the merits of the case, or for the admission or rejection of any evidence contrary to law, or for the incompetency of the court in respect of any excess of jurisdiction or that the case has already been tried, or forms the subject of a trial pending in some other competent court, or for incompetency of the court in respect of the commissioner himself, as that either he or his kinsman had an interest in the cause, for malice or corruption on the part of the Commissioner. And the said Supreme Court shall affirm, reverse, correct, alter and vary every such decree order or proceeding, or order a new trial on such terms as it thinks fit, and may make such order with respect to the costs of the said appeal as the said court may think proper. Provided that no party shall be allowed to appeal to the Supreme Court in any suit or proceeding when by any law or Ordinance it is expressly provided that the judgment, decree or other proceeding of the Court of Requests shall not be brought in review before the Supreme court.—And provided further, that it shall not be necessary in any petition of Appeal to the Supreme Court from the decree or order of any Court of Requests to set forth the particular grounds of appeal but in failure thereof the Appellant shall be liable to be disallowed his costs or any part thereof in appeal."

This is a considerable improvement on the corresponding clause of the Ordinance of 1843; but there exists no good ground for this restricted appeal to correct error in law only. Law and fact are sometimes so interwoven in a case and stand in such intimate and close connection with each other, that the entire separation and the consideration of the one apart from the other is found to be difficult. Besides, the erroneous finding of a fact works as much mischief and injustice as the commission of an error in law. True, it might be said that the Supreme Court, as a court of appeal, is not possessed of means to discover such error; then why does it exercise such power in reference to the District Courts? Perhaps, a Commissioner draws his conclusions of fact from a very hasty, superficial enquiry, upon loose and imperfect evidence full of contradictions and discrepancies, being less careful in absence of the check of an appeal from facts. Ought a party to suffer by such conduct? If an appeal lay, the Supreme Court discovering these defects in the depositions might remand the case back for fuller and more careful enquiry. Liberty of unrestricted appeal will be so far salutary. The appeal, which this Ordinance proposes to allow, will be of little or no avail to a party in the absence of legal advisers. I have already shewn that these courts will have to try, under the increased jurisdiction, about 9-10ths or more of the Civil Suits of the Island, and that the District Courts, except in one or two places perhaps, will have so little business left in them, that that business will be utterly insufficient to maintain a bar. When the bar then becomes thus extinct, a party will be reduced to the necessity of himself discovering the error of law committed by a Judge. But how few of the people that resort to these courts have studied either the Roman Dutch law, the Roman Civil, or the English law, or the law of evidence, or even our local acts and Ordinances? Yet the Legislature proceeds upon the presumption of their knowledge of all these, & their ability to state distinctly upon what matter a Commissioner has erred, for, if they fail to do so, they are threatened with punishment; that is, they "shall be liable to be disallowed their costs or any part thereof in appeal." With such a threat will they venture upon an appeal even when they suspect error? You appeal, but are unable to state correctly the particular ground of appeal: the appeal proves successful and yet you are punished for your ignorance of the law which prevented your stating the grounds. Is this just and reasonable, I ask? In fact our legislators seem to give the most credit to the suitors, as lawyers; for they are thought capable of detecting the Commissioners' errors: less to the Commissioners, because when they see a difficulty they are allowed to hear counsel argue; and

least of all to the Judges of the Supreme Court, before whom, not only may counsel argue in every case but even the very suitors are compelled by penalties to instruct them by setting forth the particular grounds of appeal. Surely, this is hardly complimentary to the Judges of the highest court in the Island, lawyers by profession, and persons who are thought to be able to correct all others, and in whom legal wisdom is supposed to dwell in its utmost perfection. One would have thought, if any court or any party could dispense with assistance in discovering error, in finding the law, it must be these very Judges, and the bar would have been excluded from their court first.—No! the more one knows the less should he be presumed to know; and the less one knows, the greater credit should be given him for knowledge. This appears to be the rule upon which Legislation proceeds here, and even elsewhere.

There is another anomaly. These minor courts are courts of "Equity and good conscience" and not of law strictly; fanes specially dedicated to the divinity of common sense, who is supposed to dispense justice even in greater perfection than her sister the divinity of the law, though this latter is characterized as the perfection of wisdom. While these courts remain as such, how could there be an appeal to correct their law? Those who framed the county court Act of 1846 appear to have perceived this, and they denied any appeal whatever (See Exparte Rayner, 11 Jurist 1018) but in the subsequent act the distinction has been lost sight of. These courts must either be required to decide according to law or according to "Equity and good conscience," for both are not always coincident. What equity or what good conscience will tell one that a man should not pay his shop bills which he has neglected to pay for a year? But the law will not compel him to do so against his will. The distinction, hence, will be easily seen.

So much for this Ordinance which appears to be a most faulty piece of proposed legislation, and I flatter myself with the hope of having assigned sufficient grounds for saying so: and should this appeal prove successful, I hope I shall not be cast in costs for not so doing, either in whole or in part, (that is the cost of printing this.)

The mistake as regards the value of these minor courts appears to have arisen from the commendation which Bentham and others of his stamp have bestowed upon their simple and natural mode of procedure. Some mistook this as commendation bestowed on the organization of the courts themselves and their merits as administrators of Justice. Bentham himself tried to guard against this error; for he says.

"*As far as concerns the organization of the existing courts of*

natural procedure, they are susceptible of great improvements: but in respect of the mode of procedure, two single features, (appearance of the parties before the Judge, and *vivâ voce* examination of the parties, but especially the former) are enough to render them as much superior to the best of the regular courts as the military tactics of European are to those of Asiatic powers. They afford no work for lawyers; the wonder is not great that they should not be to the taste of the lawyers."

When he says "they afford no work for the lawyers" he of course means, work by way of special pleading, motion, business &c. and not oral advocacy, interrogation &c for that would be a contradiction of himself.

To the above is attached the following valuable note of Mr. J. S. Mill:

"It is proper to observe here, that the praise bestowed by Mr. Bentham upon the existing courts of natural procedure, is confined in the strictest sense, to the *procedure* of these courts, and by no means extends to the constitution of the courts themselves. In many of these courts, it is well known that justice is very badly administered. What, however, we may be very certain of, is, that the cause of this bad administration of justice is not the absence of the technical rules; and that if, over and above all other sources of badness, the practice of these courts were afflicted, in addition, with the rules of technical procedure, they would be not only no better, *but beyond comparison worse*, than they are."

"The real and only cause of the badness of the courts of natural procedure, (in so far as bad,) is that which is the cause of the maladministration of so many other departments of the great field of government; *defect of* responsibility on the part of those persons, to whom the administration of them is entrusted."

