THOUGHTS

ON THE

GOVERNMENT, UNION, DANGER, WANTS, AND WISHES,

OF THE

CANADAS;

AND ON THE PROPER LINE OF POLICY OF THE BRITISH PARLIAMENT

IN THESE RESPECTS:

BEING A LETTER TO MR. HITCHINGS OF TORONTO, OCCASIONED BY, AND CONTAINING STRICTURES ON, ONE ADDRESSED TO HIM BY DR. DUNLOP, CONVEYING HIS THOUGHTS ON THE SUBJECT OF

RESPONSIBLE GOVERNMENT.

BY CHARLES SCOTT.

"Unbounded materials of agricultural, commercial, and manufacturing industry are there: it depends upon the present decision of the Imperial Legislature to determine for whose benefit they are to be rendered available."—*Earl of Durham. Report.*

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MONTREAL:

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ADVERTISEMENT.

THIS is a very hasty production, commenced as a mere newspaper review of the letter of Dr. DUNLOP, extended under the pen to the dimensions of a pamplet, and made to embrace subjects of higher or more general interest, only during its progress through the press. Though it will doubtless betray much error, as being the production of a man extremely ignorant of almost every thing relating to the history and constitution of these Provinces; it is hoped that it will also be seen to be the production of one that is not a stranger to such subjects, in their more general relations: of one who has not been unaccustomed, in these respects, to distinguish between the evil and the good, and to trace the various evils which he may have detected through all their various windings to their most hidden sources: of one who, while he scorns the affected singularity of the fopling, is not afraid to have, on any subject which he has studied, an opinion of his own: of a man, in short, who, while he knows how to think and dares to speak, will neither pander to the passions of the mob, nor spare the corruptions of the monopolists of pelf and power. Such as it is, he gives it to the public, with the hope that it may serve—in some degree—in some respect—their interest.

THOUGHTS, &c.

A LETTER.

——— HITCHINGS, Esq.

Sir,—A few days ago I observed in the *Montreal Gazette* of the 12th instant, copied from the *Toronto Patriot*, the following letter of your friend Dr. Dunlop, with an admiring panegyric by the first-named journal, recommending it to the attentive and good-tempered perusal of the *advocates* of Responsible Government, as containing much forcible and sound constitutional doctrine, conveyed in the Doctor's usual candid and straight-forward style. Having followed this advice, and formed an opinion of the production very different from that of the *Gazette*, and of its subject somewhat different from that of your friend, though a stranger both to yourself and the Doctor, I take the liberty to address to you this letter. Besides a review of that of your friend, it will be found to contain my thoughts on some other matters of great importance besides the subject of your enquiry, equally perhaps, and now especially interesting, as being connected with the projected Union of the Provinces.

Gawbraid, *Sept.* 25, 1839.

My Dear Hitchings,—You ask me what is my opinion of Responsible Government. I will tell you in a few words—I look upon it as a *trap, set by knaves, to catch fools.* To which of these classes the Laird of Woodhill, who is at the head of the Upper Canada Chartists—or you, who have judiciously appended yourself to their tail, belong, I own has puzzled me. With you, as a lawyer, the thing is not so bad, as great allowance is made for you folks in the law, for making wrong right—but for him who is only a Barrister, and who never was accused of being a lawyer, I have no excuse—for, even in walking the boards of the Parliament House, he might have met with some Bartoline Saddletree, to have informed him, that spouting sedition to a rascally rabble, in the spirit, and nearly in the words of his friend, Mackenzie, was not secundum Erskine, Dalrymple, or M'Laurin. "It is our right, and we must and *will* have it," means, being translated into English, "if they won't give it you, take it by force."

I have not read either Gulliver's lucubrations or your own—God forbid! Nothing but the sentence of a Court of Justice, with the Sheriff and his Constables to see it inflicted, could induce me to undergo such a penalty—but I have read the correspondence between him of Laputa and him of Woodhill, and a washy, trashy, milk and water hog-wash it is, as I would wish to cope withal on the longest summer day, (and that is the 22nd of June,) for the remainder of this, or the first half of the next century. Neither of the combatants are straight-forward hitters, and each (most needlessly) is afraid of the other. Now I can assure both those heroes, that there is no fear of his being floored by a right and left facer from his opponent, or doubled up, by a "nasty one," on the bread basket,—a pat on the lug, or a scratch on the nose is the outside of what can be expected from these controversial pugilists.

The gentle and judicious Mr. Gowan also has favoured the world with an article on the subject, but not having a surveyor's chain by me, I am not capable of judging accurately of the *extent* of its merits. My worthy friend and ally, the wet Quaker too, keepeth up a most harrassing fire of pop-guns, as if an impression were to be made on the head of the public, as water wears the stone, "*non vi*," (most assuredly not,) "*sed sæpe cadendo.*"

I was once of opinion that some means similar to those employed at home, of making the Government responsible to the people, might be adopted in this country, but observation and reflection have convinced me, that the way proposed is quite impracticable here. It is quite clear, that the House of Assembly is not a body of sufficient intelligence, nor in their collective capacity of even sufficient honesty, to be trusted with the management of the check necessary to be kept over judicial or monetary concerns.

This is not a matter of prejudice or theory, nor is it arguing in the plu-perfect tense, of what might, could, would, or should happen, but a matter of fact which is as susceptible of proof, as any fact to be substantiated on evidence less than mathematical. Look at the proceedings of every House of Assembly, of every shade of political opinion, in the management of the funds of the Province, for the last fifteen years, and tell me if the men who have squandered the resources of the country on such jobs as the Welland Canal, (which I don't object to as an undertaking, but as to the misapplication of the money employed in it,) of that most absurd and nefarious job the St. Lawrence canal,—of all the jobs of the late Parliament, for which jobs Sir F. B. Head sent them packing, and the colony confirmed his sentence, and then tell me upon what principle, save that doubtful one of setting a thief to catch a thief, you could ever propose to commit to these worthies the surveillance of their brother plunderers.

No, if you are to have any responsibility on this side of the water, let it rest with the Legislative Council, a body of men sufficiently independent both of the rabble and the Family Compact to do justice, without fear or favour, and by making their proceedings in all investigations an open Court, you exercise a more effective and beneficial control by the people, than you ever would do through their representatives in Parliament. On the whole, however, considering the average of Assemblies, of Councils, and Lieut. Governors that I have known, I would infinitely rather commit the charge of checking abuse to the latter, than either of the others, and for this reason, that an individual is always really responsible for his actions—a body, however constituted, never is so.

But if your plans had been as judicious as they are in the extreme absurd, the time you have chosen to bring them forward is enough to condemn them. The Province just recovering from rebellion within, and still obnoxious to invasion from without, all minor matters should be laid aside, and before you proceed to legislate for the Province, you should take care to secure the possession of it, and this is not to be done by dividing the well affected, and giving the enemies of the British Constitution a point round which to rally. When the "Carle o' the Carse" set up for a Daniel O'Connell, he should first have been sure, that he had a fair share of Dan's talent and of Dan's impudence, and you and Gowan and Fothergill, and Carroty Hughie, should reflect, that while you are grubbing for yourselves holes under the foundation, you may bring the house about your ears,—that if you are successful in your present agitation, it will certainly end in sending men into the

next Parliament on your shoulders, who are inimical to British supremacy and British connection (the Radicals not being fools whoever else are), who will disgust the people of Britain with the Province, and end in its becoming an appendage of the United States. W. D.

Having perused this singular production, I very naturally inquired, Who is this doughty Doctor? and great was my surprise on being told, that he is a personal—I think it was said a *particular* friend of that most accomplished and popular writer, Professor WILSON, and that he had been made to play a conspicuous part in the *Noctes* of Blackwood's Magazine. So great, indeed, was my astonishment, that I was ready to exclaim—What! the Attic Bee of the Modern Athens a friend of a—(so I thought his letter shewed him)—vulgar, blustering, would-be three-man beetle, conceitedly flaunting that proud insignia of "science," the champion's belt? What! he—the writer of this letter—whose commended style is that of Bell's Life in London, illuminated with gems of classic Latin, and blazoned with choice scraps of Billingsgate,—he—a friend of Professor WILSON! It seemed incredible. My impression had been that he was some cheek-by-jole of Dr. Boss—him—

> With a big bottle nose, and an acre of chin,
> His whole physiognomy frightful as sin.

I ought, perhaps, to beg pardon for having formed such an unworthy opinion of your friend; but the truth is, finding myself, not less than his "Dear HITCHINGS," looked upon as a new-catched fool in a knave's trap, it can hardly be wondered that my feelings should have prompted me to cast back at the looker a look of the kind above-mentioned. And verily, is it not enough to try the patience of any man, and much more of one thought to have been "born bilious," thus to be looked upon at all? But—confound the fellow! thought I; he has not been satisfied with this. Having fixed us in his horrid trap, away he sends us round the country to be made the sport of "the rascally rabble," like badgers or baboons. It is now more than a week since I first read the Doctor's letter, and it may be well for his wig that it is so. Had these strictures been written under the first rush of feeling, he may rely on it he would not have given me his "nasty one" for nothing. Either I much mistake my man, or I am not the man I was once thought to be, if, in return, I should not have peppered his snitcher. Ay, and if I had not tapped his claret, and battered his knowledge box, and sprung his 'tato trap, and gone

far to shift his wind, it would not have been for want of inclination. Fortunately, I remembered the friendly admonition—"good-tempered:" for oh! if it had so happened that your friend had found himself so served out, to the last day of his existence how must he have chewed the bitter cud of calm reflection! How must have rankled in his breast the thought, that he had thus been robbed of that on which he so confidently reckoned—

The earthquake shout of victory,
To him the breath of life!

Not doubting that the Doctor, on hearing of his fortunate escape, will be disposed to feel, as assuredly he ought, greatly grateful for the forbearance of his unknown adversary; and being equally assured that you are one of the Poet COWPER'S "friends indeed," and consequently determined not to be a whit less friendly for all the thump-back freedoms of your friend, I propose that for any thing offensive which we may have thought, said, or intended, or hereafter may think, say, or intend respecting him, we duly deprecate the Doctor's wrath.

Pardon, O pardon, great physician![*]
On stolid souls some pity take:
For wond'rous hard is our condition—
To drink thy beer,[†]
To brook thy jeer,
To stand thy sneer,—
Thy fists to fear—to fear and quake!

I have done with badinage, and now to business.

"I was once of opinion that some means similar to those employed at home of making the Government responsible to the people, might

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[*] I forgot to enquire in what profession the Doctor obtained his diploma; but suppose it must have been the medical. Surely—in the name of all the Saints—it was not in Divinity! and I should not willingly believe that he is titled LL.D. No: he must be "a member of the Esculapian line;" and I make no apology for presuming that, like his friend of "Newcastle-upon-Tyne,"

No man can better gild a pill—
Or make a bill:
Or draw a tooth out of your head,
Or bleed, or blister;
Or chatter scandal by your bed,
Or —— give a glister!

Indeed, taking this as a specimen of his prescriptions, I should imagine he must have had very extensive practice and think himself quite an adept in this last branch of his profession.

[†] "Hogwash:" the sort of stuff which the Doctor brews, and which he so well knows how "to *cope* withal."

be adopted in this country; but observation and reflection have convinced me that the way proposed is quite impracticable here." For a man that plumes himself on being a straight-forward hitter, this is a by-play sort of answer. Your question respected Responsible Government—the *thing*, and not the "means." Making a fortune is no bad thing, I fancy; but "the way proposed" by which to make a fortune, may be, and frequently is found to be, "quite impracticable." The Doctor may not like our way; but does his logic lead him to conclude that *therefore* he must denounce our end? The probability is—and we shall have other reasons for the opinion presently—that, instead of having *changed* his mind, or in consequence of its too frequent changes, the Doctor does not *know* it. Perhaps we shall have reason to conclude that he is one of those—and there are many such—who, with crooked spirits and shrivelled intellects, talk much, bark fearfully, but never think; strangely mistaking flippancy for eloquence, and positivity for truth. If this be his character,

Your muleteer's the man to set him right.

The Doctor proceeds. "It is quite clear that the House of Assembly is not a body of sufficient intelligence, nor in their collective capacity, of even sufficient honesty, to be trusted with the management of the check necessary to be kept over judicial or monetary concerns." I know not whether I exactly understand the Doctor here, or it may be that I do not understand the subject. By mentioning judicial as well as monetary concerns, it would seem that he had an eye to the appellate jurisdiction of the Governor and Council, and which appears to be somewhat similar to that of the Privy Council in England. "From the decrees of the Courts of Chancery in the Colonies, an appeal lies to the King in Council here in England; and from the judgments of the Courts of Common Law in the Colonies, a writ of error lies to the Governor and Council of the Colony; and from their decision an appeal (in the nature of a writ of error) lies to the King in Council here."* By the 16 Car. 1, c. 10, s. 5, it is expressly declared that neither the King nor the Privy Council have any jurisdiction or power to take cognizance of any matter of property, real or personal, belonging to the subjects of "this Kingdom." In these Colonies, it is otherwise; and I conjecture that the Doctor alludes to some expressions of dissatisfaction by the Assembly on that account, or to some pretensions to a right

* Chitty on the Prerogatives of the Crown. p. 31. Note *(c.)*

to sit in judgment on the conduct of the Judges in this Court. Be this, however, as it may, the Doctor takes his stand against the pretensions of the Assembly principally on the ground, not of incapacity or want of intelligence, but of honesty. It is not that the Assembly is not competent to be a check on the Council, so much as that they are unworthy to have a check on the financial administration of the country, as proved by their own squandering of its resources. Now, if you contenders for Responsibility residing in the Upper Province have no more formidable arguments to "cope withal" than any that have been or that can be drawn from "such jobs as the Welland Canal," I should think you might calculate on an easy and very harmless victory. It is for us in the Lower Province to prepare for conflict. Here it is that we shall have to stand against repeated discharges of whole parks of artillery, such as can at any time be cast out of suppressed rebellion, national antipathy, political disaffection, treachery, and treason. In the mean time (for as yet we have hardly begun to skirmish), it surely is something to our purpose, that an adversary so formidable and straight-forward as Doctor DUNLOP, should concede a check upon the Council as "necessary to be kept." Such a *check* Lord DURHAM did not find, and such a *necessity* for their being checked, is just what we insist on.

It is necessary that the Executive Council be checked: but hitherto it has not been checked; *ergo*, it is time there was a change. Your friend has granted the major: he will hardly venture to cry, Non sequitur. It would seem, therefore, that his only chance is in attempting to explode the minor. He must endeavour—for I hope he does not intend to quit the field—in order to demolish the argument above stated, to make "quite clear" that there is no necessity for any change, because the check that has been, and that is, is just what it ought to be in kind, and sufficient in effect. It may be well, however, that your friend should have a gentle hint, that if this is really his opinion, and what he means to establish so that it will stand, it will not be his saying what he thinks, nor his bluntly asserting it; no, nor his unwearied or even endless reiteration of it that will serve his purpose. Facts are against him: and in opposition to their testimony, Truth never can be made to speak. *He* may shout—*She* will be silent. If, as respects Responsibility, he undertakes to *prove* that whatever is is right, *hand him the Report*, is my advice, *and bid him*—not bark at, but—*answer* THAT. Your friend will cut a very sorry figure if he attempt it.

A House of Representatives, pretending to be established *on the principle of a Representative Government, according to the English Constitution*, and yet denied all controul over the administration of Government affairs, is a perfect fraud. What does it? What was it meant to do? Merely to give advice for the people's welfare to those whose interests are antagonist, and who can snap their fingers with impunity? To pass bills for the people's welfare, merely to see them systematically rejected? It is not thus in England. What makes the difference? RESPONSIBILITY. "The constitutional responsibility of the advisers, ministers, and officers of the Crown," says Chitty,* "not only operates as an inducement to them to act with caution, but enables the people, through their Representatives, the House of Commons, to expose, by an impeachment, to public view, to the eye of the world, the corrupt, the ill-advised, or impolitic measures of administration." When men love darkness rather than light, we have reason to suspect that their deeds are evil. We want our Representatives to have the means of exposing certain secret springs and movements "to public view, *to the eye of the world.*" We ask for our Assemblies the power to see, to make known, to arrest; and, if necessary, to punish. In fact, we want a Representative—not House, but Government, according to the true principle,—the English; the only one, as history and experience prove, consistent with established liberty or settled peace. If this cannot be allowed us; if nothing more in this respect can be than has been granted, better far that we should be deprived of our pretented "Constitutional" self-government in toto. What we want that we have not, and what we might have consistently with the supremacy of the Imperial Government, is SO MUCH OF ENGLISH LAW AND LIBERTY AS THE NATURE OF OUR SITUATION WILL ALLOW. In the meantime, I have seen enough to justify my saying, without hesitation, If it be not safe or possible to give us more than we have at present, too much has been given us already. What we have is what pretends to be—restricted, indeed, but still to some extent—self-government. I maintain it is not self-government at all. If we are worthy or capable of nothing better in this respect than what is merely nominal, let our Rulers take back the name and disabuse the world. Should it be thought necessary, in order to soothe us under the terrible privation, that we should be allowed to hope for emancipation in case of future good

* Prerogatives of the Crown.

behaviour, in mercy let it be granted that we be disciplined and trained. Let us be put under Tutors as well as Governors,—Tutors whom we may not answer, Governors whom we must obey.