"Causes of such defect of responsibility."

1—"Defect of publicity. In the case of a Justice of Peace administering judicature, alone, or in conjunction with a brother justice, at his own house, or on his bowling green, or wherever he happens to be, publicity does not exist in any degree. In the case of courts of conscience, there is (I believe) nominal, but there can scarcely be said to be effectual publicity; since the apparent unimportance of the cause prevents the proceedings in it from being reported in the Newspapers, and would prevent it, even if reported, from attracting in general any portion, sufficient to operate as a security, of public attention."

2—"Number of judges. In many of the courts of conscience, the tribunal is composed of a considerable number of officers; though any greater number than one, or at most two, (one to officiate when the other is sick, or from any other cause unavoidably absent,) can serve no purpose but that of dividing, and in that manner virtually destroying, responsibility."

3—"Defect of appeal. In a great variety of cases, no appeal lies from the decision of an individual justice of peace, except to the Quarter Sessions, that is to say, from the justices individually to the justices collectively. How fruitless an appeal of this sort must in general be (not to speak of its expense) is evident enough. What little value it has, is mainly owing to the greater effectual publicity attendant on the proceedings of a court of general sessions, which are generally reported in the local papers, and always excite more or less of interest in the neighbourhood."

Again Law Review No. XIV P. 254, speaking of County Courts.

"A great deal of petty litigation has sprung up, which it would have been better, not to have called into existence. This however, is, but the weed which springs up in the healthy soil A far more serious evil presents itself in the perjury which is frequently committed by the parties to the cause; and which, although seldom successful, must be kept in check by greater care being taken to secure its punishment than is now manifested. This is the more important, as the liberty now accorded to the parties to give evidence in their own behalf, is that alone which prevents the County Court Act from being one of the most monstrous abortions that legislation ever produced." (Mind this is the language of an avowed law reformer, through the regular organ of modern law reformers.) "If the ordinary rules of evidence had been adhered to while the plaintiff was obliged to obtain at his own cost professional assistance to prepare himself with legal proof of his case lest it should be disputed at the hearing, the act would long before this have been obliterated from the statute book at the urgent and unanimous demand of the country."

Hence it will be seen, that it was not the constitution or the organization of these courts that drew forth the approbation of these learned Jurists; it was not the completeness or perfectness of their jurisdiction (for its non-existence was made a subject of complaint), it was not the absence from these courts of securities against mis-decision, which securities, all sound jurists thought, should never be withdrawn; but it was their simple and natural mode of procedure that they advocated and held forth as deserving *universal* imitation. Strange it is how this came to be lost sight of; how, instead of introducing

this simple procedure into courts which already prossessed the requisite securities and a clearly defined jurisdiction, the Legislature came blindly to adopt what was faulty together with much that was good. Imitation, without thought, has been the root of this evil. Mr. Cameron introduced a system which required but little improvement as far as constitution and jurisdiction of courts were concerned.—The Judges who framed the rules of Practice to carry this system into effect either did not understand the principles on which it proceeded or were lawyers too technical to enact simple rules to make it work well. What was thereupon left for our Legislature to do was, merely to introduce a simple and natural mode of procedure into the then existing courts, and this was a most easy task. This therefore brings me to the concluding Chapter of my subject, to suggest what I consider to be the amendments required.

CHAPTER V.

STATEMENT OF THE WRITER'S OWN VIEWS AS TO ALTERATIONS REQUIRED IN RESPECT OF THE CONSTITUTION OF THE COURTS OF THIS ISLAND AND IN RESPECT OF PROCEDURE.

In commencing this Chapter I wish to impress on the mind of the reader certain rules which the Legislature ought always to follow, if it does not desire to see change after change, to unsettle every thing and produce confusion, uncertainty and doubt. But as far as I can I shall try to intimate them in words not my own but of much superior authority.

"When every year brings some fresh bit of alteration, *founded on no principle*, it passes human patience to be always unlearning and relearning, and human memory to recollect what is the ultimate result of the various and frequently conflicting changes" xv. Jurist. Part 2. page 314.

"In questions of Law Reform when once the extent of the evil is steadily discovered, the boldest reform is often the most advisable, because it settles foundations and prevents the great evils of frequent changes." (Quoted by Sir. E. Perry in p. 50 of his Pamphlet as "the remark of perhaps the greatest living authority in common law.")

"A further objection to the proposed scheme of dealing with established evils in law procedure by gradual reforms is that it is nearly sure to prove illusory.—I have shown the objections necessarily entertained by the profession (as part of the natural history of lawyers) to changes generally in the law, and justly entertained *when the changes proceed*

on no fixed principle, and through indefinite periods of time. The public, on the other hand, whose interests are paramount in the matter, pay so little attention to the subject that they are very apt to adopt all the notions, and imbibe the prejudices of those whose interests are certainly not coincident with their own. The consequence is, that an unsuccessful or an incomplete measure of Law Reform enables so many plausible arguments to be urged against alterations generally, that the progress of improvement is arrested, and the happy opportunity lost of basing a solid reform on principle." Sir E. Perry's Pam. p. 52. 53.

"Bombay is extremely favourably circumstanced for an experiment in law reform. For 48 years past it has presented the example of the best small cause court in the British Empire. Sir David Pollock and myself have lately extended the jurisdiction of this court to so large a sum, and over such a large field of law, that there is no reason, except the supposed conflicting interests of practitioners, why it should not be extended indefinitely" (that is to destroy its character as a small cause court.) Sir E. Perry's Pam, p. 68.

In like manner what we want here, is a solid Law Reform, based upon principle, and without its being prospective of further material change or alteration. If any such Reform is possible in this Island, this is the practicable moment; as we have now at the head of the Government one who by his judicial experience, is capable of comprehending the subject when placed in a right point of view, and is very desirous of establishing a system which will prove to be a real improvement. This opportunity is not likely to recur, and were it not for the occasion thus presented, the writer of these pages would have preserved complete silence on the subject and not have obtruded himself upon the public to expound his own ideas on this matter; which ideas, under different circumstances, would probably be treated with contempt and inattention. My earnest desire is that the Sir G. Anderson will take nothing as good upon mere authoritative dictation, but consider and reason upon it for himself, and adopt that which his reason approves.

Sir E. Perry observes "At home it will be found that practitioners are nearly always enamoured with the practice of their own courts." In like manner our present Ruler's Indian judicial experience and his intimate acquaintance with the system which prevails there, and his legal habits there contracted, might possibly raise in his mind a predilection and bias in favor of that system. But impartial enquiry will shew, that we are, or at least have been, greatly in advance of Continental India as regards the constitution of our courts, and also

in respect of practice. I say this upon the authority of Sir E. Perry, who in his pamphlet P. 62. says "I witnessed a remarkable illustration of the efficacy of the practice" (the examination of parties) "in one of the visits which I have already mentioned to the District Courts at Ceylon. I have already described the defective state of the substantive * law of that country. The Judges also for the most part have not been happily selected. But the procedure which has been adopted upon fixed principles" (so far as our rules followed Mr. Cameron's recommendations only it must be kept in mind,) "and after careful consideration appeared to me most satisfactory, and to contrast very favourably with that which is to be seen in India. Every where I went I found the court sitting at regular hours, and the same interest exhibited by the natives, and the same publicity shed over all parts of the proceedings as is exhibited at the most frequented assize Town in England." The Indian judicial system does not proceed upon any fixed principle, and that in itself is an objection to it. It resembles, I believe to a considerable extent, the system which prevailed here before the Charter of 1833. I shall now, without further preface, proceed to make my suggestions, adding thereto my reasons and authorities, when necessary, or where any thing contained in the previous part of my inquiry fails to shew sufficient grounds.

1.—I suggest that the entire Island shall stand divided into judicial districts as at present; or if necessary, that a re-division be made so as to admit of the distribution of an exclusive original jurisdiction on the Geographical principle as suggested by Bentham.

I agree that "the courts should be locally situated so as to bring justice home to every one's door, and neither put the suitor nor the supposed offender to the inconvenience and charge of a distant tribunal."

I also concur with Mr. Mill that "the question, how many courts there should be as well of primary as of appellate jurisdiction is to be determined by one thing only: namely, the need there is for them. The number of the courts of primary jurisdiction must be determined,

* "The terms, adjective and substantive, applied to law, are intended to mark an important distinction first pointed out to notice by this author; (Bentham) viz. the distinction between the commands which refer directly to the ultimate ends of the legislator, and the commands which refer to objects which are only means to those ends. The former are as it were the laws themselves; the latter are the prescriptions for carrying the former into execution. They are, in short, the rules of procedure. The former Bentham calls the substantive law, the latter the adjective." Mill.—The subject of this Pamphlet belongs entirely to the adjective law.

in some instances by the number of suits; in some by local extent. To render justice sufficiently accessible the distance from the seat of judicature must not be great, though the number of accruing suits either from the paucity or from the good conduct of the people should be ever so small."

2d.—I suggest, that in each of the districts above referred to, there shall be two courts established: one to be called the Civil Court, and the other the Criminal Court of such District; and to each of which shall be appointed one Judge; the one appointed to the former to be called the Civil Judge, and the one appointed to the latter, the Criminal Judge.

The complete union of criminal and civil jurisdictions can never be effected for any practical purpose. Though conferred on one and the same Court and Judge, the amalgamation, in reality, never takes place; the business will stand always divided; that is, one establishment consisting of two distinct departments, the Officers of the one being also the Officers of the other. It is a mere nominal union without destroying their distinctive character. Nor do I see the benefit of such union. No confusion, conflict or doubt is raised by this natural separation. When it is practicable and circumstances do permit, it is desirable that to each of these Courts a separate Judge should be assigned, which would effectually prevent criminal business dislodging and retarding civil. Formerly when they stood united, sometimes an urgent criminal enquiry necessarily postponed the civil business which had been already fixed, to the great annoyance and cost of suitors.—If I rightly remember, once the civil business of the District Court of Colombo stood suspended for nearly fifteen days, the Judge being engaged in holding inquests upon the bodies of some persons that had been killed at a riot during a Mahomedan Festival.

The reasons given by Sir C. Marshall for the combination, and which Mr. Cameron quoted in support of his recommendation, do not strike me as satisfactory.—He declares:

"Indeed, I am inclined to think that the union of the two Jurisdictions in the same person, supposing him to possess diligence and a good understanding is very beneficial to the natives, by refering them in all their little grievances of whatever description to the same arbitrator." (What signifies whether there be one or two arbitrators, if both are equally convenient and both able to afford redress.)

"Another very material advantage derived from this combination of authority, arises out of the difficulty which so frequently presents itself of deciding whether the wrong complained of should be treated as a civil injury or a criminal offence; if the complainant mistakes his

course and applies to the wrong side of the court for redress, he is transferred to the other side, and his case may be heard at once, instead of his being driven to seek another tribunal." When the two courts are situated near the same locality, the inconvenience must be too small to deserve consideration. Besides, the principle of the division of labour will make each court more efficient when so presided over. The best civil Judge is not always the best criminal Judge.

As regards the alteration of the names of courts and their Judges, there is nothing essential, but it is better to give an intelligible name rather than an unintelligible one. Those I have selected are words in common use and to which a fixed meaning attaches. "A court of Requests" and "Commissioner" have no definite meaning. The former does not at all give any notion of the business that should come before it, nor the latter of the functions belonging to the Office. The names "Police Court" and "Police Magistrate" are alike objectionable, as the business is not confined to Police offences.

3.—I suggest that the Civil Court shall possess all the original civil jurisdiction now exercised by the District Court and Court of Requests of each District, and the Criminal Court the whole of the original criminal jurisdiction now exercised by the Police, the District and the Supreme Courts within each district, except the trial of the following offences: treason, homicide &c. and this latter, the Criminal Court, be vested with power to award any punishment which the law allows to the offenders tried before it.

So far as the Civil jurisdiction is concerned I have already stated reasons enough. In reference to the criminal jurisdiction I have only to observe that under the defective state of the substantive law of the country in respect of criminal offences, the specified mention of the offences excluded from the Criminal Court will be abundantly better than the undefined distinction which now exists. Of course the Legislature ought to determine what offences should be so excluded.

4.—I suggest that all cases tried before these courts shall be tried before the Judge of each court without a jury or assessors, with the following exception; that it shall be allowed to any party to a cause to apply for a jury; in which case jurors shall be selected from the bystanders to perform such duty, but such jurors will only have the cognizance of facts under the guidance of the judge, and the judge shall be bound to pass decision applying the law to the facts so found by the jury, but shall be at liberty to record his own opinion of the facts with the reasons thereof.

The reasons for this suggestion I have already stated. I agree in the principle that "each court should be so constituted

as to throw upon the judges undivided responsibility," but the exception is a necessary one. Certain cases will occur which require a special jury, and in such the application should be made at the settlement of the issues, as I shall hereafter state, that sufficient time may be allowed for the citation of jurors.