Lord DURHAM's Report,—which, till a few days ago, (having engaged my promise when I entered the BANK OF BRITISH NORTH AMERICA, that I would not join in or interfere with political proceedings or discussions), I had not read, and had scarcely looked into,—informs us, that "the wisdom of adopting the true principle of Representative Government, and facilitating the management of public affairs, by entrusting it to persons who have the confidence of the Representative Body, has never been recognised in the government of the North American Colonies." How to account for this, except on the supposition of contempt on the one hand, or of fear on the other,*—fear, pushing caution to the length of odious suspicion, impolitic and pernicious, because offensive and insulting,—exceeds my comprehension. If no confidence can be accorded, no right to influence the Government or interfere with its proceedings, why give a right to and solicit counsel? why grant liberty of speech? Is this merely to save appearances? In effect it is to sow the seeds of discontent and wide-spread disaffection. For near two centuries the Commons of England spoke their wishes in the style of very humble petitions, frequently beginning with—'Your poor Commons beg and pray,' and ending with—'For God's sake and as an act of charity.' Was it expected that our Canadian Assemblies would be thus servile and crouching? DAVID HUME informs us that "when the Speaker, Sir EDWARD COKE, made the three usual requests of freedom from arrest, of access to her [Queen ELIZABETH'S] person, and of liberty of speech; she replied to him that liberty of speech was granted to the Commons, but that they must know what liberty they were entitled to: not a liberty for every one to speak what he listeth, or what cometh into his brain to utter: their liberty extended no further than a liberty of Aye or No." Doubtless such language would be thought odd, addressed to a Speaker of a House of Commons in the present day; but however oddly or harshly it might sound, and however arbitrary might appear its absolute enforcement, better far for the people that their Representatives should be reduced to this, than that they should be allowed in addition the liberty of free debate, and nothing more. The evil which otherwise they

* Our Constitutional Act, it ought to be remembered, was passed soon after the American Revolution.

would not, that they do; the good which otherwise they could, and would aspire to do, that is not allowed.

The Commons of England, poor as were their first attempts at legislation,* shameful as were the frequent betrayals of their trust as the chosen protectors of the people,† spite of insult, spite of danger, spite of every species of opposition, still proceeded in their grand career, till at the revolution in 1688, Liberty was established on a firm foundation, and is still maintained. If such has been the onward course of the English House of Commons, why may not our Assemblies follow? More and more dire calamities as consequent cannot be predicted by our Colonial croakers than were prognosticated by the thinkling politicians of past times in England. We are told indeed—what seems almost too good to credit—that the Home Government is prepared at length to recognise the wisdom of an application of the English principle (of course, only within certain limits), to the local government of these Provinces; but we are also told that there is great danger lest the cup of promise, thus presented, should be dashed away by certain officious would-be-somebodies among our fellow-Colonists. Instigated by ambition or cupidity, pretending to be urged by conscientious fears, or far-seeing scruples, these good conservators of present evils cry—"Oh, stop!—wine of abomination! None drink but fools or those that are false-hearted. They will be drunk with fury and the land with blood!"

The passages now quoted, will serve to shew that government in England was not always what it now is. Parliaments, it ought to be remembered, are not the creatures of Eutopian speculation or politico-philosophic fancy. They have been the gradual

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* In former days, the Commons used frequently to request the Lords to send some of their members to instruct them in their duty, on account of the arduousness of their charge, and the feebleness of their own powers and understandings. See Christian's Notes on Blackstone.

† "So little care," says HUME, speaking of HEN. 8th's Statutes of Treason, "was taken in framing these Statutes, that, had they been strictly executed, every man, without exception, must have fallen under the penalty of treason. By one Statute, for instance, it was declared treason to assert the validity of the King's marriage, either with CATHERINE of ARRAGON or ANNE BOLEYN: by another, it was treason to say any thing to the disparagement or slander of the Princesses MARY and ELIZABETH; and to call them spurious would, no doubt, have been construed to their slander; nor would even a profound silence with regard to these delicate points be able to save a person from such penalties; for, by the former Statute, whoever refused to answer upon oath to any point contained in that act, was subjected to the pains of treason. The King, therefore, only needed to propose to any one a question with regard to the legality of his first marriages: if the person was silent, he was a traitor by law: if he answered either in the negative or in the affirmative, he was no less a traitor. "So monstrous," exclaims the historian, "were the inconsistencies which arose from the furious passions of the King, and the slavish submission of his Parliaments."

production of a people struggling for their freedom; wrestling with rulers who plied their every power of craft, and fraud, and force, to school them to submission. Antiquarians may grope for the model of our English House of Commons in the fragmental histories of the ancient Germans or the more modern Anglo-Saxons, but they only lose their labour. As Lord WOODHOUSELEE, one of the wisest of them, well observes: "We know very little of the nature of the Anglo-Saxon government, or of the distinct rights of the Sovereign and people;" and speaking of the Wittenagemote of the Heptarchy, supposed by some to have been the germ of our House of Commons, he says expressly: "We hear nothing of election or representation in those periods."

"It is most probable," says Mr. CHITTY,* "that Parliaments were originally called together solely for the purpose of advice with the King, on matters of State, without any pretensions on their part to a definite right of interference, till they gradually became a distinct and independent feature, and a substantive part, of the constitution." Though this appears to be the opinion of the generality of our writers, and as respects the first attempts at *civil* government among our German ancestors, *may possibly* be true, it unquestionably is not true, if intended to be applied to the Commons House of Parliament. That House was not created by our Kings with a view to counsel or advice; it was gradually forced upon them by the people for their own protection, and was greatly favoured in its growth by all those circumstances of the times, which required that it should be brought to bear against the Barons for the emancipation and protection of the Throne. The Crusades were its grand pioneers: they broke the iron yoke of baronial and feudal despotism. Commerce brought wealth, and wealth brought power. Cities arose, and citizens were no longer *villains*.† The art of printing was invented; light broke forth upon the people: deeds of darkness were exposed, and civil and religious despots shrunk aghast. At the shout of the multitude, at the blast of the ram's-horns of the "people," the walls of the Jericho of their opponents fell down flat. The fanatic few that could neither be shamed by exposure, nor subdued by public indignation, were crushed. As it was in the old world, so it has been in the new; and if our rulers are not wiser than they have been, or seem yet disposed to be, so it will be again.

* Prerogatives of the Crown.

† Vilain vient de ville, parce qu'autrefois il n'y avait de nobles que les possesseurs des châteaux.—*Voltaire.*

In the course of these Thoughts I shall have occasion frequently to mention the Queen's Prerogative. It is a delicate subject, and I shall treat it accordingly. I shall not, however, shrink from saying whatever I think or know respecting it, that might properly or ought to be more generally known. For instance, the Prerogative was not always in England what it now is: it is not now in England what it is in Canada: it is not now in Canada what it ought to be, or will long continue. It is, however, a necessary guardian of the Throne, and therefore ought to be maintained; but in its name, as in that of Liberty, O what crimes have been committed! "Among the topics advanced in the House," says HUME, "it was asserted, that the Queen [ELIZABETH] inherited both an enlarging and a restraining power. By her prerogative she might set at liberty what was restrained by statute or otherwise, and by her prerogative she might restrain what was otherwise at liberty: that the prerogative was not to be canvassed, nor disputed, nor examined; and did not even admit of any limitation: that absolute Princes, such as the Sovereigns of England, were a species of divinity," &c. This is prerogative with a vengeance. For let it not be imagined that the doctrine above stated was merely that of some Court sycophant, and such as was never attempted to be reduced to practice. We have heard the Queen's answer to the Speaker of the House of Commons: in one of her proclamations still extant, "She orders martial law to be used against all such as import bulls (popish rescripts) or even forbidden books and pamphlets from aboad, *any law or statute to the contrary in any wise notwithstanding.*" Of this insolent prerogative the towering crest has been brought down in England: its pretensions are now no longer allowed in any wise to restrain or interfere with the omnipotence of Parliament; and though it may still be true, in theory, that in a country newly and unconditionally conquered, the Prerogative of the Crown is absolute; so that, nothing having been granted, nothing can, as matter of legal obligation, be required; it is only in this case exactly as in every other proposed for legislation,—the Crown must sanction, or there can be no Act. The Province of Quebec started into political existence nearly destitute of every thing: by Royal Proclamations and Imperial and Provincial Acts, much has been already granted: the power to which we owe so much is able, and is, in fact, preparing to give us more: we are actually invited to declare our wants and wishes: I call upon my fellow Colonists to join in one petition,—A LEGISLATURE, AS NEAR AS

CIRCUMSTANCES WILL ADMIT, ACCORDING TO THE PRINCIPLES OF THE BRITISH CONSTITUTION.* AS MUCH OF ENGLISH LAW AND LIBERTY AS THE NATURE OF OUR SITUATION WILL ALLOW. What is our situation, what are those principles; how much can be safely granted, and how, being granted, it might best be guarded, are matters respecting which, though the people interested and others may write and argue and petition, according to the Constitution, and to every principle of right and reason, the decision is and must be with the Imperial Parliament. Whatever may be our grievances, it becomes us to acknowledge, let friends or foes say what they may, that all we Colonists can do without an open rupture (which God forbid), or the "agitation" of the terrorists (respecting which I shall have something to say hereafter), is to reason, to remonstrate, to petition —the Crown, the Peers, the Commons; and to call upon our Brethren in the sister Provinces, in the Parent State, by all the motives of our common wants, of our natural and political connection, to join us in our efforts to obtain a greater portion of that law and liberty which they and we have learned to prize.

"But," objects your friend, pointing to your Upper Canada Assemblies, "you cannot think of committing the surveillance of their brother plunderers to these worthies." What then if, in place of these worthies (easily dismissed) some less unworthy worthies were to be elected? "Tut tut!" cries the Doctor; "Impossible! The experience of fifteen years proves it impossible! No conceit of prejudice or theoretical deduction this: no room for arguing in the pluperfect tense of what might, could, would or should happen:† it is a fact, a fact as susceptible of proof as any fact not sensible, being based on evidence less than mathematical can be. Look at the proceedings of every House of Assembly, of every shade of political opinion, that for the last fifteen years has been, and tell me if they do not prove these worthies such a set of arrant and incorrigible scoundrels, that nothing better can be expected for the future?" If this be not the Doctor's argument, I confess I cannot comprehend

* In the debate on the Bill of 1791, Mr. PITT said,—It appeared to His Majesty's Ministers, that the only way of consulting the interest of the internal situation of Quebec, and of rendering it profitable to this country, was to give it a Legislature, as near as circumstances would admit, according to the principles of the British Constitution.

† Might, could, would, or should be, in the days of my pedagogy, were given as examples of the imperfect tense, and not of the *plu*-perfect. I have tried to give the Doctor the benefit of a slip of the pen or of an error of the press here, but can make nothing of it. The argument is undoubtedly prospective: the case requires it, and the conclusion proves it. "Tell me upon what principle you could ever propose," &c.

it. If any meaning can be extracted from that jumble of words, so strung together as to bid defiance to all the rules of syntax, it must be this.—"For the last fifteen years the conduct of these worthies of the Assembly proves them and their predecessors to have been so bad, that it is impossible—a fact!—it is *impossible* that either they or their successors should be better!" Carrying out this argument I might proceed,—"Change as you think proper the composition and functions of the Assembly: transport into the House the whole Executive Council, if you will; it will be *Hail fellow—well met!* —all 'brother plunderers' still: bring whatever influence of a vigorous public opinion to bear on its proceedings you either can at present or ever will be able,—all to no purpose: were you even to import a cargo of Members direct from the English House of Commons, and introduce them all and none besides them, it would amount to nothing: I tell you, even in that case, the conduct of the Assembly would be—not what it might, could, should, or *would* be, but—exactly what it *has been.*"

You must pardon me if I take the liberty to give expression to a suspicion respecting your friend, which will go far to touch his honour, and of course to

> —rouse him like a rattling peal of thunder.

He must bear with me however. I have often had occasion to say with the author of the Monody on the death of SHERIDAN,

> Oh! it sickens the heart to see bosoms so hollow,
> And spirits so mean in the great and high-born!

The suspicion alluded to is, that your friend is under some little obligation to your late Lieutenant-Governor for the tact with which, according to the tactics of the modern art of war, he manœuvres in this discussion. Permit me to explain.

Soon after his arrival in the Province, Sir FRANCIS B. HEAD wrote Lord GLENELG, thus: "As far as I am capable of judging, *it appears to me that in general terms* [Sir FRANCIS thought himself a Master in the art of writing!] a good feeling pervades a majority of the people of this Province, who, intently occupied in their various locations, are naturally desirous to be tranquil, and equally disposed to be loyal."—*(Despatches, p.* 162*)*. On the 21st April, 1836, he not only shews an accession of confidence, but a little of the enthusiastic—pretty well guarded, however. "Your Lordship is aware I

have had some experience in ascertaining the opinions of the lower classes in the Mother Country, and I have no hesitation in declaring that in no part of Great Britain does there exist so loyal a disposition as will be displayed in this Province, if we will only act towards it with firmness and decision."—*(Despatches, p.* 182.*)* But I am travelling too fast. A few lines before he had said: "I am perfectly confident that the whole country is disposed to rise up to support me:" and turning still further back, I find in a Despatch of the 6th of the same month, "As soon as I have an opportunity of visiting, as I propose to do if I remain here, every County in this Province, and of meeting and conversing with the inhabitants, I feel quite confident that a burst of loyalty will resound from one end of the Province to the other; for a more honest, well-meaning yeomanry and peasantry cannot exist than His Majesty's subjects in this noble Province."—*(Despatches, p.* 165.*)* Now, Sir, what shall you say to this gallant Knight, when you find him counselling the King his Master, not only to avenge upon these noble Colonists the factious conduct of the fellows whom he, Sir FRANCIS, had just sent "packing," but to absolve himself from all obligation to keep his royal *promise* in their favour, they being such a set of rank infernals, that no faith *ought* to be kept with them, *even by a King?* Do you doubt the truth of this? Then hear Lord GLENELG: "You propose that the influence and authority of the Government in the new Assembly, should be exercised in the retracting of a pledge solemnly given by the King to the Province. I must answer that there is no danger which ought not to be encountered, nor any inconvenience which should not be endured, in order to avoid the well-founded reproach of a breach of faith; above all on such a subject and on such an occasion. By the engagements into which the King has entered His Majesty will abide, not indeed indifferent to the possible issues of that decision, but prepared for any consequence inseparable from the observance of his Royal word."—*(Despatches, p.* 47.*)* Proceeding to reply to the arguments by which this generous, frank, and high-souled friend of Canada endeavoured to enforce this infamous advice;—advice, which, had a Minister dared to give His Majesty in England respecting his English subjects, he might have thought himself happy if he had got nothing more for his temerity than a ten-years' lodging in the Tower, Lord GLENELG says: "The assumption on which your argument proceeds identifies in character the last and the present Houses of Assembly. It ascribes to the new Representatives of the People those

designs and principles which led first to the dissolution and then to the rejection of their predecessors. It plainly asserts, or necessarily involves the assertion, that the Representatives of the People of Upper Canada, from whatever class of society they may be chosen, are unworthy to be trusted with the appropriation of the revenues of the Province, and will be led on by every concession to new encroachments and usurpations. If compelled to reason on this basis, I should be irresistibly urged to consequences far exceeding those which you have stated, or perhaps contemplate. But I entertain a very different opinion. For the support of the Constitution in Upper Canada, I would with confidence appeal to the good sense, the loyalty, and the public spirit of the inhabitants at large."—*(Despatches, p.* 47.*)* Had not Sir FRANCIS so appealed? Did he not boast of the result? And THIS was the return for their devotion! Does it not *sicken the heart* to see bosoms so hollow?

This advice was tendered on the 23rd of July. The words are these:—" The defeat of the republicans in this Province has been so complete, that I am confident people of all parties are not only prepared to *submit* to strong remedial measures, but, &c. With this power and opportunity"—mark now; for it is worthy to be noted —" to rescind any measures which your Lordship, in January last, was disposed, for the sake of conciliation, to carry into effect, I beg leave very humbly to submit to your consideration the propriety of His Majesty's Government informing the Legislature of this Province, that although I had been authorised to relinquish the control which His Majesty has hitherto exercised over the Hereditary and Territorial Revenues, in return for an adequate Civil List, yet that the conduct of the late House of Assembly has too clearly proved that such an arrangement would not be safe or prudent. The odium of the denial would thus be thrown upon the republican party, while His Majesty's Government would be extricated from an intended concession, which," &c.—*(Despatches, p.* 324.*)* On the 28th of October, Sir FRANCIS writes: " During the inspectional tour I have just concluded, I have been occupied nearly two months in silently observing the moral feeling of this Province." A pretty gentleman to talk of moral feeling—truly! Well, what did this observer observe? That the people were all rank infernals! Hear him:— " I have since had full leisure and opportunity deeply to reflect upon all I have seen and heard; and although I am at this moment sensible how much may possibly depend upon the integrity of the evidence I

am about to offer to your Lordship, and into what difficulties I may lead His Majesty's Government if by exaggeration I should induce them to construct their remedial measures upon a false foundation, yet with all this before my mind I have no hesitation whatever in declaring to your Lordship, that upon the loyalty of the people of Upper Canada His Majesty's Government may now build as upon a rock; I declare to your Lordship that in England there does not exist a more sensible attachment to the British Constitution and to the person of our Sovereign than here."—*(Despatches, p. 345.)* I remember seeing, in HEYLIN'S Cosmography, an old popish distich:—

> When the devil was sick, the devil a monk would be:
> When the devil got well,—the devil a monk was he!
>
> O for a footy-parson power to chant
> Thy praise, HYPOCRISY!

Your friend, the Doctor, is pleased to look upon your Assemblies and their proceedings with a sort of holy horror, as being a something morally monstrous. For my part, though—according to what I am told— I have seen less of the world by far than he has, I regard the strange monstrosity as a thing of a very common character; affording only another instance, among thousands, in confirmation of a very obvious position—namely, that no public body can safely be trusted to have an uncontrolled disposal of public treasure. If your friend knew as much about "monetary," as I doubt not he does about medical affairs, he would see nothing to be astonished at in this.