5.—I suggest, that the Supreme Court, as at present, shall try all the excepted criminal offences as a court of original jurisdiction.

6.—I suggest that the Supreme Court, consisting of three judges, as at present, shall form one court of appeal and hear all appeals, civil and criminal, sitting at Colombo, but every such appeal shall be heard by all the judges that may happen to be at the time of such hearing in Colombo, sitting together, and the decision of such court to be final, reserving the right of the Queen in Privy Council to entertain appeals of any kind as at present.

Bentham judiciously observes that the court of final appeal stands most in need of securities against mis-decision; simply because there is no ulterior remedy. It has been already intimated that two stages of appeal are objectionable, if the unity of the law can be preserved without them. When all appeals are decided in Colombo I think it can be practically secured. Besides, a collective court of appeal to revise the decision of each of its individual members, is not at all, in its working, likely to prove a good constitution for a court, and an appeal to such a court is attended with inconvenience, expense and trouble. As appeals will have to be heard at Colombo, from the remotest parts of the Islands; and even in the case of a supposed error of the appellate court an Advocate will not venture to lodge appeal to the collective court without previously consulting his client—For such consultation and the giving of the necessary securities a much more considerable allowance of time will be required than at present; and that itself will form no trifling obstacle in the way of such an appeal. But all the benefits of a collective court, I think, might be secured without such an appeal and without its cost. As the time occupied by the judges in making circuits will no doubt be now very much reduced there will almost always be found at least two of the judges in Colombo. Each of the judges may take his just proportion of the appeal business, and enter upon the hearing simultaneously with his brother judge or judges, who may happen to be in Colombo, sitting together, and pronounce judgment in the hearing of each other, each judge taking up a case in rotation from those he has previously read. When so delivering judgment whenever there exists a difference of opinion on any point of law or practice, it will necessarily create a quiet de-

cision, which must either lead to agreement, or reservation for collective determination. This will promote much more effectually the unity of the law, than when the resort to the collective court is left to the means and option of a party.—This of course adds another argument in favor of appeals being heard at Colombo. Under this system the three judges must be continued, or often the appeals will be left to one individual judge. If the number be reduced to two, the Chief Justice's opinion must be allowed to prevail, and there will be less confidence in such a decision than when it proceeds upon a majority of votes.—Moreover the system I recommend will furnish sufficient business for three judges, not for a useless but a beneficial purpose—the correct administration of justice.

Further, the presence of more judges than one on the Bench will be a wholesome check, the one upon the other. Even the superior Judges are subject to like infirmities as the inferior, and are apt to act capriciously, at times, and even arbitrarily. I make no allusion to living instances, and even if I found any grounds for so doing, it would be very unbecoming of me to do so.—But in illustration of my remark and in order to induce the belief that it is not entirely uncalled for, I shall instance a case decided long ago, in appeal; both the appellate judge who decided it, and the judge of the original court, being now dead.—Both were most conscientious men, desirous of doing justice, but there was this difference between the two:—The judge of the original court was a calm, patient, industrious character, who seldom allowed his mind to be at all ruffled; but the appellate judge, whatever were his other good qualities, and they were many, had not the control of his passions; allowing sometimes suspicions and irritated feelings to get the better of his judgment, which under other circumstances was extremely sound.—The case was a suit between two parties for a piece of land.—The original court gave judgment in favor of one, against the other. The successful party had called a witness who also claimed some interest in another portion of the land, but not then in question; and the original court proceeded to decide, giving credit to his testimony. However, the defeated party denied the witness's alleged right also. On the hearing of the appeal the appellate judge thought that the judgment could not be sustained, suspected this witness; but sent back the case to the original court to call upon this witness to intervene and establish his asserted claim. On being so called, the witness, probably aware of the certainty of defeat after the pre-expressed opinion of the appellate judge, declined to involve himself in litigation; said that his interests did not

enter into the subject of this suit, and therefore he was not a necessary party. On this being intimated to the appellate court the decree it pronounced was, that as the least punishment which the Supreme Court could inflict upon the party who declined to intervene, for his contumacy, was to condemn him in all the costs of that suit; and he was so condemned to pay the costs of all parties, successful and defeated, and even of the party who called him as a witness. There was no further appeal and no remedy. The whole of this man's property was sold under execution to satisfy this arbitrary decree—Now, had there been any other Judge sitting on the bench at the time this judgment was pronounced; being an honest and an independent man, would he not have suggested his dissent, and, probably, prevented the arbitrary & unjust decree taking effect? Some may doubt the correctness of my report, but I am in a position to say where the record, which will prove all this, is to be found.

Thus much for courts, their constitution and jurisdiction. Next comes

PROCEDURE.

Civil.

1.—I suggest that all suits shall commence on the personal application of the party "or of his counsel to the judge."

On such application, of course, if the judge discovers that the party has come to the wrong court; as for instance to the criminal instead of the civil, or *vice-versâ*; he will at once refer him to the proper court, making, if required, a record of the order and its grounds, for the purposes of an appeal.—So also making a like record, if requested, he will refuse summons, if he be clearly of opinion that the grounds of complaint stated are insufficient to support the claim. The benefits connected with this proceeding are obvious. It avoids further trouble and expense, and enables parties instead of resorting for legal advice to a Practitioner who may possibly advise him ill, at once, to take the opinion of the court whether he has good grounds to found an action upon or not.

2.—I suggest that when the judge permits the entry of the suit, "a summons or a capias shall thereupon issue."

3.—I suggest that "on summons &c., being served, the parties" (unless personal attendance be dispensed with) shall attend before the judge in open court; and "if any matter shall appear to be in dispute, a day shall be fixed for the hearing, and the proceedings in the suit regulated."

According to the present rules for the courts of Requests a party defendant as also the Plaintiff are obliged to attend at once, after summons, prepared with evidence to meet every possible issue that may be raised. In this case, in many an instance, either witnesses have been unnecessarily brought up, or the necessary witnesses have not been cited.—This causes useless expense. This rule has been copied without consideration of its effects. Its faultiness is thus exposed in the Law Review No. XIV P: 250.