For the sake of argument, however, I shall consent to let the Doctor have his own way. I grant him that the present and late Members of the House of Assembly are and were monsters of iniquity, and that such is the horrid state of society in your Province, that it is vain to expect an election of any better. Having proved this, does he not perceive that he has proved a little too much, and so, for his own purpose, nothing? At this rate, the proper course is, not to deny us *Responsibility*, but REPRESENTATION. Good! Doctor: in mercy to the public, send them all, at once and forever, "packing." Let the wretches, their constituents—"the rascally rabble"—be brought under the discipline of the bastinado and the bowstring!

Society in Canada,—at least in the Upper Province; and I fear we of this rebel-ridden Province are even worse,—is altogether

corrupt. From the crown of the head to the sole of the foot, there is no soundness in it, but only wounds, and bruises, and putrifying sores. But is there, then, no Balm in Gilead?—no Physician there? Call up your friend the Doctor,—him with the

——lotion, potion, clyster-pipe and plaster.

He surely does not give up the case as hopeless.—*He does?* Nay, then—send for the Undertaker! Pax vobiscum! Rear him a marble mausoleum, and on the basis of his statue be this inscription,

Alas! poor Yorick!

As a last effort, however, the Doctor is willing to try his skill. "If we are to have any responsibility on this side of the water, let it rest with the Legislative Council." With the *Legislative Council* truly! This *is* a Daniel come to judgment. We knave-trapped fools would set a thief to catch a thief; the Doctor laughs à gorge déployée; and lo! he sets a thief *to catch himself.*

No matter. If any responsibility on this side of the water,—this. It is not only the best; it is, says the Doctor, the only tolerable.

But changing his side, as a lawyer knows how,—

(and here I cannot but suspect that he and we are under obligation to your friendship)—the Doctor discovers something better than the best. On the whole, he tells us, he would infinitely rather commit the charge of checking abuse,—not, as just decided, to the Legislative Council, but—to the Lieutenant-Governor. The former is undoubtedly the best; the latter, however, is *infinitely better!* Now, is not this a pleasant man, and of good assurance?

And what, I wonder, can be the reason of this preference? What?

Bear it, ye Muses, on your brightest wing!

"An individual is always really responsible for his actions"—an English King for instance: "a body, however constituted, never is so"—his Ministers to wit! Why really, *really*, Doctor,

E'en Satan's self with thee might dread to dwell,
And in thy skull discern a deeper hell!

Having now dismissed the Doctor,—somewhat unceremoniously perhaps, for want of patience,—I propose to take a much wider range than was at first intended, in order to obtain a more comprehensive view—1st, *of our Colonial Constitution as it now exists,* in order to prove that it is bad: 2nd, *of the projected Constitution according to the Bill that has been printed,* in order to discover whether or in what respects it is likely to be better: and, lastly, *of the Constitution as I think it might be,* so as to secure all that can reasonably be required in the way of self-government, and at the same time avoid whatever could be reasonably advanced in opposition. Should it be any fortune to accomplish so much, I trust I shall be allowed to have some claim on the public—at least for a patient hearing. If, on the other hand, I fail, I am free to confess that I shall fall short of the achievement to which my ambition prompts me to aspire.

I am not so inexperienced in the ways of men as not to know, that I am about to enter on a very perilous adventure. Belonging to no party, determined that I will belong to none, is it for such a one as I am to assume a right to do,—what some indeed have done; what nature seems to have designed some men to do, but what no man yet has been allowed to do without a fearful visitation,—in a case of such importance to think as I please, and to speak as I think? This, says GIBBON, speaking of BAYLE, is what nature had designed *him* to do, Ay, and this was what *he* did; and well he paid the forfeit. He it was of whom BYRON beautifully observes,

> —— Deep and slow, exhausting thought,
> And hiving wisdom with each studious year,
> In meditation dwelt, with learning wrought,
> And shaped his weapon with an edge severe,
> Sapping a solemn creed with solemn sneer;
> The lord of irony,—that master-spell,
> Which stung his foes to wrath, which grew from fear,
> And doom'd him to the zealot's ready hell,
> Which answers to all doubts so eloquently well.

Is there then to be a privileged class in this respect? Is freedom of thought and speech to be the prerogative of the favoured or highly-gifted few? With Lord ERSKINE, I answer, no. "Every man, while he obeys the Laws, is to think for himself, and to communicate what he thinks." "Opinions," as the same writer quotes from MILTON.—"Opinions and understandings are not such wares

as to be monopolized and traded in by tickets, and statutes, and standards." It is true, the press is no longer trammelled: but is it not also true, that there are still, in all their strength, the trammels of authority and tyrant custom? "It is the first care of the Reformer," says GIBBON, "to prevent all future reformation." May we not now say,—all future and all present *unorthodox* reformation? He proceeds: "To maintain the text of the Pandects, the Institutes, and the Code, the use of cyphers and abbreviations was rigorously proscribed; and as JUSTINIAN recollected that the *perpetual* edict had been buried under the weight of commentators, he denounced the punishment of forgery against the rash civilian who should presume to interpret or pervert the will of their Sovereign." What emperors did formerly, upstarts do still. They claim the right, as the only legitimate Reformers, as Governors, and Councillors, and Legislators, and Journal Editors, to be the leaders of the people; and having taken sides, like true Gymnastics, of whom the object is not truth but victory, woe be to the man that ventures into the fray, and thinks to maintain an independent standing. "In the field of controversy," says GIBBON, "I always pity the middle party." No matter. I have taken my resolve. I will contend,—not for victory, but truth. Let it be said of one at least, whatever may be the issue, *Ne quid veri dicere non audeat.* In his life of ARISTIDES, PLUTARCH has beautifully said,

> To be, and not to seem, is this man's maxim,
> His mind reposes on its proper wisdom,
> And wants no other praise.

"If any man ask me what I am," says the great HUET, "since I will be neither Academic, nor Sceptic, nor Eclectic, nor of any other sect, I answer that I am of my own opinion, that is to say, FREE; neither submitting my mind to any authority, nor approving of any thing but as it seems to come nearest the truth."

The most discouraging circumstance appearing to me in prospect is, the strange propensity of men, in Canada especially, to talk, and their still more strange antipathy to think. Where shall we look to find a student? Where may we not listen to be entertained with gossip? What hope for one that comes to offer *thoughts*, that he should find recruits for TRUTH?

> Who will go down into the well
> In which dame Truth is said to dwell?

Or, changing the metaphor, which is not very elegant, Who will learn the art, who will endure the labour, necessary to find, and purify, and polish, her precious ores and gems, deep buried in the earth? It is very easy for any man to answer, as did PYTHAGORAS, when asked, what any man could do like that which God does,—"Speak the truth;" but a truth not known, cannot be spoken; and a truth not sought for, is not likely to be found. Truth, in every branch of science, is the invention* and reward of silent study, unbroken meditation, and thoughts often revised and corrected. It is one thing to read—hear—swallow: it is quite another thing to read, mark, learn, and inwardly digest. And then again, besides the labour, there is the danger.

Men dare not study, dare not be *let* study; dare not think, dare not be *let* think, *freely;* for fear of consequences. Our noble poet tells us, indeed:

> He that made us with such large discourse,
> Looking before and after, gave us not
> That capability and God-like reason
> To rust in us unused:

whereas certain priests and politicians tell us, that our poor carnal reason leads us all awry. LOCKE tells us that he never could believe a man opposed to reason, who did not find that reason was opposed to him. WOLLASTON has well observed of those who are the willing instruments of such rulers: "He that is governed by what another says without understanding it, and making the reason of it his own, is not governed by his own reason, and that is, *by no reason that he has.* To say one is led by the nose (as we commonly speak), gives immediately the idea of a brute." Those who dare not use their own faculties for fear they should lead them into hated truth, have been admirably schooled!† They want to be deceived; and what they want, they generally find. For their benefit their mental doctors pound and prescribe all kinds of falsehood, and at a pinch can even quote the so-called Christian Fathers for authority! The 32d chapter of the 12th book of EUSEBIUS's Evangelical Preparation,

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* I use the word *invention* here in what I take to be its proper acceptation, the Latin. Invenio, venire; *to come upon, light on, find, or discover.*

† "Since the discovery of printing," says NAPOLEON, "talent has been called in aid of government, and we govern in order to enslave it."

one of the most learned and elaborate works, says GIBBON, that antiquity has left us, bears for its title this scandalous proposition: *How it may be lawful and fitting to use falsehood as a medicine, and for the benefit of those who want to be deceived.* Whoever of my readers wants to be deceived, had better close this pamphlet; as I have no ambition to be his Doctor. Whoever feels that he should regret the discovery that he *had been deceived*, or believes it impossible that he *should have been*, had better refuse to look into this pamphlet; for though it may not discover truth, it will assuredly expose much error,—much that is foolish, much that is fraudful,—much that would disgrace the skill and sincerity of any writer. If others cannot—will not—see it, no matter:

> ——————— I may stand alone,
> But would not change my free thoughts for a throne.

A Constitution, as I take it, is the constituted *form* and established *rules*, oral or written, of some present or formerly existing Government. The sense in which the word is understood to signify, the documentary or other evidence defining such form and prescribing such rules, is nothing to my present purpose. I am not going to discuss with Mr. LOCKE, or Mr. BURKE, or the Author of the Rights of Man, questions about which I should hardly agree with any one of them, relating to the proper foundation, and mode of edification and reparation of a Constitution. Not because I have no opinion respecting such questions, but because such discussions would be quite irrelevant, and because practically, owing to the ignorance and headlong passions of the disputants, all *popular* discussions of these questions have been productive of much evil, while the *solitary and philosophic* have done little good. Avoiding, therefore,

> ——————— that Serbonian bog
> Where armies whole have sunk,

my remarks will have respect to more obvious and useful principles.

The English Constitution *is*,—just what the Parliament have been pleased to leave or make it: in future it will be *altered*, and ought to be,—just as the Parliament shall be pleased to alter it. I observe further, that as it is with the Imperial Constitution in this respect, so it is exactly with that of every one of the subordinate possessions of the Crown. Now, if this be true, this further and not less important truth will follow: whatever may be our opinions, individually

or collectively, of the character, either of the Imperial or of any of the Colonial Constitutions, as British subjects we ought not, *without a reason which would justify a war*, to strive to bring about any alteration by any other means, than such as may bear upon, but will not attempt to overbear, the free volition of the Imperial Parliament. This *in limine*. How far the principle is sound, and how far, being sound, it goes to decide the character of political agitation, you and your reforming friends will do well to consider. I proceed.

The Canadian Constitution now existing,—what is it? I answer, in the first place, *negatively*: It is not what it pretends to be: it is not a transcript of the English Constitution. Knowing under what circumstances I come before the public, I intend to be at same pains in fortifying, as I proceed, my facts and inferences with authority. This will necessarily give the work an air of pedantry, which I would gladly avoid; but as matters stand, I can only crave your indulgence, and that of the public, for the introduction of a host of references and quotations.

In the debates on the Bill of 1791, now our Constitutional Act, Mr. BURKE, with reference to what had been done in forming for themselves a Constitution by the United States, spoke thus:—"He did not say, give this Constitution to a British Colony; because, if the imitation of the British Constitution was so good, why not give them the thing itself?" which was, in fact, the avowed object of the then present measure. Mr. FOX, on the other hand, speaking in opposition to his former colleague, said: "Now what had been the conduct of the gentleman who looked on theory with such abhorrence?"—namely, Mr. BURKE. "Not to enter into a practical discussion of the Bill, clause by clause, and to examine whether it gave, *what it proposed to give*, the British Constitution to Canada, but ——," &c. Again: "He wished them," the Canadians, "to be in such a situation as to have nothing to envy in any part of the King's dominions. But this would never prove the case under a Bill which *held out to them something like the shadow* of the British Constitution, but *denied them the substance*." And again: "He had frankly declared, as he thought, that under a pretence of giving to Canada the British Constitution, we in reality gave them a Constitution ESSENTIALLY DIFFERENT." What reason Mr. Fox had for this opinion, we shall see in the sequel.

I have been in Canada about two years; and it is now about a month since I sat down to the study of this subject. To that time I

had been completely absorbed and buried in bank affairs; so much so, that I had neither entered into society, nor indulged my—as I once thought it—invincible love of reading and study. Beside the narrow road of business, I saw next to nobody, read next to nothing, and consequently about Canadian affairs, *knew* next to nothing. I had learned enough, however, to induce a strong suspicion,—not that I was not *living* under the British Constitution, for that of course I knew, but—that the Canadian Constitution was not the British, *nor like it.* Accordingly, having no longer the means of applying my faculties in the line of my profession, I determined to look into the matter. I read the Act of 1791. It was quite enough. I was not such a novice in the science of government as not to see, not only that that Constitution was not the British, but also—what, though I had often asked, I could never learn till now—*the reason* of the ill feeling that prevailed in the Upper Province respecting the conduct of the Government; and especially the reason why there was *no prosperity;* nothing even to compare to that across the border. I saw it now. I read Lord DURHAM's Report, and saw much more. The letter of Doctor DUNLOP had roused my indignation: the insolent snarlings of those would-be war-dogs, the public prints, led on by that hell-hound, your *Toronto Patriot,* had fixed my purpose: my pamphlet was in the press, when I discovered that this question about the Constitution had been fiercely debated by Sir FRANCIS HEAD. I stopped the press, and sat down to the study of his folio volume of Despatches, &c., and now I come to do what I think I can do,—not, however, as I know it should be done; not as I could wish to see it done; but yet—something more than any living man can undo,—or I am much mistaken.

In this most important matter of their Constitution, the people of these Provinces appear to have been completely bamboozled. Your first Lieutenant-Governor, Colonel SIMCOE, whom a Public Meeting in your City Hall, in their Address to Sir FRANCIS B. HEAD, were pleased to style "the ablest and most enlightened Lieutenant-Governor of this Province,"—he, it seems, began the game, or rather the farce, of befooling the public. His having been a Member of the House of Commons when the Bill of 1791 was passed; his having been the bearer of the Act to Canada: his having been undoubtedly authorized "by His Majesty's Government to declare to His [Majesty's] faithful subjects in this Province the nature of the Constitution then about to be put into operation for their benefit;" and

his having "assured the people of this Province from the Throne... that the said Act had 'established the BRITISH CONSTITUTION, and all the forms which secure and maintain it, in this distant country'; "— these pompous and imposing circumstances and assurances, so pompously paraded, however convincing to that meeting, or to the inhabitants of the Province generally for fifty years in succession, do not weigh one straw with me. "Because a man understands the Chinese language, is he, therefore, authorized to tell us absurdities with the authority of an Oracle?" This was asked by GIBBON respecting FOURMONT the elder, who had made SATURN the same with the Patriarch ABRAHAM! If great men will be blockheads, why let them; but that is no reason why we should let them make blockheads of us.

"Mind what you say,"—I am admonished:—"you will find the same language in a Report to the House of Assembly by its own Committee." What then? That Report extends to five-and-thirty folio pages, a great part of which are occupied in proving this important point. Have they proved it? We shall see presently. In the meantime take this whole passage:—

The Government of this Province was in fact the subject of one of the most interesting and memorable debates ever witnessed in the British Parliament; and while Mr. FOX urged the extension of the elective principle in the new Constitution farther than it existed in the British Constitution, no one proposed that the form of Government should be less popular or less free. Governor SIMCOE heard the debates on the subject, and in fact took part in them; he was the bearer of the Act to this country: was the first Lieutenant-Governor of the Province; and was well qualified, and appears to have been authorized by His Majesty's Government, to explain to the people the new Constitution which was established for their benefit. This enlightened British Statesman and Legislator, who certainly knew what the principles of the British Constitution were, on the very opening of the first Session of the first Provincial Parliament addressed the Legislature from the Throne, and in the King's name, in the following terms:—

'I have summoned you together under the authority of an Act of the Parliament of Great Britain, passed last year, *which has established the British Constitution, and all the forms which secure and maintain it, in this distant country.*

'The wisdom and beneficence of our most Gracious Sovereign and the British Parliament have been eminently proved, not only in imparting to us the *same form of Government*, but also in securing the benefit, by the many provisions that guard this memorable Act; so that the Blessings of our invaluable Constitution, thus protected and amplified, we may hope will be extended to the remotest Posterity.

'The great and momentous Trusts and Duties which have been committed to the Representatives of this Province, in a degree infinitely beyond whatever till this Period have distinguished any other Colony, have originated from the British Nation upon a just Consideration of the Energy and Hazard with which its Inhabitants have so Conspicuously supported and defended *the British Constitution.*'

Still more striking was the following Language used by him, as the King's Representative, from the Throne, in the speech with which he closed that Session:—

'At this Juncture I particularly recommend to you to explain, *that this Province is singularly blest, not with a mutilated Constitution, but with a Constitution which*

has stood the Test of Experience, and is the very Image and Transcript of that of Great Britain.'

Such were the emphatic Words of this great and good Man. Were they, after all, a mere Delusion? An empty-sounding, unmeaning Mockery?—*(Despatches, p. 211.)*

These gentlemen of the Committee, though they mentioned the "memorable debate" and "Mr. Fox," forgot to give his opinion as above quoted as a set-off against that of Colonel Simcoe. "This distinction of His Excellency," they had just before observed, "between the Council serving him and not the people, is calculated to awaken much concern, and seriously impair that identity of interest and purpose, which (under the presumption of our enjoying the British Constitution) we always supposed to exist between the King and people." Again, at the very commencement of their Report, p. 202, these gentlemen open thus: "It is at such a crisis that we are called to the discussion of a question of *vital importance* to the people of this Province; a question which, in the opinion of the Committee, is *no less than this;* whether we have, as we have been taught to believe, a Constitution, 'the image and transcript of that of Great Britain,' or have only a mutilated and degraded Constitution." Most heroically do these gentlemen contend for the affirmative, and if I cannot carry this *fort*, I lose the battle. My enemies are a host, and their artillery bristles in terrible array. Now for the pounding.