"In the superior court, at the end of eight days after service of the writ, the plaintiff delivers to the defendant a declaration, to which the defendant must plead in four days, and if he fail to do so, Judgment is signed against him. The costs are greatly increased by this proceeding as we shall show hereafter, but the suit is ended here and the Plaintiff has not been called upon to sacrifice one moment of his time, or to put himself to any inconvenience or expense in proving his demand. In the county courts, however, the case is very different. On the day appointed for hearing he must go prepared to prove his case although the defendant may not have the smallest intention of requiring him to do so. He has no means of knowing before hand whether it is to be opposed or admitted, whether he is to be met with every objection that ingenuity can suggest, or to be allowed to take a judgment without question or dispute. He must therefore be prepared for contest, and expense and annoyance of this preparation; and the vexation of finding that it has been unnecessarily taken is enough to make many a suitor forswear altogether a course of Proceeding that so needlessly gives rise to them."

The summons should direct the defendant to produce all documents on which he may rest his defence, that they may be admitted or denied by the opposite party.

The above is as summary a kind of procedure as can be devised applicable to a vast variety of cases of all kinds and of all amounts. It will be at once seen there will be three stages. 1.—The entrance of the claim. 2.—The appearance of the parties. 3.—The hearing or trial. A portion of the cases will terminate at the first stage. Another portion at the second, and the remainder at the third. A small number of cases not so triable, and of a very complex nature will arise, whether the amount of the suit is small or large, in which written pleading will be of considerable advantage. Sir E. Perry. (Pamphlet No. 16.) observes.

"There remains the class where there really is something, whether of law or fact to try; where it is necessary to impress firmly on the mind of the judge minute facts from which legal conclusions are

derivable where it is expedient to chalk out the limits beyond which the discussion is not to proceed at the trial; cases, in short, in which the advantages afforded by careful written statements should be available to the parties" (complex cases).

In these cases the pleadings should never proceed beyond the answer. On the filing of the answer after examination of parties, if necessary, the issues should be settled and a day for hearing immediately fixed. So that this class of suits must also terminate, at the third stage, at the most; that is, so far as judgment is concerned.

I claim nothing of originality in the above suggestions. The procedure is that recommended by Mr. J. Mill and Sir E. Perry. Written pleadings should be avoided as much as possible. In fact this is exactly what Mr. Cameron recommended in his report. He says:

"4th—I recommend that the pleadings shall consist of an oral altercation between the parties in open Court, and that a minute thereof shall be made by the officer of the Court under the direction of the judge."

"5th—I recommend that at the time of pleading each party, shall state the names of the witnesses whom he intends to produce at the trial, and the matters which he expects them respectively to prove, and shall describe the documents which he intends to produce at the trial, and that a minute thereof shall be made by the officer of the court, under the direction of the judge."

"6th—I recommend that each party shall be subject to cross-examination by his adversary as to the statements made by him in the pleadings, and as to those relating to evidence, and that each party, if he desires it, shall be assisted by an advocate or a proctor who may examine him in chief, and cross examine his adversary as to their respective statements."

Mr. Mill, thus supports these views:

"The stages we have observed are three. The *first* is that in which the Plaintiff adduces the fact on which he relies, and is met by the defendant either with a denial of the fact, or the affirmation of another fact, which, to maintain the suit, the Plaintiff must deny. The *second* is that in which evidence to prove or disprove the fact on which the affirmation or denial of the parties ultimately rests, is adduced and decided upon. The *third* is that in which the operations are performed necessary for giving effect to the sentence of the judge." (Execution.)

"What is desirable in the operations of the first stage, is, 1stly—That the affirmations and negations with respect to the facts should be true; and 2dly—that the facts themselves should be such as really to have the quality ascribed to them. For the first of these purposes,

all the securities, which the nature of the case admits of, should be taken, for the veracity of the parties. There is the same sort of reason that the parties should speak truly as that the witnesses should speak truly. They should speak, therefore under all the sanctions and penalties of a witness. They cannot indeed, in many cases swear to the existence or non-existence of the fact, which may not have been within their cognizance. But they can always swear to the state of their belief with respect to it. From the second of the above purposes, namely, that it may be known whether the facts affirmed or denied are such as to possess the quality ascribed to them, two things are necessary; the first is, that all investitive and divestitive facts, and all acts by which rights are violated, should have been clearly predetermined by the legislature; in other words, that there should be a well made code; the second is that the affirmations and denials with respect to them should be made in the presence of some body capable of telling exactly whether they have the quality ascribed to them or not. The judge is a person with this knowledge, and to him alone can the power of deciding in matters so essential to the result of the enquiry be entrusted."

"To have this important part of the business done then, in the best possible way, it is necessary that the parties should meet in the very first instance in the presence of the judge. A is asked, upon his oath, to mention the fact which, he believes, confers upon him or has violated, his right. If it is not a fact capable of having that effect, he is told so, and his claim is at an end. If it is a fact capable of having that effect, B. is asked whether he denies it or whether he affirms another fact, either one of those which, happening previously, would prevent it from having its imputed effect; or, in a civil case, one of those which, happening subsequently, would put an end to the right to which the previous fact gave commencement. If he affirmed only a fact which could have neither of these effects, the pretensions of B. would be without foundation."

"We have now seen the whole of the operations to be performed. The parties are required to state before the Judge the investitive or divestitive facts on which they rely. If they state, for this purpose, a fact which is not possessed of those qualities, they are immediately told that it is not possessed of them, and not calculated to support their claim. They come, by two or three steps at the longest, to a fact upon which the question ultimately turns, and which is either contested or not contested. In a great many cases it would not be contested. When the subject was stript of disguise, the party who had no right would generally see that he had no hope, and would acquiesce. The suit

would thus be terminated without the adduction of evidence. When it was not, the cases would be frequent in which it might be terminated by the evidence which the parties brought along with them. In these cases, also, the first hearing would suffice. A vast majority of the whole number of suits would be included in these two sets of cases. For the decision of a vast majority, therefore, of the whole number of suits, a few minutes would suffice. When all the evidence could not be forthcoming at the first hearing, and only then, would a second hearing be required. In this mode of proceeding, justice would be, that without which it is not justice, expeditious and cheap.

"In all this there is nothing which one man, with the appropriate intellectual and moral qualities, is not as competent to perform as any number of men. As one is cheaper than any greater number, that is one reason why no more than one Judge should be allowed to one tribunal."

PROCEDURE.

Criminal.

4.—I suggest that every party having any charge of a criminal nature to make in the Criminal Court, shall be allowed to do so by personal application to the Judge, and no previous committal of the accused by a Justice of Peace be considered a requisite in any case whatsoever.

It is unnecessary to enter further into rules of criminal procedure as the rules enacted for the District Courts in this Branch, and now in operation, are extremely simple and summary.

PROCEDURE.

Criminal and Civil.

5.—I suggest that every party to a suit, whether Criminal or Civil, shall be allowed free liberty to have the aid and assistance of counsel at all the stages of a cause, but such counsel shall not be at liberty to argue or address the Court at length without the leave of the Judge Reasons have already been given.

6.—I suggest that every party engaging the services of counsel shall be at liberty to contract for the remuneration of such service, the sum agreed upon being entered in the proxy given to such counsel; but no party shall be at liberty to charge, against the opposite, any other fees than the following.

Proctor's Fees chargeable by one party against another.

Appearance in Court to lodge plaint .....£. „ „
Appearance in Court to settle issues ..... „ „
Attending Trial (once only) ..... „ „ „
Suing out writ of Execution ..... „ „ „

The reasons for restricting the counsel from arguing at length without permission have been already given; but full liberty should be given to cross-examine witnesses and parties under due control. I have already argued the propriety of allowing every party to recover his reasonable expences which he has incurred in retaining counsel, but I do not see why every counsel should be compelled to accept the same sum. This may be safely left to be arranged between the employer and the employed. Let every man put his own value upon his services and get employment if he can. This is the principle of free trade. Only care should be taken to protect the defeated party from a too burdensome charge of costs, without necessity, and at the option of the party opposed to him. If I rightly remember, this rule has been adopted in the New York Code, and it prevails here in respect of Advocates. I only desire its extension, there being no reason particularly under the procedure I have suggested, for the distinction between the two branches of the Profession, Advocates and Proctors. It is notorious that one man's services are of greater value than those of another, and why should both be sold at the same rate. Legal compulsion in such a case merely produces evasion; they *will* not sell at the same rate and the law becomes a dead letter. It will perhaps be objected, that the practitioners, by mutual agreement, are likely, in such a case, to put a monopoly price upon their labor, and make extravagant demands. This objection will equally apply to Advocates, and yet the rule has produced no such effect. Each Advocate fixes his own rate of charges, as the market value of his services stand, and lowers or raises it as the demand diminishes or increases. If, haply, a common understanding among the Practitioners should, for a time, enable them to make exorbitant charges, the politico-economic principle will soon come into operation; high wages will introduce more labourers and bring down the wages to a natural level. Against exorbitant demands the liberty to conduct one's own cause will be another check.

If the bar is to be maintained a fair rate of remuneration should be allowed, to attract men of education, and enable them to fill a respectable position in society.

The previous settlement of fees will extinguish the desire to protract proceedings. The fees I above proposed are for unavoidable services,

When the rate of remuneration has been agreed on between Proctor and client, it may be made to appear in the Proxy, at what stage or stages, it is agreed that it should be discharged either in whole or in part.

7.—I suggest that an appeal should be allowed from Courts both Civil and Criminal upon every question of law and upon every question of fact.

I agree in the rule that "in case of any miscarriage through the Judge's fault at a trial, means should be afforded of reversing the decision, whether upon a question of evidence or upon any direction given by the Judge: and in any manifest error in those who decide on the fact, a new trial should be allowed. But no relief should be given against the consequences of any oversight committed by the party or his advocate."

Mr. Mill justly remarks,

"What is required to be done, in the case of an Appeal, is the first thing which deserves to be ascertained. An appeal takes place in consequence of a complaint against the previous Judge. Where no complaint, there is no appeal nor place for appeal."

"A complaint against the Judge must relate to his conduct, either at the first, the second, or the third stage of the judicial operations."

"If to his conduct at the first stage, it must be a complaint of his having permitted a party to rest upon a fact which had not the investitive or divestitive quality ascribed to it; and this implies either a mistake with respect to the law, or that he allowed the decision to turn upon a fact which did not embrace the merits of the question It is evident that, for the decision of this question all that is necessary is an exact copy of *the pleadings* and the transmission of it to the Court of Appeal."

"If the complaint relates to his conduct at the second stage, it must turn upon one of two points; either that he did not take all the evidence, or that he did not properly determine its value."

"If he did not take the evidence properly, by a failure either in assembling the sources of it, or in extracting it from them when assembled, the proper remedy is to send back the cause to him with an order to supply the omission; or if he be suspected of having failed wilfully, to send it to the Judge of one of the neighbouring districts, to retake the evidence and decide."

"If the complaint relates to a wrong estimate of the evidence, the statement of it transmitted to the court of appeal, with the reasons assigned by the Judge for the value affixed to every portion of it, will enable the Appellate court to decide.

To the comprehensive appeal thus proposed to be allowed, the only objection that may be offered, is that too much appeal business is likely thus to be thrown into the Supreme Court. This objection is grounded on the supposition either, that so many would be the errors of law and errors of fact committed by the Judges of original jurisdiction, that appealable cases would be very numerous; or that parties would resort to appeal without just grounds. If the former, the appeal becomes the more indispensable, for want of which, much injustice will be done throughout the country; but if the latter, the proper course to check it is to punish those who frivolously appeal and make an abusive use of so wholesome a liberty.

Moreover it is to be taken into consideration, that the proceedings which will go before the Appellate Judges for revision under the proposed simple system, will not be incumbered with the mass of paper and written pleadings which now go to the composition of a file; so the labour of perusal will be greatly lessened.

Thus have I endeavoured to sketch out a course of simple procedure, giving only the broad outlines of it, and omitting all minor detail, simply to show, that there is nothing impracticable in it. The Legislature seems to assume that such is practicable with reference to 9-10ths of the cases. I only argue, that it may be indefinitely extended with benefit.

Perhaps some will think it strange that I should take for my authorities a few jurists or theoretic men chiefly, and not Practical Lawyers. The reason is obvious; that these latter are mostly technical men, wedded to an already existing artificial system, men of precedent and not of principle. The former are more likely to propound an improved system than the latter. Sir E Perry correctly observes:

"But I ought to premise, that I do not consider practitioners like Sir L. Peel and myself to be the fittest persons to conduct this sort of enquiry. The Germans have a very good division of those who cultivate the study of the law in *Theoretiker* and *Praktiker*, the former are the scholars by whom the science is advanced, the latter are the practical men who apply the doctrines patiently thought out under the midnight lamp to the every day business of life. A similar distinction prevails no doubt as to all sciences, and a ready illustration occurs to my mind in the passing political events of the day, where one may see the practical statesmen of the House of Commons carrying out the theories and enforcing the doctrines of the philosopher of 70 years ago," (The New corn laws were just passing through Parliament at this period,) "but it is in the Law especially that the distinction is most marked."

It will perhaps be asked, how comes Sir E. Perry then to have taken views supposed to be correct, and not his other brethren. He explains the reason.