But stop. I must first enquire the opinion of the men of this Lower Province. In a Petition of the Counties in the District of Quebec, and of the County of Warwick in the District of Montreal, dated 2d February, 1828, addressed to His Majesty, and bearing 29,388 signatures, I thus read:—

Amongst the numerous benefits for which the inhabitants of Lower Canada are indebted to your Majesty's Government, there is none that they more highly prize than the invaluable Constitution granted to this Province by the Act of the Parliament of Great Britain, passed in the 31st year of the reign of our beloved Sovereign, your august father, of ever-revered memory.

Called by that Act to the full enjoyment of British constitutional liberty, and become the depositaries of our own rights, under the protection of the Mother Country, we contracted the solemn obligation of preserving inviolate this sacred deposit, and of transmitting it to our descendants, such as it was confided to us by the great men who then presided over the destinies of your powerful and glorious empire.

Is not this a rather formidable army, playing away with muskets and *cross*-bows, all in the same direction? After all, however, I like the *Reports* of the great guns best. They make more music and better fun. Unfortunately, you, as well as we, have lost your

most terrific *Bombardiero.* Another volley, however, from the heroes, and then—have at 'em.

Sentiments similar to those of Governor SIMCOE have been expressed by succeeding Lieutenant-Governors, and by persons of all Classes and Creeds who have ever treated on the Subject. Although some have demurred, that while we were entitled by the 31st of the King to all the Blessings of the British Constitution, that while it was held out to us in Theory and by Profession, it was denied (in some respects) in Practice, yet all have agreed that it was guaranteed to us by the Constitution; and those who have heretofore complained of the Want of it in Practice have been charged with Disaffection, and denounced as Demagogues, Grievance-mongers, and Disturbers of the public Peace, by Lieutenant-Governors and their Adherents. The Records and public Documents of the Province are filled with Expressions (sometimes explicitly and at other Times incidently mentioned) calculated to impress the Belief that we are entitled to the full Enjoyment of all the Blessings flowing from the Constitution of Great Britain; and what is peculiarly striking is, that amidst all this Multitude of Witnesses in favour of our Right to the British Constitution, with all its Blessings and Benefits, not even a hint to the contrary was ever heard from any of them; and it has been reserved for Sir FRANCIS BOND HEAD, in 1836, to discover that our Constitution is different from the British Constitution, and that it would be *foolish* and *ruinous* for us to introduce the British Constitution if we could, and that any attempts to do it would be *vain.* Whatever evils we suffer under our present nondescript Constitution, which even Sir FRANCIS admits are so great and oppressive as to require '*important remedial measures*' *without* '*delay*,' which 'our Sovereign has *ordained*,' and 'which he is here to execute,' we should console ourselves, according to his opinion, with one animating and delightful reflection, namely, we are not and cannot be *cursed* with the *British Constitution.* According to his doctrine, the Constitutional Act *ordained* no such *absurdities*, and the Royal instructions were equally *gracious* and careful to protect us from that terrible evil and calamity the British Constitution.

It has been observed by His Excellency in one of his public Expositions, that SIMCOE 'could not alter the Charter committed to his charge,' or render it what His Excellency asserts it is not, the very 'image and Transcript of the British Constitution.'

Your Committee in imitation will say, neither can Sir FRANCIS HEAD, by his detractive Assertions, impose upon us a 'mutilated Constitution,' nor has he the right to impose upon Upper Canada the arbitrary Government of Russia or Constantinople, in place of the genuine transcript of which SIMCOE was the bearer. But although SIMCOE could not alter the Law, and was too great and good a man to do it, yet he never had a successor who had equal pretensions to expound the meaning, elucidate the provisions, and explain the scope of the new Constitution. He who fought with U. E. loyalists in the American war, and knew the worth and claims of the men for whom the Constitution was generously designed; he who sat and spoke in the Senate in which the law was passed, who was moreover intrusted with the duty of putting it into operation, and who, from the Throne, solemnly declared the magnanimous gift of the British Constitution to those who had been driven by their loyalty to seek an asylum under it, was surely better and more competent authority respecting that law and Constitution than a gentleman nearly half a century afterwards, who, &c.—*(Despatches, p.* 212.*)*

It now becomes my turn. I am not going, however, to enter into a ridiculous dispute about the competency or incompetency of some third party to settle the dispute. I am going to try if I cannot settle it myself. I am going to produce such facts as cannot be denied, and such arguments as will not easily be refuted. I begin with the HEAD of the respective Governments.

By the people under HER Government, the QUEEN cannot be lawfully arraigned for any of her Acts of Government: By the people under *his* Government, her Canadian *Representative* can. I shall be told that this difference is necessary. I shall show that it is no such thing. I shall be told, perhaps, that this is a difference of no consequence. I aver that it is of vital consequence. Is it of no consequence that the Representative of Majesty should descend, should be tempted and goaded on the one hand, and permitted on the other, to descend, as did Sir FRANCIS HEAD, into the dusty arena of party rencontres, like a political Gladiator? His Excellency thought this right and proper: I think it equally unseemly and pernicious. He agrees with me in the difference which I insist on, but of the decree which makes the difference, he celebrates the wisdom. Thus, for instance: He supposes a case;—that with the concurrent advice of his Council he were illegally to eject, by military force, an individual from his land. Of course he would be liable to arraignment; "and whether he had acted by the opinion of the Law Officers of the Crown, by the advice of his Council, by information derived from books, or from his own erring judgment, it has been wisely decreed that the injured subject shall look to him, and him alone, for retribution; and that he, and he alone, is answerable to his Sovereign for the act of injustice which has been committed." Sir FRANCIS is right when he insists that this is according to the wise decree of our Canadian Constitution, but will any man assert that, were a case of such ejectment to occur in England, the injured party would find himself under such a wise decree of the Imperial Constitution? Would have no better means of obtaining justice, than by carrying his cause before a Court four thousand miles away; where the Court would be the King in his Privy Council; the party to be tried the King's Representative; and where, before a step could be taken, good security must be given by the appellant that he will effectually prosecute the appeal and answer the condemnation, and also pay whatever costs and damages may be awarded? No man will venture the assertion. The remedy for such an injury in England, would be as direct and certain as if the oppressor had been an ordinary subject. It is not so here, *because our Constitution is not what is pretended.*

I have supposed here, what however I am not lawyer enough to know, that the arraignment, in the case supposed, would be that of the Agent in a Provincial Court. Excepting that this would be the

most absurd proceeding, the question is of small importance. The Governor, if condemned, would of course appeal—to himself in Council! If arraigned at once in England, I presume it must be by Impeachment, and what private man could command the necessary interest, could think of incurring the expense?

It has been wisely decreed, says Sir FRANCIS, that the injured subject shall look to the Governor, and him alone, for retribution. With the wisdom of this decree the President of the United States appears to have been forcibly struck. By way of illustration of this important subject, I beg to quote from the Boston *Daily Advertiser* of the 8th of October, one of the Resolutions of the VIRGINIA CONVENTION.

> We have seen the principle asserted by the President, that the Executive Administration is a *unit*, and this practical consequence deduced from that odd and novel dogma, that all executive officers are the mere servants or agents of the President, *responsible to him only, and he alone responsible to the nation for their conduct*:—a doctrine which, if admitted and carried out in practice, will destroy all responsibility, and abrogate the power of impeachment of officers of Government for official misconduct or crimes.

For a CICERO or a DEMOSTHENES, here is a text for a fine oration. A British Sovereign is not at all responsible; a States President, taught by our Colonial Constitutions, claims to be alone responsible; but if this, if carried out in practice, will destroy all responsibility, and abrogate the power of impeachment, how much more must the nominal responsibility of a Colonial Governor, appealing to his Master's Court, four thousand miles away? If our adversaries' needs must force us to allow that this is necessary, shall not we force them to allow that our Government is not British? They profess to be horror-struck at what is Yankee, and at us for entertaining Yankee notions: will they quarrel with, will they not fondle on the knee, will they not present and answer for at the baptismal font, this true-born British Loco-foco brat?

Sir FRANCIS B. HEAD, like a gallant son of MARS, has the bravery to tell us, that "this difference between the Constitution of the Mother Country and that of its Colony, is highly advantageous to the latter!" Excellent, your Excellency! Bravo! Highly advantageous, truly! Permit me to quote from the Report of the Committee of your House of Assembly.

> Your Committee deny the pretended All-sufficiency of the Governor's Liability to Impeachment for Mismanagement of our Affairs, for the following Reasons:
>
> 1st. Because, although such Impeachment might be a Punishment for Maladministration after it was done, yet it affords no daily Check or Guard against it

by means of Advice or Caution ; and it seems to your Committee that the Impeachment should at most be only resorted to after a Governor had acted wrong, with every local Means afforded him to do what was right.

2nd. Because the Impeachment or Complaint must be made by the injured Person at a great Distance, requiring a Delay, Expense, and Watchfulness out of the Reach of the Power or Means of the Sufferer, who (if belonging to 'the industrious Classes,') might make out in Writing a very informal or insufficient Case, however clear its Merits, or be unable to retain Counsel and Agents here and in England to conduct his Suit. Limitation to such a Remedy would practically be a Denial of Justice.

3d. Because the Complaint would be made to a Minister in Downing Street, who is the Patron of the Governor accused ; and, besides, the Governor has numerous Friends on the Spot to exercise every Influence and Interest in his Behalf.

The weight of this reason is increased by the difficulty of proving any act to have been done from corrupt motives. Even if a presumptive case could be made out against a Governor, it would be contended that a clear and positive one must be established before the Consequences of Impeachment could be visited on the Accused ; and how very many Acts of Misgovernment there are, in their Nature vexatious and injurious, against which it would be difficult to fix the Charge of corrupt Motive, while it was palliated, evaded, or explained away as an Error of Judgment, the deceptive Assurances of others, a Misapprehension of Circumstances, a mistaken Policy, or the like. For instance, it would be in vain to proceed against the executive Authorities for the Erection (as herein-after mentioned) of 57 Rectories, and certain corrupt Exchanges of Lands, although opposed to the well-known Sentiments and Interests of a vast Majority of the Religious Community. It would be equally vain to attempt to institute such Proceedings for many Appointments to Office, as Surveyor-General, Colonels of Militia, the Commissioners of the Courts of Requests, and other offices. It would therefore obviously place the Country in a desperate Condition, if the *only Hope of preventing Wrong being done*, was founded on an Institution of an Impeachment for it *after it was done*, before a Patron of the Wrongdoer, 4,000 Miles off, defended by a person intrenched in Power here, and sustained at home by Family Connexions, and the Preservation of what is called *the Colonial System*. The House of Assembly of Lower Canada instituted a Complaint of this nature against Lord AYLMER in a most solemn Manner, and with great Unanimity, for most arbitrary and unconstitutional Misgovernment ; but it only ended in his Promotion to a higher Post of Honour. Although therefore an Impeachment might be resorted to in extreme Cases, yet it by no means supersedes the Necessity of all local and constitutional Checks, calculated to prevent Cause for so difficult, painful, and undesirable a Course. This Precaution against the Occurrence of Evil, instead of merely contriving how it can be punished by Impeachment 4,000 Miles off, is the more needed from the Fact that this Impeachment would yield no Redress to the Persons injured, even if it punished the Persons injuring them. If all our local Governors were impeached, and all their Estates confiscated, it would not repair the Injuries of the most notorious Nature ; besides Thousands of just Complaints murmured only in Secret, and either endured with Patience, because, the Remedy proposed would be worse than the Injury, or because, what is notoriously true, to prefer a Complaint, however just, against a Governor, ensures a Black Mark against his Name as a troublesome, a factious, or undeserving Man, whose future Hopes are blasted, and his Oppressions multiplied at every favourable Opportunity, in various Ways, that elude all Proof and Conviction. What could be done to redeem the Injustice against GOURLAY, WILLIS, the late ROBERT RANDAL, FRANCIS COLLINS, and others ? And if an insufficient blustering Pretender to Learning should be made a Judge, and an innocent Person be convicted thereby and executed, he could not by Impeachment be restored to Life. . . . . .

4th. Because there are such Changes of Colonial Ministers, that there might be Half a Dozen in Succession before a Suit could be conducted to a Conclusion ; and the Justice done by one Minister is often undone by another. For instance, in Lower Canada, Mr. GALE, who gave such Evidence before the Canada Committee

of 1828 as to oblige the Right Honourable Mr. SPRING RICE to pronounce him unfit for any Office of Trust, was appointed a Judge by Governor-General AYLMER, whose active Partisan he had been.

When the News of this Appointment reached England in the Autumn of 1834, Mr. RICE had become Colonial Secretary, who addressed a Despatch to Lord AYLMER, saying he could not confirm Mr. GALE's Appointment. Mr. RICE was soon succeeded by Lord ABERDEEN; and therefore Lord AYLMER, disregarding the Commands of Ex-minister RICE, and the known Sentiments of the People and their Representatives, procured from the Successor of Mr. RICE a Confirmation of Mr. GALE's Appointment, who is still on the Lower Canada Bench, although Mr. SPRING RICE on the 9th March 1835, being again in Power, in a Speech in the House of Commons reiterated the Denunciation of Mr. GALE as an improper Person to occupy that Station.

Your Committee find the same doing by one Minister and undoing by another, in the Affairs of our own Province, which is unhappily Misgoverned by the same Policy under the same Constitutional Act; for instance, the late Attorney General and Solicitor General were dismissed from Office, according to Lord GODERICH's Despatch, because they opposed the avowed Policy of His Majesty's Government in making certain Concessions to the Wants and Wishes of the People; nor did his Lordship seem at all to notice the personal Indignity they had audaciously offered to himself even as a Minister of the Crown; but no sooner was Lord GODERICH succeeded by Lord STANLEY than the Decision of the former in favour of the Rights and Liberties of the People was by the latter cancelled, and the Solicitor General put back again into Office, to the great Dissatisfaction of the Country, and the Attorney General sent as Chief Justice to Newfoundland, to create new Scenes of Trouble and Dissension there.

The sixth reason opens thus:—

6th. Because this pretended Responsibility to Downing Street has been in full Operation for nearly Half a Century, and we have therefore against its Sufficiency the uniform Testimony afforded by our Misgovernment during nearly the whole of that Period.

I have already mentioned the power which, by the Act of 1791, the Governor and Council have here, and the King in Council has in England, as Courts of Civil Jurisdiction, in appeals from a Colony, to take cognizance of matters of property belonging to the *Colonial* subjects of the Crown, whereas all such interference, by the Crown or Council, in matters of property belonging to the *Metropolitan* subjects of the Crown, is prohibited by statute. And is not this a difference of something more than nominal importance?

There is, too, another striking and most important difference which I discover between the British and our Colonial Constitutions. By the former, the discretionary power to allow or disallow a Bill is not only an incommunicable prerogative of the Crown, while by the latter it is not incommunicable; but the Royal decision, in the one case, is required to be signified *during the Session of Parliament*, whereas, in the other, it may be suspended FOR TWO YEARS from the date of the receipt of the Bill in England? and what is more, and *infinitely worse*, and in my opinion even MONSTROUS; a Bill which shall have obtained the Royal Assent in Canada, may at any

time within two years of its receipt in London, receive the Royal DISALLOWANCE ! * And now, ye thumping would-be sons of thunder, is this your boasted British Constitution ?

I should be glad now if some one would undertake to show, what necessity or tolerable reason there is or can be for this extraordinary stretch of the prerogative. By the British Constitution the Legislative power of the Sovereign is merely negative ; "and," says CHITTY, "it is only for the purpose of protecting the regal executive authority that the Constitution has assigned to the King a share in legislation." Now, if this be true,—and the same thing had been said by MONTESQUIEU and BLACKSTONE,—where can be the necessity for such a period of suspense ? It may be answered indeed, and truly, that the King cannot and ought not to be expected to trust his Royal Prerogative to his Representative ; but can he not trust it to himself ? Must he be allowed *two years* to make up his mind on a question of mere prerogative ; and in a case, too, where his Representative saw nothing to apprehend ? 'The Representative may have been a buzzard.' Well, but your cause supposes that the King and all his Councillors are buzzards. 'Not so ; they probably want time to correspond.' Ay, I understand you now ! Yes ! yes ! The truth is, there's some back-stairs influence at work :—some whispering and winking between some underling in office, and some clique of *upperlings* "on this side of the water !" Some ROEBUCK, perhaps, has got behind the scenes, or some DAN O'CONNELL, and *therefore* it is that we poor Colonists must hang in sweet suspense, patient in tribulation, rejoicing in hope ; and all for love of *the British Constitution !*

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* The 31st Clause of the Act of 1791, runs thus : "*Provided always, and be it further enacted by the authority aforesaid*, That whenever any bill, which shall have been so presented for His Majesty's assent to such Governor, Lieutenant-Governor, or person administering the Government, shall by such Governor, Lieutenant-Governor, or person administering the Government, have been assented to in His Majesty's name, such Governor, Lieutenant-Governor, or person as aforesaid, shall, and he is hereby required, by the first convenient opportunity, to transmit to one of His Majesty's principal Secretaries of State, an authentic copy of such bill so assented to ; and that it shall and may be lawful, at any time within two years after such bill shall have been so received by such Secretary of State, for His Majesty, his heirs or successors, by his or their order in Council, to declare his or their disallowance of such bill, and that such disallowance, together with a certificate, under the hand and seal of such Secretary of State, testifying the day on which such bill was received as aforesaid, being signified by such Governor, Lieutenant-Governor, or person administering the Government, to the Legislative Council and Assembly of such Province, or by proclamation, shall make void and annul the same, from and after the date of such signification." N.B. By the Act of 1774, the previous Constitutional Act, the Royal disallowance might be declared *at any time without any limit*, after the allowance. See s. 14. There has been some improvement : let us hope—let us strive lawfully—for more.

I might mention various other particulars in which the power of the Crown is much more limited in England than in Canada—at least in this Province: in the appointing of Sheriffs, for instance. In England, the custom is, "for the Lord High Chancellor, the Chancellor of the Exchequer, the Judges, several of the Privy Council, and other great officers of State, to assemble, &c., when three persons for each County are proposed or selected, out of which three one is finally appointed by the King." "Sheriffs, by virtue of several old statutes, are to remain in office no longer than one year, and therefore it seems that the Crown cannot authorize them to remain in office for a longer period."—*(Chitty.)* Had this rule obtained in this Province, we should have lost less by defalcations, and been spared the disgust occasioned by some late proceedings. Have we not had enough of these *pocket* Sheriffs? I might also mention Justices of the Peace. In England, "in selecting individuals to fill this important situation, the Crown must ascertain whether they are sufficiently qualified, according to several statutes on the subject." Are there any such statutes here? Is there any such discrimination? Looking in certain directions, one would hardly think so. I might even dwell on the unconstitutional power (as it would be thought), which the Crown possesses here, of adjourning the Houses of Parliament. It has no such power in England. They adjourn themselves.

But there is yet another and a more important difference, which I was on the point of passing, and which, if I am not mistaken, is no trifle either. The Lord Chancellor in Canada, is the head of the Executive, the Represensative of the Crown. Is his Royal Mistress the Lady Chancellor in England? "It seems," says CHITTY, "that in very early times our Kings, in person, often heard and determined causes between party and party; but, by the long and uniform usage of many ages, they have delegated their whole judicial powers to the Judges of their several Courts; so that, at present, *the King cannot determine any cause or judicial proceedings, but by the mouth of his judges.*" Now if any attention is to be paid, any deference shown, to the opinions of any of the great men, British or foreign, who have written on the subject of the English Constitution, such a violation of every principle observed in its entire fabric, can be justified by nothing less than sheer necessity. But where is the necessity? or who will undertake to show it? Are there not twenty men, in either Province, better qualified by far to preside in the Court of Chancery than was Sir F. B. HEAD? What knew he about either Statute or

Common Law? What knew he about the legal and long-established principles of Equity? O! "In government, impartiality"—so he tells us—"is better than knowledge;" and hence, I suppose, the reason, why he chose so frequently to turn his skull into a dice-box. I grant the great importance of impartiality, *in a Judge* above all functionaries, and more especially in this Lower Province: but impartiality, in England, is thought to be best secured by independence. Now is, I ask, a Provincial Governor independent? Is it not the case, that he no sooner enters into the Government, than he finds himself entangled in the toils of self-constructed aristocratic compacts, so as to be necessitated either to espouse their cause against the Commons, and become their advocate and apologist at Court, or to return disgraced? Was Sir FRANCIS HEAD impartial? Will any man venture the assertion? Whoever thinks so had better spare himself the consequence of an exposure. From first to last he was the cock-bird of a party. "Having submitted to your Lordship the foregoing documents, I beg leave to repeat, as my humble opinion, that the greatest possible benefit will be derived from" —— What should one conjecture now? *My self-applauded impartiality?* No. "The greatest possible benefit will be derived from the *dispute which I am having* WITH THIS PROVINCE?" I have looked a little into the writings of the mighty and petty disputants of past and present times; in politics, philosophy, theology; but in my life I never met with such a coxcomb of a disputant as this. If to be what *he* was, the boasted bestower on his country of the greatest possible benefit, consequent on his disputing with and routing as a disputant the Province which he was sent to govern: if to play the part, and to boast of having played the part, of an *Agitator*, and a GLADIATOR, and at the same time claiming superior merit on the score of impartiality: if these are recommendations for a Judge in Equity and a Lieutenant-Governor, *he* stands the solitary SELKIRK; his right there is none to dispute.

I fear me now this censure will hardly suit some gentlemen in Upper Canada; and as for certain Magistrates in the Midland District, I expect they will be little short of frantic. Here is their opinion—as it was at least. Let us hope that by this time they have learned to think more moderately:—

Under Circumstances of unusual and uncalled-for Excitement and Embarrassment your Excellency's dignified, dispassionate, and firm Conduct in the Management of public Affairs here merits, and is, in some Degree, recompensed by our warmest Thanks. Your Excellency's calm and deliberate Manner of meeting these Embar-

rassments, and the solid Reasoning with which you sustain the constitutional Ground which your Excellency has taken up, cannot fail to have a salutary Effect in repressing the Growth of political Error.—*(Despatches, p. 287.)*

Without doubt these gentlemen supposed that this their Address would greatly assist His Excellency's dignified endeavours to repress the direful growth. Do they then require to be told, that what they call an uncalled-for excitement was personally and loudly called for by his Excellency? That he avowed it? that he gloried in it? that he, not less than O'CONNELL, dubbed himself what I have called him, an Agitator, (a very dignified, very dispassionate one, of course).—

Observing that these Answers,—[such are his very words,]—not only produced great Excitement in both the Canadas, but that the more Addresses I answered the more I received, I determined to continue the Controversy, in order that the Republicans should, in the most public Manner possible, be forced to measure their Strength with the Supporters of the British Constitution.

If the Subject of Dispute had been of trifling Importance I need hardly say I should have avoided rather than have courted a Conflict of this irregular Nature; but as I knew that it involved our Possession of the Canadas,—as I felt confident that the Position which the Republicans had imprudently assumed was untenable, and that I never could again hope to attack them on such advantageous Grounds,—I steadily continued to excite and agitate the public Mind.—*(Despatches, p. 322.)*

Do these gentlemen, I further ask, require to be told, that nine-tenths of his "solid reasoning" is claptrap sophistry? that not unfrequently, of his own assertions, he himself supplies us with flat contradictions? We have seen a specimen or two of the uniformity of his testimony respecting the character of the men of Upper Canada: take an instance of the manner—very similar—in which he treats our Constitution.

The Yeomen and Industrious Classes of Upper Canada should never allow a single Letter to be substracted from or added to this great Charter of their Liberties; for if once they permit it to be mutilated, or what may be termed improved, they and their Children become instantly liable to find themselves suddenly deprived of their Property, and, what is better than all Property, of their Freedom and Independence.—*(Despatches, p. 168.)*

Something however must be done,—[must be? why?] and although I trust I am as unwilling as any person can be to meddle with the Constitutional Act of 1791, yet, seeing the unavoidable Necessity of doing so, I cannot but avow I think it the Duty of the Country, if it does resolve to interfere, to prevent the Necessity of ever doing so again.—*(Despatches, p. 348.)*

On a Province the most noble this amiable Knight would wreak vengeance the most disgraceful; and a Constitution which others were to fight for to the last letter, without a shadow of necessity *shewn*, he would mutilate without mercy. Again,

In his reply to the Address of the House of Assembly, dated March 14, 1836, Sir FRANCIS, speaking of his Council, says, "For

their acts I deliberately declare myself to be responsible."—*(Despatches, p.* 154.*)* What can he mean? How could he be? Speaking of himself in the third person, he declares,—"By his oath he cannot even divulge which of his advisers may have misled him.... Their individual opinions can never be divulged, *even to the King.*"—*(p.* 157.*)* "*Their* oath," observes his Excellency, "appears to my judgment to be an oath of non-responsibility *to the people;*" *(p.* 169.*)* then was not *his* oath, by the same rule, an oath of non-responsibility—"*even to the King?*" But away with inference: take his own declaration. "It would be evidently unjust..... that he should be liable to impeachment for any acts but his own."—*(p.* 157.*)* Thus he deliberately declares himself to be, what he as deliberately declares it would be *unjust* if he were *liable* to be!

But I have taxed his Excellency with writing claptrap sophistry. Very well: can I not prove it? Let us see.

If the Crown voluntarily surrenders its actual property in this Colony (before it has imbibed from the Mother Country a Hundreth Part of the redundant Population it is capable of supporting) it may with equal Justice be required to surrender its Jurisdiction.—*(Despatches, p.* 325.*)*

That is to say,—leaving out the parenthetic clause, which is nothing to the purpose,—Give "voluntarily" a part of what is "your actual property"—*your own;* and "with *equal justice* may you be REQUIRED to surrender"—any portion or the whole of the remainder! Such is the "solid reasoning" of Sir FRANCIS BOND HEAD, when deliberately writing—not answers "in homely language" for purposes of agitation, to Addresses from "farmers and yeomen;" but—officially to Lord GLENELG. Again.

Ridiculing, as well he might ridicule, the paraded Colonel SIMCOE, for having asserted that the Act of 1791 had "established the British Constitution," and "that this Province was singularly blessed,—not with a mutilated Constitution, but with a Constitution which has stood the test of experience," &c. Sir FRANCIS thus replies to the addressers of such nonsense:—

Supposing it were to be argued that Four Fifths of the Members of your House of Assembly ought immediately to be dismissed, because, in proportion to the Population of Great Britian and Ireland, there exist Five Times as many Members here as in the English House of Commons, would you not think it very irrational that this noble but thinly-peopled Colony should be made the 'the exact Image and Transcript' of the British Constitution merely because Colonel SIMCOE happened to use these Words? Would you not immediately appeal to your Constitutional Act on the Subject?

Would you deem it just that a young rising Province like this should be afflicted with the same expensive Machinery requisite for the Government of the Mother Country, 4,000 Miles off?

Would you not very fairly argue, that as the whole Population of this immense Country exceeds only by One Third that of the single Parish of St. Marylebone in London, and as the whole of its Revenue does not equal the private Fortune of many an English Commoner, it would be unreasonable to expect that the People of this Province should be ruined in vainly attempting to be the 'exact Image and Transcript' of the British Constitution.—*(Despatches, p.* 168.*)*

Now, is not this a precious piece of "solid reasoning?" I have heard the right of the Crown to increase the number of the Members of the House of Commons questioned, because such increase would destroy the proportion tacitly settled by the Acts of Union, between the number of the English Members, and the Scotch and Irish; but beside this great political polemic, did any man ever hear or dream, that according to the British Constitution, the Members of the House of Commons must be in some stated "proportion to the population?" that the British Constitution prescribes the expense of the machinery of Government? What if we had, in fact, as these men pretended that we had, "the very image and transcript of the British Constitution?" would any man not crazed assert that it involved, either the irrationality or the ruin here pretended? I look upon such stuff proceeding from such men, as I do upon an old woman's bogle,—a mental monster to frighten naughty children.

The ignorance which prevails in Canada respecting politics is not at all suprising, looking at the character and conduct of their instructors. Speaking generally, what do the people read? *Newspapers.* Now take a sample. The *Montreal Herald* of this morning calls the political apophthegm, Vox populi, vox Dei, a "modern creed:" and the same paper, a while ago, gravely told us, that in *its* opinion, instead of being the voice of God, the voice of the people was more frequently that of the devil! One might fear this learned Theban had been mistaking for the voice of the people, his own sweet voice! It has been said—and there is much truth in the saying, "permi les aveugles un borgne est Roi:" among the blind a blinkard is a King: and verily, before a man would venture to publish notions such as those above-mentioned, he must have calculated pretty confidently that the eyes were all his own.

What opinion ought we to form of the public press? Lord Brougham tells us it is the best possible public instructor. I beg his Lordship's pardon, but I cannot be of his opinion. Napoleon's notion was much more rational. "When I landed at Cannes, they wrote in the Paris newspapers—*Rebellion of Buonaparte:* five days after—*General Buonaparte has entered Grenoble:* eleven days after—*Napoleon has made his entry into Lyons:* twenty days after—

THE EMPEROR *is arrived at the Tuileries.*" Then follows a pretty good reflection. "After this, look for public opinion in the newspapers!"

"The ambition of ruling over the mind," says NAPOLEON, "is one of the strongest passions:" and this is most strikingly observable in politics and religion. GIBBON saw it in CALVIN, and hence he calls him "a stern theologian, who loved liberty too well to endure that Christians should wear any other chains than those imposed by himself." And is it not so with our Yankee neighbours and *their* liberty? And is it not so with our newspaper editors and their *opinions?* "As to Responsible Government in a dependent Colony," says our *Herald*, "it is a political contradiction too palpably gross and ridiculous to require more than the passing remark, that WE *have always considered it the touchstone between loyalty and rebellion.*" What magniloquence. "We" are noble fellows!

For the benefit of those who hear and say so much about the British Constitution, and know so little, I shall give a very masterly delineation of it, in the words of MONTESQUIEU. I prefer this sketch before that of any English author that I have met with, for two reasons: it is more concise and clear, setting forth what *is*, and *why* it is, and why it *ought* to be so; and it possesses every possible recommendation to a respectful attention of the Franco Canadians; whom I shall choose, whatever may be the cry for their political destruction, to treat as fellow-subjects; and for whose reclamation to loyalty, and introduction to a more full participation of the incalculable blessings of English Liberty than this Colony has yet enjoyed, I am not and shall not be ashamed to labour.

The French Canadians, speaking generally, may be ignorant, may be degraded, may be disaffected: they may be unenterprising; they may be comparatively stupid: all this they are said to be, and this, to a great extent, I believe they are. What then? *All this may be the fault of others, rather than their own.* Are the French in France, their brethren, unenterprising, ignorant, degraded, stupid? What makes *the difference?* I put this question, not to a company of snarling curs, but to calm, observant, reflecting men. *What makes* the difference? I think I could tell, and shall, perhaps, some day. In the mean time, I ask another question.

Have the Franco Canadians ever yet been guilty of a tythe of the rebellion that have the Irish? Yet the Irish are not politically proscribed: on the contrary, they now are courted. Their Peers

are admitted into our House of Lords, and mingle with the proudest of the Sassanachs on equal terms. Do I complain of this? Not so. It is one of those "tides in the affairs of men" of which history shows many, resulting from a law of political attractions and repulsions, of which, if those who wield the destinies of England knew how to avail themselves at present as I would to God they did, I should not yet despair to see Franco-Canadian Lords in a Canadian House of Peers.

It is pitiful to sneer and fleer, as do our coxcomb parvenues, at *pauvre* JEAN BAPTISTE. It is pitiful to hear a little knot of insolent exclusives, "all true-born Englishmen," the blood of every one of whom is a mixture of that of half a dozen different races, flouting like any Spanish Hidalgo, snorting and tossing up their noses like horses at the smell of a dead hog, at the idea of a matrimonial contamination. God! it makes one's blood boil! Whence came the noblest blood of a true-born Englishman? From France. Whence came the better portion of our admirable language? From the Latin *through the French.* The great JOHNSON, like a true-born bigot,—the man that would not defile his orthodoxy by entering a conventicle to hear a sermon from the great Historian of Scotland;—this great Lexicographer of England, despised the French, and scouted the idea of an obligation. What was the consequence? He composed his Dictionary after the very model of that of the Academy, and was so careful to conceal all appearance of approbation, that for words strictly and even literally French, he assigned, in numberless instances, any the most absurd original or affinity, rather than avow the hated truth. I might go on with this censure to almost any length. In arts, in sciences, in literature, we were, for centuries, an age behind our European neighbours. Not one single first edition of a Greek or Latin Classic can England boast. All the best of what we knew, *except in Government*, we had to borrow: and is it fair now, is it generous, is it manly, that, when we have a chance to repay the obligation, *principally owing to our conquerors the Normans*, we should tender in payment sneers and insults?

OF
THE ENGLISH CONSTITUTION.

In every State there are three kinds of power, the legislative, the executive, and the judicial. By the first the prince or other established authority makes laws, temporary or permanent, and corrects or abrogates those that have been

DE LA CONSTITUTION
D'ANGLETERRE.

Il y a, dans chaque état, trois sortes de poivoirs; la puissance législative, la puissance exécutrice des choses qui dépendent du droit des gens, & la puissance exécutrice de celles qui dépendent du droit civil.

made. By the second, he makes peace or war, sends or receives ambassadors, provides for the public security, and prevents invasion. By the third, he punishes crimes, and judges the causes of individuals.

The political liberty of a citizen is that tranquillity of spirit, which results from a persuasion of his security; and to afford that liberty, the government should be such, that one citizen can have no occasion to fear another.

When the legislative and executive powers are united in one person or in one body, there is no liberty; because one should have reason to fear that the Monarch or the Senate so empowered, would make tyrannical laws, to execute them tyrannically.

Unless the judicial power is separated from the legislative, and also from the executive, there is no liberty; if joined to the legislative, the power over the life and liberty of the citizens would be arbitrary, because the judge would be the maker of the law: if united to the executive, the judge would have the power of an oppressor.

Were the same men, or the same body of men,—nobles or people,—to exercise the three, all would be lost. . . .

The judicial power ought not to be given to a permanent body of magistrates, but to persons taken from the body of the people. . . . The two others should rather be given to public officers or permanent bodies; because they are not exercised on any individual; the one being only the general will of the community, and the other the execution of that will.

But if the judicial body ought not to be permanent, the judgments ought to be so precise as never to deviate from the law. Were they to be according to a mere private opinion of the judge, men would live in society without knowing precisely what engagements they had contracted. It is even necessary that the judges should be of the same rank as the accused, or, as we say, his peers; lest he should fancy that he had fallen into the hands of men seeking occasion to do him violence.

If the legislative power leave to the executive the right of imprisoning citizens who can give security for their conduct, there is an end of liberty:—except in cases where they are held in custody to reply, without delay, to an accusation which the law has made capital: in

Par la première, le prince ou le magistrat fait des loix pour un temps ou pour toujours, & corrige ou abroge celles qui sont faites. Par la seconde, il fait la paix ou la guerre, envoie ou reçoit des ambassades, établit la sureté, prévient les invasions. Par la troisième, il punit les crimes, ou juge les différends des particuliers. On appellera cette dernière la puissance de juger; & l'autre, simplement la puissance exécutrice de l'état.