"It was my good fortune just before I entered the chambers of a special pleader to hear the great speech of Mr. Brougham on Law Reform in 1828, and very shortly afterwards to become acquainted with the works of Mr. Bentham. From that moment to the present, I think, I may fairly assert, that I have never lost an opportunity, whether in conducting the technical business of a Pleader's office, practising at the Bar, reporting the decisions of the Court of Queen's Bench, visiting the law courts of continental nations, or studying the works of theoretic and practical writers, of endeavouring to make myself acquainted with the rationale of rules of procedure and the comparative value of the methods adopted for the ends in view. The advantages which Indian experience confers in this respect, and especially the presidency of Bombay where a court of natural procedure had sprung up under the tutelage of such men as Sir William Syer, Sir James Macintosh and Sir Edward West, are in my view so great, that now when I am approaching the end of my legal career, and when I have arrived at a time of life at which hasty and inconsiderate opinions are not fairly presumable, I do not hesitate, even at the risk of being thought dogmatic, to express my opinion in the strong and confident tone, which I have adopted above. According to the theoretic views laid down by Mr. Bentham, the appearance of the parties before the Judge at the earliest stage of the suit is the simplest, the most rational, the most economic and most satisfactory method of settling the matter in dispute. In nine cases out of ten, it enables the suit to be disposed of at once without any expense; in the tenth case it brings the parties on the stage who know better than any one else what the real matter in dispute is, and enables arrangements to be made for the further conduct of the suit. The method is eminently plastic, and allows of the complicated entangled case of the rich suitor to be equally and carefully disposed of as the simple difficulty of the poor for which a five minutes audience will often suffice."

"It is moreover founded on the principles of common sense; it is to be found occurring in the jurisprudence of all nations before chicanery has been allowed to raise its head, and seems so obviously to be the mode which reason would dictate for solving a difficulty, as to make it a fundamental principle in natural procedure. I feel bound to depose that all the experience which I have gained both from men and books confirms the truth of these doctrines."

It will be seen that in working out the Procedure which I suggested,

the Judge is made to supervise the proceedings from their inception to their ultimate termination with judgment; and little or no room is left for the miscarriage of a case by the fault or neglect of practitioners. These latter come in merely by way of aid to the Judge and the parties. Upon the fitness and aptitude of the Judge must therefore depend almost entirely the result. No system, however scientifically and well arranged, can be worked with unfit instruments. Sir E. Perry has stated "the Judges" of this Island "for the most part have not been very happily selected." It would ill become me to express any opinion on the subject; but if this observation be correct, means should be adopted to prevent a like evil occurring again. Those at present holding office may be deemed as having acquired certain vested rights, to endure through life or during good behaviour and ability to work, and their removal will be difficult except by transfer, for which the occasions will be few; but prospective provision is not impossible. Besides character for honesty, a Judge should possess two indispensable requisites; legal learning and aptitude, and a knowledge of the language of his District. Without these, efficiency is very uncertain. The device I would suggest to secure these two latter (the first being left for enquiry by the Governor who selects) would be two classes of certificates, one obtainable from the Judges of the Supreme Court, (who should never grant them to any without due examination) as to legal efficiency; and the other from a Board of standing examiners at Colombo, certifying as to a candidate's knowledge of either one or both of the native languages. Of this latter there may be two kinds; the first to be granted to those who possess a full, thorough and critical acquaintance with them; and the other to those who possess it sufficiently for all practical purposes. The issue of these certificates should not be deferred to the moment of a vacancy, but should be made obtainable of right by all the Advocates of the Supreme Court and by all who belong to the Civil Service or are admitted as writers. The Governor may exercise his patronage by allowing any other whom he selects to apply for such certificates. The possessors of these certificates should be considered as the only persons eligible to fill a vacancy as Judge.

Would it be too much to suggest that even the Bench of the Supreme Court should be filled by persons either selected from the Local Judges or from Queen's Advocates of three years standing in the Island who have obtained the above Language certificates. At present, occasionally, a Judge is imported from a distant part of the world, and he immediately on his arrival, assumes duties which he is but imperfectly prepared to perform. Of local customs and laws he can know but little, and of the people literally nothing. Does a Judge so sent make the

same estimate of evidence on his first arrival as he does after 2 or 3 years' experience? In administering Criminal Justice in cases of the gravest nature this is a serious consideration.

Mr. Mill justly observes

"The Judges of Appeal ought all to be chosen from the Judges of primary jurisdiction, not only on account of the education and the experience received but as a step of promotion, and a proper motive to acquire the requisite education, and to merit approbation in the inferior employment. There is the same propriety, and for the same reason, in choosing the Judges of primary jurisdiction from the deputies."

If selection for judicial office be made, as I have above suggested, it will not only attract to the Island Lawyers of respectable ability and legal acquirements from the British Isles in the expectation of obtaining judicial offices even the highest,—but will give no small impulse to those born in the Island, by creating wholesome emulation. Perhaps it is too much to expect such liberality, but the country should demand it and reiterate the demand till it is given.

Further, the substantive law of the country has been pronounced to be defective. Codification, though not an impossible task, is one of difficulty and time. But certainty may to some extent be secured by maintaining the unity of the law as administered in the several Courts. Uniformity depends on the knowledge of decisions. May not a half yearly publication of Reports of decisions take place under the management of the Registrar of the Supreme Court. Such publication should comprehend the Collective decisions of the Supreme Court, other decisions of the Appellate Court considered by any of the Judges to be of sufficient importance, and such of the decisions of the local Courts as may be sent by the Judges of these courts, provided the Registrar agrees on their importance or value. The gentleman who at present holds the office of Registrar may be fully competent to perform such a duty with occasional assistance from the Judges. The value of such a publication would be great. It would keep both the Bench and the Bar of each court informed of the course of decisions on many points of law. As precedents the decrees of the local courts cannot be of any great authority. Still, as guides, to a certain extent, they are not without their value.