La liberté politique, dans un citoyen, est cette tranquillité d'esprit qui provient de l'opinion que chacun a de sa sureté; &, pour qu'on ait cette liberté, il faut que le gouvernement soit tel, qu'un citoyen ne puisse pas craindre un autre citoyen.

Lorsque, dans la même personne ou dans le même corps de magistrature, la puissance législative est réunie à la puissance exécutrice, il n'y a point de liberté; parce qu'on peut craindre que le même monarque ou le même sénat ne fasse des loix tyranniques, pour les exécuter tyranniquement.

Il n'y a point encore de liberté, si la puissance de juger n'est pas séparée de la puissance législative & de l'exécutrice. Si elle étoit jointe à la puissance législative, le pouvoir sur la vie & la liberté des citoyens seroit arbitraire; car le juge seroit législateur. Si elle étoit jointe à la puissance exécutrice, le juge pourroit avoir la force d'un oppresseur.

Tout seroit perdu, si le même homme, ou le même corps des principaux, ou des nobles, ou du peuple, exerçoient ces trois pouvoirs; celui de faire des loix, celui d'exécuter les résolutions publiques, & celui de juger les crimes ou les différends des particuliers. . . . . .

La puissance de juger ne doit pas être donné à un sénat permanent, mais exercée par des personnes tirées du corps du peuple. . . . . .

Les deux autres pouvoirs pourroient plutôt être donnés à des magistrats ou à des corps permanens; parce qu'ils ne s'exercent sur aucun particulier; n'étant, l'un, que la volonté générale de l'état; & l'autre, que l'exécution de cette volonté générale.

Mais, si les tribunaux ne doivent pas être fixes, les jugemens doivent l'être à un tel point, qu'ils ne soient jamais qu'un texte précis de la loi. S'ils étoient une opinion particulière du juge, on vivroit dans la societé, sans sçavoir précisément les engagemens que l'on y contracte.

Il faut même que les juges soient de la condition de l'accusé, ou ses pairs,

which case they are really free, because they are made subject only to the power of the law. If, however, the legislative authority believes itself in danger on account of some secret conspiracy against the State, or of treasonable correspondence with foreign enemies, it may for a time,—short and limited,—permit the executive power to arrest suspected citizens, who will thus lose their liberty for a time, only that liberty may not be lost forever.

As in a free state, every man who is considered to have a will of his own, ought to be governed by himself; it follows that the people in a body should have the legislative power: but as, in large states, this is impossible; and in small ones is subject to great inconvenience; what the people cannot do themselves, it is necessary that they should do by their representatives.

A man knows much better the wants of his own city than of others; and judges much better of the capacities of his neighbours than of those of his distant countrymen. The members of the legislature, therefore, ought not to be taken from the body of the nation generally: it is preferable that the inhabitants should choose a representative in each principal town or location.

The great advantage of representatives is, that they are capable of discussing national affairs: the body of the people is totally incapable; which forms one of the great inconveniencies of a democracy.

It is not necessary that the representatives, who have received from their constituents a general instruction, should be further instructed on each particular affair that arises, as is done in the Diets of Germany. It is true that, in this case, the vote of the deputies would more exactly express the will of the people; but this would produce interminable delays; would render each deputy the master of all the rest; and in the most pressing emergencies, all the force of the nation might be arrested by some caprice.

When the deputies, as Sydney has well observed, represent a body of people, as in Holland, they ought to render an account to those by whom they were commissioned. It is otherwise when they are deputies of Boroughs, as in England.

All the citizens, in the several districts, ought to have a right of suffrage, except those only who are in such a state of

pour qu'il ne puisse pas se mettre dans l'esprit qu'il soit tombé entre les mains de gens portés à lui faire violence.

Si la puissance législative laisse à l'exécutrice le droit d'emprisoner des citoyens qui peuvent donner caution de leur conduite, il n'y a plus de liberté; á moins qu'ils ne soient arrêtés pour répondre, sans délai, à une accusation que la loi a rendue capitale: auquel cas ils sont réellement libres, puisqu'ils ne sont soumis qu'à la puissance de la loi.

Mais, si la puissance législative se croyoit en danger par quelque conjuration secrette contre l'état, ou quelque intelligence avec les ennemis du dehors, elle pourroit, pour un temps court & limité, permettre à la puissance exécutrice de faire arrêter les citoyens suspects, qui ne perdroient leur liberté pour un temps, que pour la conserver pour toujours. . . . .

Comme, dans un état libre, tout homme qui est censé avoir une ame libre doit être gouverné par lui-même, il faudroit que le peuple en corps eût la puissance législative: mais, comme cela est impossible dans les grands états, & est sujet à beaucoup d'inconvéniens dans les petits, il faut que le peuple fasse, par ses représentans, tout ce qu'il ne peut faire par lui-même.

L'on connoît beaucoup mieux les besoins de sa ville, que ceux des autres villes; & on juge mieux de la capacité de ses voisins, que de celle de ses autres compatriotes. Il ne faut donc pas que les membres du corps législatif soient tirés en général du corps de la nation; mais il convient que, dans chaque lieu principal, les habitans se choisissent un représentant.

Le grand avantage des représentans, c'est qu'ils sont capables de discuter les affaires. Le peuple n'y est point du tout propre; ce qui forme un des grands inconvéniens de la démocratie.

Il n'est pas nécessaire que les représentans, qui ont reçu, de ceux qui les ont choisis, une instruction générale, en reçoivent une particulière sur chaque affaire, comme cela se pratique dans les diettes d'Allemagne. Il est vrai que, de cette manière, la parole des députés seroit plus l'expression de la voix de la nation: mais cela jetteroit dans des longueurs infinies, rendroit chaque député le maître de tous les autres; et, dans les occasions les plus pressantes, toute la force de la nation pourroit être arrêtée par un caprice.

Quand les députés, dit très-bien M.

depravity or degradation, that they are considered as wanting the faculty of free volition.

In the greater part of the ancient republics, there was one grand vice: the people had a right to resolve respecting matters belonging to the executive department, and altogether beyond the reach of their ability. The people ought not to take part in the government, except to choose their representatives. Of this they are sufficiently capable: for although there are but few men who know the precise degree of the capacity of each particular individual, yet every one, generally speaking, can judge of the relative intelligence of different individuals.

Neither ought the representative body to be chosen for the purpose of taking, any more than the people generally, a share in the executive government: this would be highly improper. They are chosen either to make laws, OR TO SEE IF THOSE ALREADY MADE HAVE BEEN PROPERLY EXECUTED. *This they can do extremely well, and it can be well done by none but them.*

There are always in a state men distinguished by birth, riches, or honours: but if they were to be confounded among the people, and if they had only one voice, like others, the common liberty would be their slavery, and such liberty they would have no interest in defending; because the greater part of the proceedings would be against them. The share therefore which they have in legislation, ought to be in proportion to the other advantages which they have in the state; and such will be the case if they form a distinct legislative body, having a right to prohibit the enterprises of the commons, as the commons have a right of prohibition of theirs. By this means the legislative power will be entrusted to a body of nobles on the one hand, and on the other to a body chosen to represent the people; having their assemblies and deliberations apart, according as their views and interests are separate and distinct.

Of the three powers of which we have spoken, the judicial is, comparatively, nothing. There remains then only two: [*i. e.* the legislative and the executive:] and as these have need of a regulating power to moderate them, the branch of the legislative body which consists of nobles, is very proper for that purpose.

The body of nobles ought to be hereditary. In the first place it is so by its

Sidney, représentent un corps de peuple, comme en Hollande, ils doivent rendre compte à ceux qui les ont commis: c'est autre chose lorsqu'ils sont députés par des bourgs, comme en Angleterre.

Tous les citoyens, dans les divers districts, doivent avoir droit de donner leur voix pour choisir le représentant; excepté ceux qui sont dans un tel etat de bassesse, qu'ils sont réputés n'avoir point de volonté propre.

Il y avoit un grand vice dans la plupart des anciennes républiques: c'est que le peuple avoit droit d'y prendre des résolutions actives, et qui demandent quelque exécution; chose dont il est entièrement incapable. Il ne doit entrer dans le gouvernement que pour choisir ses représentans; ce qui est très à sa portée. Car, s'il y a peu de gens qui connoissent le dégré précis de la capacité des hommes, chacun est pourtant capable de sçavoir, en général, si celui qu'il choisit est plus éclairé que la plupart des autres.

Le corps représentant ne doit pas être choisi non plus pour prendre quelque résolution active; chose qui ne seroit pas bien: mais pour faire des loix, OU POUR VOIR SI L'ON A BIEN EXECUTE CELLES QU'IL A FAITES; *chose qu'il peut très-bien faire, et qu'il n'y a même que lui qui puisse bien faire.*

Il y a toujours, dans un état, des gens distingués par la naissance, les richesses ou les honneurs: mais, s'ils étoient confondus parmi le peuple, et s'ils n'y avoient qu'une voix comme les autres, la liberté commune seroit leur esclavage, et ils n'auroient aucun intérêt à la défendre; parce que la plupart des résolutions seroient contr'eux. La part qu'ils ont à la législation doit donc être proportionnée aux autres avantages qu'ils ont dans l'état; ce qui arrivera, s'ils forment un corps qui ait droit d'arrêter les enterprises du peuple, comme le peuple a droit d'arrêter les leurs.

Ainsi, la puissance législative sera confiée et au corps des nobles, et au corps qui sera choisi pour représenter le peuple, qui auront chacun leurs assemblées et leurs délibérations à part, et des vues et des intérêts séparés.

Des trois puissances dont nous avons parlé, celle de juger est, en quelque façon, nulle. Il n'en reste que deux: et, comme elles ont besoin d'une puissance règlante pour les tempérer, la partie du corps législatif, qui est composé de nobles, est très-propre à produire cet effet.

Le corps des nobles doit être hérédi-

nature; besides which it is necessary that it should have great interest in preserving its prerogatives, odious in themselves, and which, in a free state, must always be exposed to danger.

But as an hereditary power might be induced to follow its own interests, and forget those of the people, it is necessary that in matters where there may be a sovereign interest to corrupt it, as in those which concern the raising of money, it should take no other part in legislation than by its power to negative,—not any by its ordinary faculty of enacting.

The executive power ought to be in the hands of a Monarch; because that part of government, which generally requires prompt action, is better administered by one than many. That which depends on the legislative power, is generally better regulated by many than by one.

And if there were no Monarch, and the executive power were to be confided to a certain number of persons taken from the legislative body, liberty would exist no longer; for in that case, the two powers would be united; the same persons taking sometimes, and being always able to take, a share in legislation, and also in the execution of the laws.

It would be useless that the Parliament should be always assembled: it would be inconvenient for the members, besides which it would too much occupy the executive power: which, instead of being intent on public affairs, would think of nothing but defending its prerogatives, and its right to do, what, in consequence of such destraction, would not be done.

Besides, if the legislative body were continually assembled, it might happen, that the only change of members would be by supplying vacancies occasioned by death; and in that case, if the body once became corrupt, the evil would find no remedy. When divers bodies succeed each other, the people who have a bad opinion of the one in being, with reason carry forward their hopes to that which will come after; but if there were always the same body, the people seeing it once corrupted, would hope for nothing further from the laws: they would either become furious, or sink to a state of indolent abjection.

The Parliament ought not to convene itself; for a body is understood to exercise volition only when assembled; and if it were not to convene unanimously, it might be difficult to say which

taire. Il l'est premièrement par sa nature; et d'ailleurs, il faut qu'il ait un très-grand intérêt à conserver ses prérogatives, odieuses par elles-même, et qui, dans un état libre, doivent tourjours être en danger.

Mais, comme une puissance héréditaire pourroit êtrè induite à suivre ses intérêts particuliers, et à oublier ceux du peuple; il faut que, dans les choses où l'on a un souverain intérêt à la corrompre, comme dans les loix qui concernent la levée de l'argent, elle n'ait de part à la législation que par sa faculté d'empêcher, et non par sa faculté de statuer. . . . .

La puissance exécutrice doit être entre les mains d'un monarque; parce que cette partie du gouvernement, qui a presque toujours besoin d'une action momentanée, est mieux admintstrée par un que par plusieurs; au lieu que ce qui dépend de la puissance législative est souvent mieux ordonné par plusieurs que par un seul.

Que s'il n'y avoit point de monarque, et que la puissance exécutrice fût confiée à un certain nombre de personnes tirées du corps législatif, il n'y auroit plus de liberté; parce que les deux puissances seroient unies, les mêmes personnes ayant quelquefois, et pouvant toujours avoir part à l'une et à l'autre. . . .

Il seroit inutile que le corps législatif fût toujours assemblé. Cela seroit incommode pour les représentans, et d'ailleurs occuperoit trop la puissance exécutrice, qui ne penseroit point à exécuter, mais à defendre ses prérogatives, et le droit qu'elle a d'exécuter.

De plus: si le corps législatif étoit continuellement assemblé, il pourroit arriver que l'on ne feroit que suppléer de nouveaux députés à la place de ceux qui mourroient: et, dans ce cas, si le corps législatif étoit une fois corrompu, le mal seroit sans remède. Lorsque divers corps législatifs se succèdent les uns aux autres, le peuple, qui a mauvaise opinion du corps législatif actuel, porte, avec raison, ses espérances sur celui qui viendra après: mais, si c'étoit toujours le même corps, le peuple le voyant une fois corrompu, n'espéreroit plus rien de ses loix; il deviendroit furieux, ou tomberoit dans l'indolence.

Le corps législatif ne doit point s'assembler lui-même. Car, un corps n'est censé avoir de volontés que lorsqu'il est assemblé; et, s'il ne s'assembloit pas unanimement on ne sçauroit dire quelle partie seroit véritablement le corps

was the true legislative body,—that which had assembled, or the remainder. On the other hand, if the legislative body had a right to prorogue itself, it might happen that it would refuse to exercise this right; which, in case of an attempt against the executive power, would give a dangerous advantage. Besides, there are times for the assembling of the legislative body more convenient than others: the executive power, therefore, ought to determine the times of convening, and the duration of the sessions of the legislature, with reference to such circumstances as come under its observation.

If the executive power had not the right to obstruct the enterprises of the legislative bodies, they would become despotic: for, since they could give themselves all the power they pleased, they would soon annihilate all other powers.

But it is not necessary that the legislature should, reciprocally, be able to arrest the executive power; for this, being by its nature limited, it were useless to restrain it; besides which, it is always exercised on matters of a transient nature. The tribunitial power in Rome was vicious, inasmuch as it arrested, not only legislation, but the execution of the laws. This produced incalculable evil.

But if, in a free state, the legislative power ought not to have the right to interrupt the executive, *it has the right, and ought to have the ability, to examine in what manner the laws have been executed which it had made:* and here is the advantage of this government over those of Crete and Sparta, where the Cosmæ and the Ephori gave no account of their administration.

But whatever may be the scrutiny, the legislative body ought not to have the power to judge the person, and by consequence the conduct, of the executive magistrate. His person ought to be sacred: because, being necessary to the state, in order to prevent the legislative power's becoming tyrannic, from the moment that he should be accused or judged, liberty would be at an end. The state would be no longer a monarchy, but a republic without freedom.

As, however, he who executes cannot execute ill, without having evil counsellors, who hate the laws as ministers, though they favour them as men, THESE CAN BE SOUGHT OUT AND PUNISHED: and here is the advantage of this government over that of CNIDUS, where the

législatif, celle qui seroit assemblée, ou celle qui ne le seroit pas. Que s'il avoit droit de se proroger lui-même, il pourroit arriver qu'il ne se prorogeroit jamais; ce qui seroit dangereux dans les cas où il voudroit attenter contre la puissance exécutrice. D'ailleurs, il y a des temps plus convenables les uns que les autres, pour l'assemblée du corps législatif: il faut donc que ce soit la puissance exécutrice qui règle le temps de la tenue et de la durée de ces assemblées, par rapport aux circonstances qu'elle connoît.

Si la puissance exécutrice n'a pas le droit d'arrêter les entreprises du corps législatif, celui-ci sera despotique; car, comme il pourra se donner tout le pouvoir qu'il peut imaginer, il anéantira toutes les autres puissances.

Mais il ne faut pas que la puissance législative ait réciproquement la faculté d'arrêter la puissance exécutrice. Car, l'exécution ayant ses limites par sa nature, il est inutile de la borner; outre que la puissance exécutrice s'exerce toujours sur des choses momentanées. Et la puissance des tribuns de Rome étoit vicieuse, en ce qu'elle arrêtoit nonseulement la législation, mais même l'exécution: ce qui causoit de grands maux.

Mais si, dans un état libre, la puissance législative ne doit pas avoir le droit d'arrêter la puissance exécutrice, *elle a droit, et doit avoir la faculté d'examiner de quelle manière les loix qu'elle a faites ont été exécutées;* et c'est l'avantage qu'a ce gouvernement sur celui de Crète et de Lacédémone, où les *cosmes* et les *éphores* ne rendoient point compte de leur administration.

Mais, quel que soit cet examen, le corps législatif ne doit pas avoir le pouvoir de juger la personne, et par conséquent la conduite de celui qui exécute. Sa personne doit être sacrée; parce qu'étant nécessaire à l'état pour que le corps législatif n'y devienne pas tyrannique, dès le moment qu'il seroit accusé ou jugé, il n'y auroit plus de liberté.

Dans ce cas, l'état ne seroit point une monarchie, mais une république non libre. Mais, comme celui qui exécute ne peut executer mal, sans avoir des conseillers méchans et qui haissent les loix comme ministres, quoiqu'elles les favorisent comme hommes; *ceux-ci peuvent être recherchés et punis.* Et c'est l'avantage de ce gouvernement sur celui de *Gnide,* où la loi ne permettant

law, not permitting the Amimones, even after their administration, to be arraigned, the people had no redress for the injuries which they had suffered. . . .