It now remains for me only to make a remark or two, though having no legitimate connection with my subject, in respect of Judicial expenditure. The primary motive which impels individuals to form themselves into societies, under an organized government, is the security and the protection of their persons and property. Every good Government is bound to afford this support, and any failure on its

part so to do, defeats the principal object for which it stands established. Protection of person and property must be given in two ways; that is, from external enemies and internal factions, who make a direct attack on the Government and the governed; and from injuries which one individual may sustain at the hand of another. In order to afford the former, a military force is maintained at the expense of the State; and for the latter courts of Justice, and a Police, the latter being no less important than the former. The redress and protection administered to parties by Courts of Justice both Civil and Criminal, may be considered a public benefit conferred upon all, in as much as it tends to repress the commission of injuries on others; just as a Police force detecting offenders creates public security and is therefore a public benefit. Properly speaking, the whole of the expenses attending the Administration of justice both Civil and Criminal should be defrayed out of the general Revenue, and no portion of it should be laid as a burden on the suitor; for that is a part of the understood original compact with Government. Justice should be administered gratuitously. Yet this plain truth is often lost sight of, and under the shallow pretence of suppressing and not encouraging litigation,—that is the seeking of redress for injury or alleged injury,—a heavy impost is laid upon litigation, and justice is sold to parties in courts, as other commodities are sold in the shops. If any portion of the expenditure comes from the general Revenue of the state, it is grudgingly bestowed, and every reduction deemed a public gain. At the time Mr. Cameron made his report in 1831, the cost of judicial establishments together with contingencies and circuit expenses, but exclusive of Police, Fiscals, Queen's Advocate's Department and Goals, he shows to have been £36,245. 0. 11. that is

	£.	s.	d.
Supreme Court	13,030	18	0
Provincial Courts	8,987	11	6
Magistrates' Courts	6,008	15	6
Judicial Commissioner Kandy	2,443	14	0
Magistrate Kandy	345	0	0
Judicial Agent Kurnegalle	272	14	0
Half of the fixed Establishment of Agents of Government	2,919	10	0
Contingencies fixed	1538	7	0
Ditto——unfixed	826	6	6
Circuits of the Supreme Court	872	4	3
Total—	£36,245	0	11

On this Mr. Cameron, observes,

"The expense of the actual judicial establishments, described in the first part of this Report is £36,245: and I cannot undertake to say that justice can be effectually administered to 800,000 people at a much cheaper rate; but I can pledge myself that the sum required for that purpose, if my views should meet your Lordship's approbation, will not exceed the amount of the present expenditure."

The expense for 1849, as given in the Almanac of last year, stands thus:

Judicial Establishments.			
Supreme Court	£42,476	5	3⅜
Queen's Advocate, Deputy Queen's Advocate and Deputies.....			
Registrar of the Supreme Court.....			
District and Police Courts and Courts of Requests			
Justices of the Peace for the Eastern, Northern &c. Provinces			
Administration of Justice.			
Supreme Court	£ 3,375	15	5¾
District and Police Courts			
Fiscals of the Provinces			
Police and Goals.....	5,633	15	11½
Fiscals in the Provinces including Goals	7,971	8	1¾
Total per Annum.—	£59,457	4	10½

The population of the Island in the same year had increased to 1,508,882. For the purpose of instituting a comparison with the year 1831, deduct Fiscals, Police and Goals (even without excluding Queen's Advocate's departments) that is £13,605. 4. 1. There will be then left a sum of £45,852. 0. 9½: and the increase compared with 1831 is only £9,606. 0. 10½. while the population is now almost doubled. So the expense has by no means kept pace with the increase of population.

Again, taking the entire expenditure, without deduction, which has been incurred for judicial and Police purposes (though a considerable portion of this latter is paid out of a special tax for the purpose) at £59,457 4 10½, it is hardly 10 pence per head; but of this sum we may safely assume for want of better data a quarter has been realized by the sale of stamps. Then on the general revenue the charge laid is £44,582 18 8¼, about 7½d. per head of the population. But if all proper deductions be made it will not exceed

six-pence. Can this be considered as too great a tax or a call on the General Revenue to give protection to person and property? How much more do we pay for less beneficial purposes because the benefit is of a more direct and palpable kind? I make these observations not because I apprehend that my scheme will entail a larger expense; far from it, but to convince those who argue for a reduction, that the expenditure at present incurred is by no means unreasonable.

The task I assigned to myself I have now finished. *Whether I have performed it well or ill,* I must leave the reader to judge. Were it but to rouse enquiry and thought, I do not despair of seeing a well digested system, one proceeding upon Principle, established—The honor and glory of achieving such a task is within the reach of our present Governor Sir G. Anderson, who is now placed in a position to introduce, not a temporary remedy, but to introduce and establish a comprehensive scheme of a permanent nature, subject to no material alteration or future change; founded on principles advocated by the greatest jurists, and which will surpass in perfection all that now exists in any part of the British Empire.

Finally, I have to apologize for thus deviating from the prescribed routine of my duties and intruding myself on the public notice. The only excuse I have to offer is the desire to perform, what our good Chief Justice would call, the act of a good citizen—the prevention of, what I consider, a public mischief by means of faulty Legislation.

THE END.

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NOTE.

As I have ventured to quote largely from Bentham and to support most of my suggestions on the sanction of his authority; but as the amount of authority attaching to his name and the connection in which he stands with the modern Law Reformers may be but little known to the general reader, I shall perhaps be forgiven when I append this further extract from the Law Review of November last—P. 94.

"The improvement of Arbitration, the introduction of Reconcilement, the institution of Tribunals of commerce, are all intimately connected with the preference of *natural* to *technical* procedure. It is also stated by Lord Brougham, in his answer to Mr. Lyne, that all the measures which he has at any time brought forward formed parts of a system whereof that preference was the foundation. We may confidently add that the great improvements now in contemplation, whether in legal or equitable procedure, must result in bringing the parties as speedily as possible to confront each other, and state their cases intelligibly and plainly, that is, *naturally*, not *technically*. Then let us never forget to whom we are indebted for taking this great distinction three quarters of a century ago, and whose language we are now using in urging the fundamental doctrines, long held in abhorrence by some, ridiculed by others, regarded as visionary by all. When we name Mr. Bentham to such of *our* readers as are Law Reformers, we give a name familiar to *them*; but beyond this circle we fear the name is about as little known as in Justinian's time were the names of the great civilians whose learning he was causing to be digested, and whom, when one was mentioned, it is recorded that the listener thought some foreign fish was alluded to. Certain it is that there seems a general disposition among those who address the public though the press, and even among those who report the debates in Parliament and at meetings, to sink all mention of that illustrious name, as if when it fell upon the hearing it connected itself with no distinct idea. As friends to the improvement of jurisprudence, the most important subject that can engage the attention of mankind, we are bound to express our sense of this injustice. True, the Philosopher seeks after truth for its own sake; and the philanthropist pursues his benevolent objects for the gratification which he finds in benefiting his fellow men. But it is both just and expedient, both the duty and the interest of the community—to hold in perpetual remembrance their great benefactors, whose exertions may be stimulated by the examples of public gratitude, while a prospect of the pleasure that it is fitted to bestow upon generous minds can never make their motives appear less pure."