It may happen that some of the officers of state shall have violated the rights of the people, and committed crimes which the established magistrates can not or will not punish. But, in general, the legislative power cannot judge; and in a case of this kind, especially, where it represents the party interested, the people, it ought not. It can only be the accuser. But before what judge? Shall it abase itself before the tribunals of the law which are its inferiors, and where, besides, the juries, being composed of the people, might be overborne by the authority of so powerful an accuser? No. To maintain the dignity of the people and the security of the individual, it is necessary that the popular branch of the legislature should carry the accusation before the other House of Parliament, that House having neither the same interests with itself, nor the same passions. And here is the advantage which this government has over the greater part of the ancient republics, where there was this abuse: that the people were at once accuser and also judge.

The executive power ought, as we have said, to have a share in the legislation by its faculty of disallowing, without which it would presently be despoiled of its prerogatives: but if the legislative power take a share in the execution of the laws, the executive power will be equally despoiled.

What caused a change of government at Rome was, that the Senate, which had one part of the executive power, and the magistrates who had the other, had not, like the people, the faculty of disallowing.

SUCH IS THE FUNDAMENTAL CONSTITUTION OF THE GOVERNMENT OF WHICH WE SPEAK. The legislative bodies being composed of two parties, each restraining the other by their mutual faculty of disallowing. Both are bound by the executive power, as is the executive by them.

As all things human have an end, the state of which we speak will lose its liberty, will perish. Rome, Sparta, Carthage have perished. It will perish then, when the legislative power shall be more corrupt than the executive.

point d'appeller en jugement les *amimones*, même après leur administration, le peuple ne pouvoit jamais se faire rendre raison des injustices qu'on lui avoit faites. . . . . .

Il pourroit arriver que quelque citoyen, dans les affaires publiques, violeroit les droits du peuple, et feroit des crimes que les magistrats établis ne sçauroient ou ne voudroient pas punir. Mais, en général, la puissance législative ne peut pas juger; et elle le peut encore moins dans ce cas particulier, où elle représente la partie intéressée, qui est le peuple. Elle ne peut donc être qu'accusatrice. Mais devant qui accusera-t-elle? Ira-t-elle s'abbaisser devant les tribunaux de la loi qui lui sont inferieurs, et d'ailleurs composés de gens qui, étant peuple comme elle, seroient entraînée par l'autorité d'un si grand accusateur? Non: il faut, pour conserver la dignité du peuple et la sureté du particulier, que la partie législative du peuple accuse devant la partie legislative des nobles; laquelle n'a, ni les mêmes intérêts qu'elle, ni les mêmes passions.

C'est l'avantage qu'a ce gouvernement sur la plupart des républiques anciennes, où il y avoit cet abus, que le peuple étoit, en même temps, et juge et accusateur.

La puissance exécutrice, comme nous avons dit, doit prendre part à la législation par sa faculté d'empêcher; sans quoi, elle sera bientôt dépouillée de ses prérogatives. Mais, si la puissance législative prend part à l'exécution, la puissance exécutrice sera également perdue. . . . . .

Ce qui fut cause que le gouvernement changea à Rome, c'est que le sénat qui avoit une partie de la puissance exécutrice, et les magistrats qui avoient l'autre, n'avoient pas, comme le peuple, la faculté d'empêcher.

VOICI DONC LA CONSTITUTION FONDAMENTALE DU GOUVERNEMENT DONT NOUS PARLONS. Le corps législatif y étant composé de deux parties, l'une enchaînera l'autre par sa faculté mutuelle d'empêcher. Toutes les deux seront liées par la puissance exécutrice, qui le sera elle-même par la législative. . . . .

Comme toutes les choses humaines ont une fin, l'état dont nous parlons perdra sa liberté, il périra. *Rome*, *Lacédémone* et *Carthage* ont bien péri. Il périra, lorsque la puissance législative sera plus corrompue que l'exécutrice.

I regret that circumstances will not permit my pausing here, to offer some remarks on this extract. In the words of a great Master it contains a sketch of the English Constitution;—a delineation on which those that have a taste for the views, and arguments, and profound reflections of political philosophy, will love to meditate. How much has France advanced in freedom since this was written! How much more nearly does her Constitution resemble ours! She has tried the opposite extremes of democratic and arbitrary sway; and in the school of stern experience has been taught to prize the kind of government here recommended. Is such experience to be lost on us? Shall we, in our self-sufficiency, repudiate the wisdom of philosophy, teaching what she has learned from the experience *of all past ages;* and take up with the new-fangled notions and contrivances of every crack-brained Constitution-monger? Give me the *storm-tried* Constitution, that, in the direst tempest and the darkest night, has beaconed and still beacons forth above the waters, THE PHAROS OF ALL NATIONS!

As one principal object of this Pamphlet is to afford a clear view of the Constitution of which ours *ought to be* an "exact image and transcript," I make no apology for adding as follows, from the pen of one of our standard Authorities, A. F. TYTLER, Lord WOODHOUSELEE.—*Elem. Gen. Hist.*

ON THE BRITISH CONSTITUTION.

1. The rudiments of the constitution of England may be traced as far back as the Norman conquest. William distributed a great proportion of the lands among his Norman followers, subjecting these, as well as the Anglo-Saxons who retained their property, to the feudal tenures, and thus extinguishing at once the ancient liberties of the people. England was divided into 60,215 military fiefs, all held of the crown, under the obligation of the vassal's taking arms for his sovereign whenever required. In the continental kingdoms of Europe, as in France, the feudal system arose by slow degrees, nor was there of consequence the same union of the fabric as in England. The feudal lords were independent of each other, ever at variance from their mutual pretensions, and often owing but a very slender allegiance to the crown. Their vassals suffered from oppression, and often struggled for their freedom; but these efforts being partial produced no consequence favourable to the liberty of the nation. In England all were oppressed by the enormous weight of the crown; it was a common grievance, and produced at times a violent effort for the general liberties of the people.

2. The forest-laws imposed by the conqueror (see Sect. XV. § 2, 11) were a grievance felt by the whole nation, as rendering every man's property precarious, and subject to the arbitrary encroachments of the crown. It was no wonder that the barons and their vassals should cordially unite to rid themselves of so intolerable a hardship. Henry I. found it necessary to conciliate his subjects, by mitigating the most rigorous of the feudal laws. A greater advance was made under Henry II. by the institution of the trial by jury. But John, imprudently resisting this natural progress towards a rational freedom, was soon compelled into those important concessions, the *Charta de Foresta* and *Magna Charta*. From that time,

whatever we may judge of the actual government, which was often most arbitrary and despotical, the constitution of England was that of a limited monarchy.

3. The next memorable era in the growth of the English Constitution was the reign of HENRY III., when, under that weak prince, the parliament received a new form, by the admission of the representatives of the people, the deputies of the counties and boroughs. (Sect. XXII. § 2.) His successor EDWARD I. acknowledged their authority in obtaining all his subsidies, and ratified a new law, which declared, that no tax should be levied without the consent of the Lords and Commons. The *Magna Charta* was confirmed no less than eleven times in course of this reign.

4. Thus the Constitution continued advancing, till its progress was suspended by the civil wars of York and Lancaster. The rights of both prince and people seemed then to be entirely forgotten; and the race of Tudor found no resistance from parliament to their vigorous but despotic sway. The talents of ELIZABETH, and the high character which her government sustained with foreign powers, extinguished all domestic disquiets, while the predominant feeling was the maintenance of the power and dignity of the crown.

5. But under the succeeding prince, when that power and dignity were abused by his own weakness, the nation began to awake from its lethargy; and that spirit of opposition, which in this reign confined itself to complaints, was in the next to break forth with alarming violence. CHARLES I., endowed with superior energy of character, and acting, as he conceived, on a principle of duty, which called on him to maintain the prerogative of his predecessors, and transmit it unimpaired to his posterity, was imprudent in exerting with rigour an authority which he wanted ultimate resources to support. He was compelled to sign the *Petition of Rights*, a grant more favourable to liberty than *Magna Charta*. The true patriots were satisfied with this concession, which conferred the most ample constitutional freedom. But with the popular leaders patriotism was the cloak of insatiable ambition; and, advancing in their demands with every new compliance, the last appeal was made to the sword, and the contest ended by the destruction of the constitution.

6. The despotism which succeeded, and the fluctuation of power from the Long Parliament to the Protector, and finally to the leaders of a standing army, afforded convincing demonstration how vain was the chimera of a republic, *under which the demagogues had masked their designs*. Weary of anarchy, the nation returned with high satisfaction to the best of all constitutions, a limited monarchy.

7. New encroachments under CHARLES II. produced new limitations, and the act of *Habeas Corpus* gave the utmost possible security to personal liberty. The violent and frantic invasion of the constitution by JAMES II. banished himself and his posterity from the throne, and produced a new and solemn contract between the king and people. Regarding, therefore, the revolution as the final settlement of the English Constitution, we shall endeavour briefly to delineate the chief features of that great political structure.

8. The Constitution of Great Britain may be viewed under two distinct heads, the legislative and the executive power; the last comprehending the prerogative of the crown.

The power of legislation belongs to parliament, whose constituent parts are, the King, Lords, and Commons. The House of Lords consists of the temporal peers of England, and the spiritual, viz., the two archbishops and twenty-four bishops. To these, since the union with Scotland and Ireland, are added sixteen delegates from the peerage of the former kingdom, and twenty-eight peers, one archbishop, and three bishops, from the latter.* The House of Commons consists of the deputies of the counties and principal towns of England, and the two Universities, amounting in all to 513 members; to whom, since the unions, are added 45 from Scotland and 100 from Ireland.† These deputies are chosen by the freeholders who possess a property yielding a certain yearly rent.‡ The chancellor generally presides in the House of Lords; the speaker is president in the House of Commons.

* The Irish bishops only sit one session in rotation, according to a fixed cycle, which always includes one archbishop and three bishops. The Scotch peers are elected for every new parliament, but the Irish peers are elected for life.

† By the Reform Act of 1831, there are 500 deputies or representatives for England and Wales, 53 for Scotland, and 105 for Ireland, amounting in all to 658.

‡ By the Reform Act, householders rated at £10 are entitled to vote.

9. The king is the most essential component part of parliament, because he alone has the power to convoke, prorogue, and dissolve it. He has likewise a negative on all its acts, which are invalid without his approbation; and each house has a negative on the decrees of the other. It is likewise competent to the king to propose any measure to be laid before the parliament.

10. All questions regarding public affairs and national measures may originate in either house of parliament, except grants of money, which must take their rise in the House of Commons, and cannot be altered, though they may be rejected, by the Lords. The matter must be primarily discussed in that house in which it originates, and, until there decided, cannot be received by the other, unless a conference should be demanded. A bill refused by either house, or, though passed by both, refused by the king, is utterly void.

11. The executive power of government is lodged in the king. (1.) The first branch of his office is the administration of justice. The judges of all courts of judicature are the king's substitutes. He is the prosecutor of all crimes, and has the power of pardoning and suspending the execution of all sentences. (2.) He is the fountain of all honor, the giver of all titles and dignities, and the disposer of all the offices of state. (3.) He is the superintendent of commerce, and has the power of regulating weights and measures, and of coining money. (4.) He is the head of the church, and names the archbishops and bishops. (5.) He is commander-in-chief of all the sea and land forces, and can alone equip fleets, levy armies, and appoint all their officers. (6.) He has the power of making war, peace, and alliance, and of sending and receiving ambassadors. (7.) He is above the reach of all courts of justice, and is not responsible to any judicature for his conduct in the administration of government.

12. These high powers of the sovereign, which, at first sight, would seem to render him an absolute monarch, are thus admirably controlled:—The king is dependent on parliament for all subsidies, without which he can neither maintain his fleets and armies, nor pay the salaries of officers. The parliament indeed settles a revenue on the king for life, but this is merely sufficient for the maintenance of his household, and supporting a proper diginity of establishment; and as it must be renewed by parliament at the beginning of every reign, it is in the power of that body to withhold it till all abuses shall be remedied. Thus the constitution may be brought back at those periods to its first principles, and all encroachments of the perogative restrained.

13. The king can never reign without a parliament. It must by law be assembled once in three years, on a notice of forty days before its meeting.* Although the head of the church, the king cannot alter the established religion, nor frame ecclesiastical regulations; these must be made by the assembly of the clergy. The king cannot interfere in the ordinary administration of justice, nor refuse his consent to the prosecution of crimes. He may pardon offences, but cannot exempt the offender from pecuniary compensation to the party injured. He cannot alter the standard of money, either in weight or alloy. He cannot raise an army without the consent of parliament; and though a moderate standing force is kept up with their consent, the funds for its payment require an annual renewal by parliament.

Finally, although the Sovereign himself is not amenable to any judicature, *his ministers are responsible for all the measures of government, and are impeachable*

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* The original or first institution of parliaments is one of those matters which lie so far hidden in the dark ages of antiquity, that the tracing of it is equally difficult and uncertain. The word *parliament* is comparatively of modern date; and derived from the French, and signifies an assembly that met and conferred together. It was first applied to general assemblies of the states under Louis VII. of France, about the middle of the twelfth century. But it is certain that, long before the introduction of the Norman language into England, all matters of importance were debated and settled in the great councils of the realm—a practice which seems to have been universal among the northern nations, particularly the Germans, and carried by them into all the countries of Europe. The first mention of the word parliament in our statute law is in the time of EDWARD I. (1272.) But it is agreed that in the main the constitution of parliament, as it now stands, was marked out in the seventeenth year of king JOHN (A.D. 1215), in the great charter granted by that prince; wherein he promises to summon all archbishops, bishops, abbots, earls, and greater barons, personally; and all other tenants in chief under the crown, by the sheriffs and bailiffs; to meet at a certain place, with forty days' notice (this period is now extended to fifty days since the union,) to assess aids and scutages when necessary.

by the Commons at the bar of the House of Lords, for every species of misconduct or misdemeanour.

Such are briefly the outlines of the admirable fabric of the British Constitution. *Esto perpetua !*

The origin of the Legislative Council is seen in Sec. 12 of 14th GEO. III. c. 83, as follows:

And whereas it may be necessary to ordain many regulations for the future welfare and good government of the Province of Quebec, the occasions of which cannot now be foreseen, nor, without much delay and inconvenience, be provided for, without intrusting that authority, *for a certain time*, and under proper restrictions, to persons resident there: and whereas it is at present inexpedient to call an Assembly, be it therefore enacted by the authority aforesaid, that it shall and may be lawful for His Majesty, his heirs and successors, by warrant under his or their signet or sign manuel, and with the advice of the Privy Council, to constitute and appoint a Council for the affairs of Quebec, to consist of such persons resident there, not exceeding twenty-three, nor less than seventeen, as His Majesty, his heirs or successors, shall be pleased to appoint; and upon the death, removal, or absence of any of the Members of the said Council, in like manner to constitute and appoint such and so many other person or persons as shall be necessary to supply the vacancy or vacancies: which Council, so appointed and nominated, or the major part thereof, shall have power and authority to make Ordinances for the peace, welfare, and good government of the said Province, with the consent of His Majesty's Governor, or in his absence of the Lieutenant-Governor, or Commander-in-Chief for the time being.

I am thus particular in quoting, notwithstanding that this enactment has been repealed, to shew the real in contradistinction to the pretended model of our present Legislative Council; and also the origin and reason of a *title*, which was much more appropriate before than since the appointment of an Assembly. The title of this statute, it may be proper to observe, is, "An Act for making more effectual provision for the Government of the Province of Quebec;" which shews that the preceding provision was considered even *less effectual* than this. But what *was* this? A Council *established as a Legislative substitute for the two Houses of an English Parliament.*" The Act by which this provision was repealed, (31st GEO. III. c. 31,) made still "*further* provision for the Government of the said Province." I set forth these gradations to shew—what indeed is very obvious, but what appears to be very generally overlooked—that our present Constitution has been a bit-by-bit creation: that its provisions were temporary and experimental: that, consequently, the prejudice and cry against any *further* and still *more effectual* provisions, as if they were to be so many innovations on the ancient and revered Imperial Constitution, are senseless and absurd: and seeing a Bill has been brought into Parliament, proposing *to make such further and more effectual provisions* as are still acknowledged

to be needed; and that we, as Colonists, have been invited to state freely our opinions and wishes on the subject; when an attempt is made to drown our cry for right and freedom *according to the Imperial Constitution*, by a counter cry of *danger to the Constitution*, our sense of the absurdity is lost in that of the IMPUDENCE—"bald and bare-faced."

The Act 31st GEO. III. c. 31, contains the following provisions:

WHEREAS an Act was passed in the fourteenth year of the reign of his present Majesty, entitled, An act for making more effectual provision for the government of the province of Quebec, in North America: and whereas the said act is in many respects inapplicable to the present condition and circumstances of the said province: and whereas it is expedient and necessary that further provision should now be made for the good government and prosperity thereof: may it therefore please your most excellent Majesty that it may be enacted; and be it enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal and commons, in this present parliament assembled, and by the authority of the same, That so much of the said act as in any mannner relates to the appointment of a council for the affairs of the said province of Quebec, or to the power given by the said act to the said council, or to the major part of them, to make ordinances for the peace, welfare, and good government of the said province, with the consent of his Majesty's governor, lieutenant governor, or commander in chief for the time being, shall be, and the same is hereby repealed.

II. And whereas his Majesty has been pleased to signify, by his message to both houses of parliament, his royal intention to divide his province of Quebec into two separate provinces, to be called the province of Upper Canada, and the province of Lower Canada; be it enacted by the authority aforesaid, that there shall be within each of the said provinces respectively a legislative council, and an assembly, to be severally composed and constituted in the manner hereinafter described; and that in each of the said provinces respectively, his Majesty, his heirs or successors, shall have power, during the continuance of this act, by and with the advice and consent of the legislative council and assembly of such provinces respectively, to make laws for the peace, welfare, and good government thereof, such laws, not being repugnant to this act; and that all such laws being passed by the legislative council and assembly of either of the said provinces respectively, and assented to by his Majesty, his heirs or successors, or assented to in his Majesty's name, by such person as his Majesty, his heirs or successors, shall from time to time appoint to be the governor, or lieutenant governor of such province, or by such person as his Majesty, his heirs or successors, shall from time to time appoint to administer the government within the same, shall be, and the same are hereby declared to be, by virtue of and under the authority of this act, valid and binding to all intents and purposes whatever, within the province in which the same shall have been so passed.

III. *And be it further enacted by the authority aforesaid*, That for the purpose of constituting such legislative council as aforesaid, in each of the said provinces respectively, it shall and may be lawful for his Majesty, his heirs or successors, by an instrument under his or their sign manuel, to authorize and direct the governor or lieutenant governor, or persons administering the government in each of the said provinces respectively, within the time hereinafter mentioned, in his Majesty's name, and by an instrument under the great seal of such province, to summon to the said legislative council, to be established in each of the said provinces respectively, a sufficient number of discreet and proper persons, being not fewer than seven, to the legislative council for the province of Upper Canada; and not fewer than fifteen to the legislative council for the province of Lower Canada; and that it shall also be lawful for his Majesty, his heirs or successors, from time to time, by an instrument under his or their sign manual, to authorize and direct the governor or lieutenant governor, or person administering the government in each of the said provinces respectively, to summon to the legislative council of such province, in

like manner, such other person or persons as his Majesty, his heirs or successors, shall think fit; and that every person who shall be so summoned to the legislative council of either of the said provinces respectively, shall thereby become a member of such legislative council to which he shall have been summoned.

IV. *Provided always, and be it enacted by the authority aforesaid,* That no person shall be summoned to the said legislative council, in either of the said provinces, who shall not be of the full age of twenty-one years, and a natural born subject of his Majesty, or a subject of his Majesty, naturalized by an act of the British parliament, or a subject of his Majesty, having become such by the conquest and session of the province of Canada.

V. *And be it further enacted by the authority aforesaid,* That every member of each of the said legislative councils shall hold his seat therein for the term of his life, but subject, nevertheless, to the provisions hereinafter contained for vacating the same, in the cases hereinafter specified.

VI. *And be it further enacted by the authority aforesaid,* That whenever his Majesty, his heirs or successors, shall think proper to confer upon any subject of the crown of Great Britain, by letters patent under the great seal of either of the said provinces, any hereditary title of honour, rank or dignity of such province, descendible according to any course of descent limited in such letters patent, it shall and may be lawful, for his Majesty, his heirs or successors, to annex thereto, by the said letters patent, if his Majesty, his heirs or successors, shall so think fit, an hereditary right of being summoned to the legislative council of such province, descendible according to the course of descent so limited with respect to such title, rank, or dignity; and that every person on whom such right shall be so conferred, or to whom such right shall severally so descend, shall thereupon be entitled to demand from the governor, or person administering the government of such province, his writ of summons to such legislative council, at any time after he shall have attained the age of twenty-one years, subject, nevertheless, to the provisions hereinafter contained.

VII. *Provided always, and be it further enacted by the authority aforesaid,* That when and so often as any person to whom such hereditary right shall have descended, shall, without the permission of his Majesty, his heirs or successors, signified to the Legislative Council of the province by the governor, lieutenant-governor, or person administering the government there, have been absent from the said province for the space of four years continually, at any time between the date of his succeeding to such right, and the time of his applying for such writ of summons, if he shall have been of the age of twenty-one years or upwards at the time of his so succeeding, or at any time between the date of his attaining the said age and the time of his so applying, if he shall not have been of the said age at the time of his so succeeding; and also when and so often as any such person shall at any time, before his applying for such writ of summons, have taken any oath of allegiance or obedience to any foreign prince or power, in every such case such person shall not be entitled to receive any writ of summons to the Legislative Council by virtue of such hereditary right unless his Majesty, his heirs or successors, shall at any time think fit, by instrument under his or their sign manuel, to direct that such person shall be summoned to the said council; and the governor, lieutenant-governor, or person administering the government in the said provinces respectively, is hereby authorized and required, previous to granting such writ of summons to any person so applying for the same, to interrogate such person upon oath, touching the said several particulars, before such Executive Council as shall have been appointed by his Majesty, his heirs or successors, within such province, for the affairs thereof.

VIII. *Provided also, and be it further enacted by the authority aforesaid,* That if any member of the Legislative Councils of either of the said provinces respectively, shall leave such province, and shall reside out of the same for the space of four years continually, without the permission of his Majesty, his heirs or successors, signified to such Legislative Council by the governor or lieutenant-governor, or person administering his Majesty's government there, or for the space of two years continually, without the like permission, or the permission of the governor or lieutenant-governor, or person administering the government of such province, signified

to such Legislative Council in the manner aforesaid; or if any such member shall take any oath of allegiance or obedience to any foreign prince or power, his seat in such Council shall thereby become vacant.

IX. *Provided also, and be it further enacted by the authority aforesaid,* That in every case where a writ of summons to such Legislative Council shall have been lawfully withheld from any person to whom such hereditary right as aforesaid shall have descended, by reason of such absence from the province as aforesaid, or of his having taken an oath of allegiance or obedience to any foreign prince or power, and also in every case where the seat in such Council of any member thereof, having such hereditary right as aforesaid, shall have been vacated by reason of any of the causes herein before specified, such hereditary right shall remain suspended during the life of such person, unless his Majesty, his heirs or successors, shall afterwards think fit to direct that he be summoned to such council; but that on the death of such person, such right, subject to the provisions herein contained, shall descend to the person who shall next be entitled thereto, according to the course of descent limited in the letters patent by which the same shall have been originally conferred.

X. *Provided also and be it further enacted by the authority aforesaid,* That if any member either of the said Legislative Councils shall be attainted for treason in any court of law within any of his Majesty's dominions, his seat in such Council shall thereby become vacant, and any such hereditary right as aforesaid then vested in such person, or to be derived to any other persons through him, shall be utterly forfeited and extinguished.

XI. *Provided also, and be it further enacted by the authority aforesaid,* That whenever any question shall arise respecting the right of any person to be summoned to either of the said Legislative Councils respectively, or respecting the vacancy of the seat in such Legislative Council, of any person having been summoned thereto, every such question shall, by the governor, or lieutenant-governor of the province, or by the person administering the government there, be referred to such Legislative Council, to be by the said Council heard and determined; and that it shall and may be lawful either for the person desiring such writ of summons, or respecting whose seat such question shall have arisen, or for his Majesty's attorney general of such province in his Majesty's name, to appeal from the determination of the said Council, in such case, to his Majesty in his parliament of Great Britain; and that the judgment thereon of his Majesty in his said parliament shall be final and conclusive to all intents and purposes whatever,

XII. *And be it further enacted by the authority aforesaid,* That the governor or lieutenant governor of the said provinces respectively, or the person administering his Majesty's government therein respectively, shall have power and authority from time to time, by an instrument under the great seal of such province, to constitute, appoint and remove the speakers of the Legislative Councils of such provinces respectively.

Section 26 enacts, that His Majesty may authorize the Governor to fix the place of holding the Sessions of the Legislative Council and Assembly (giving due notice), and to prorogue and dissolve the same. Section 27 enacts, that the Legislative Council and Assembly shall be called together once at least in twelve months. 28, that all questions be decided by a majority of voices of members present. Speaker to have a casting voice. 29, prescribes the Oath. This is all that the Act contains respecting the present question.

Now it seems impossible that any one less than absolutely blind, should take this (which respects a matter of no less importance than the Constitution of the Upper House of Parliament), to be *any thing like* the "very image and transcript of the British Constitu-

tion." Is it optional with the Crown in England whether the Members of the House of Lords shall be all Peers, all Commoners, or mixed?—all hereditary, all for life, or what proportion there shall be of either? But so it has been, ever since the passing of the "very image and transcript," with respect to our Legislative Councils. And let no one presume to tell us,—no one at least pretending to pay respect to what is high in authority among the writers on such subjects, or ancient and venerable in the storm-tried Institutions of our country,—that this is a matter of no importance: it is a matter of the last importance. Our life members of the Legislative Council, neither ennobled by the King, nor required to be entitled to respect as men of property, do not form, as do the hereditary Peers of England, any firmer *support* of the Throne than do their fellow-subjects, nor any independent *barrier* against the *abuses* of its power.*

In the Debate in the Commons at the passing of the Constitutional Act, Mr. PITT observed, "An aristocratical principle being one part of our mixed government, he thought it proper that there should be such a Council in Canada as was provided for by the Bill, and which might answer to that part of the British Constitution which comprised the other House of Parliament." The truth however is, that there never has been such a Council in Canada as Mr. PITT "thought proper" and the Bill "provided for." I say nothing now about Titles of Honour, which, as intended for Canada, Mr. Fox ridiculed, and for want of which our neighbours stick every stable-boy into the 'Squirarchy, and are dragging us, like a cockboat at a steamer's stern, pretty rapidly in the same direction. A LORD CHANCELLOR for Canada, or a LORD CHIEF JUSTICE, might be something very shocking for aught I know; but I must beg pardon for the perversity of a taste, which, however unpopular, however scowled at or scouted, would much rather follow old-fashioned than novel notions in this respect; much rather have aristocratic dikes

* Mr. WILBERFORCE desired to know from Mr. Fox, whether he intended his elective Council to be for life, or for a term of years? Mr. Fox said he had not decided that point, but he rather inclined to constituting them for life. Mr. WILBERFORCE, objecting to this, said, that let the elective Council be for life, or for a term of years, in the one case they would clog the prerogative, and deprive the subject of its protection; in the other point of view, it would be a democracy under another name, and give the popular branch of Government too much power: whereas, if they adopted an hereditary Council, they would form an open aristocracy, and though, at first, produce only saplings, in the course of years they would become forests, capable of bearing up against any innovation either of the crown or people.

than a democratic deluge; much rather follow Old England than SAM SLICK. Without, however, stopping to insist on this, Mr. PITT and his colleagues were of opinion that Canada should have, and the Constitutional Act made provision for its having, ennobled and hereditary Members of its Legislative Councils. I am not now asking any man's opinion whether ennobled and hereditary legislators are right, that is not now the question. The question is, Are they not according to the British Constitution? Is an upper House of Parliament without them according to the British Constitution? Is the Constitution which allows of the indefinite continuance of such upper Houses having no such ennobled and hereditary Members, the very image and transcript of the British Constitution? Again.

Why have not our Legislative Councils been, what was contemplated and provided for by our Constitution Act? Because, contrary to what, in a matter of such vast importance, would have been tolerated or even thought of in England, our Constitution Act allowed the *actual constitution* of those Councils to be left depending on the *discretion of the Crown*, and of course on the *capricious changes of Ministerial advice*. I do not say that such discretionary power, considering the then state of society in Canada, was not better than would have been an immediate creation of hereditary Peers; nor do I so much as say that it was not necessary. It might be so, or it might be otherwise: that is nothing to the present question: I stand upon the difference.

It appears almost incredible, and yet it is an undoubted fact, that besides our unreflecting petitioners and addressers, your very Assemblies have been so completely bamboozled, as to talk and argue as if they supposed, and probably did and do suppose, and are prepared to defend as undoubted gospel, that the whole of our Colonial Constitution is contained in the fifty clauses of the Act of 1791, and some few other records equally formal, public, and explicit. It is no such thing. An immense amount of discretionary, *undefined*, and therefore ARBITRARY power is left behind, which comes to us as "Downing-street Law," sent out in packets and bundles of *Instructions*, for the most part secret, *every one of which is as truly constitutional according to* OUR "Glorious Constitution," as is THAT ACT. I marvel that you lawyers of Upper Canada are not aware of this. I marvel beyond measure that, after the senseless squabbles between Sir F. B. HEAD and his Executive Council, you *still* do not perceive

it. Is it possible that you can have read the King's Instructions, now published, and not see it? God bless me, where can be your opticks?*

"With these our Instructions you will receive our Commission, &c. In the execution, therefore, of so much of the office and trust we have reposed in you as relates to Upper Canada, you are to take upon you the administration of the Government of the said Province, and to do and execute all things belonging to your command, *according to the several powers and authorities of our said Commission*, &c., AND *of the Act passed in the thirty-first year of our reign therein recited*, AND *of these our Instructions to you*, AND *according to such* FURTHER POWERS AND INSTRUCTIONS *as you shall* AT ANY TIME HEREAFTER RECEIVE *under our signet*, &c."

These Instructions bear date in 1818. Twenty years afterwards the Committee of your Assembly appeal to and treat these Instructions as being equally authentic with the Constitution Act, without once perceiving what stared them in the face at every paragraph, or without once suspecting that what they quoted might have been swept away and superseded by "other powers and instructions," and they again by others, and they by others. Our simpletons in Lower Canada were for years expending their ammunition on the Legislative Council: Lord DURHAM praises the Reformers of Upper Canada for their superior sense, in directing all their efforts against the Executive authority: it may be unpardonable presumption, but it is the fact;—I stand astonished at the sagacity of both.†

In the case of a Colony acquired by conquest or treaty, the Crown has, or originally had, all the powers of Government in its own possession, restricted only by the terms of the Treaty or Capitulation by which the possession was obtained.‡ The whole government, in such case,—legislative, executive, judicial,—is in the crown: the only Constitution is the Royal will.§ If the Sovereign promise to give a more definite Constitution; so far as that promise or that promised Constitution goes, the prerogative is restricted, the Crown is bound. Thus, if the Sovereign promise to give, forthwith, a Constitution

* A blind wrestler, by fighting in a dark chamber, may not only conceal his defect, but may enjoy some advantages over those who see.—*Descartes.*

† There is no subject on which men ever come to form a reasonable opinion, till they have once exhausted all the absurd views which it is possible to take of it.—*Fontenelle.*

‡ Those Princes who have acquired dominions by conquest, and made a people their own by force of arms, can divide, alienate, and transfer their regalities at pleasure, in the manner of a patrimonial estate.—*Puffendorf.*

§ When a country is obtained by conquest or treaty, the King possesses an exclusive prerogative power over it, and may entirely change or new-model the whole or part of its laws and political form of Government, and may govern it by regulations framed by himself.—*Chitty—Prerogatives, &c.*

providing a free and representative Government, similar to the English, the Crown is immediately precluded, by that gift or promise, from all further acts of *independent Sovereign Legislation* in the Colony, being now restricted, in this respect, to its right to negative, as in the case of Bills in England: but in its Executive capacity, it still retains the right to do whatever it thinks proper, restricted by no laws, (there being none as yet existing), but only by the forementioned Treaty or Capitulation.

But the Colony advances, and the sphere of its Constitutional Liberty must be enlarged. How is this to be effected? In one of these two ways: either by Imperial or Colonial Acts of Parliament, (which must, of course, obtain the Royal sanction), or else by individual spontaneous concession. But mark.

Spontaneous concessions may be twofold: they may be grants irrevocable, and so restrictive of the prerogative; or they may be revocable at pleasure, and so entirely precarious. Permit me to explain.

The division of these Provinces in 1791 was the spontaneous determination of the Crown, signified to both Houses of Parliament by a Royal Message. If the Houses had refused their concurrence, the Provinces might still have been, and doubtless would have been divided, for the entire right was in the Crown: but there would, in that case, have been this difference: that which had been done without concurrence, without concurrence might at any time have been undone: but when once the Crown had admitted the Houses a partner in the division; a re-union, without their concurrence, was no longer in its power. The division, instead of being effected by the Crown in right of its prerogative, was effected by an Act of Parliament; and consequently, from all after interference in this important matter, other than negative, prerogative is excluded.

Having thus cleared the way, I now come to the very pith and marrow of the controversy—OUR GREAT GRIEVANCE. What is it? It is this: OUR PROVINCIAL CONSTITUTION IS—YET—TOO MUCH A THING OF ROYAL PREROGATIVE AND COURT CAPRICE. IT REQUIRES A MUCH MORE PERFECT PARLIAMENTARY DEFINITION. Like the Cameleon, it is a reptile of ever-changing colours, mysterious in its sustenance, air-fed or self-supported. Children behold its beauty, and are in raptures: fools, thinking themselves philosophers, contend like very furies—each for his favourite colour! I

peep unseen behind the curtain, and mark the countenances of the merry and of the crafty ones in office; these laughing at the sport, those scowling at that tenfold flat, Sir FRANCIS, for letting slip the cat. I stumble upon something,—down comes the curtain! O for thy pencil, HOGARTH, to picture forth the scene!

It is not the business of this Pamphlet to go into a detail of the evils and grievances, which, for many years, have kept the whole of these North American possessions in a state of inquietude and too-general disaffection. These will be found in various publications, especially in the Report from the Select Committee of the House of Commons on the Civil Government of Canada (including the Minutes of Evidence, and various Petitions), and the still more valuable Report of the Earl of DURHAM. The object of my search has been to find the *root*-evil. In this search I have looked at particular complaints—local sores and inflammations—as merely symptomatic. The universality of these soon shewed me, that the disorder was *Constitutional*. I determined to search it out, to *point* it out. Have I not succeeded? I never for a moment doubted of success. I felt assured, if mortal man could find the *heart's-core* of the evil, I could. There it is. Let our state physicians treat it as they think proper, there is the pestilential cause whence comes the plague-spot. Quacks will persist in their assertions that there is no cause,* that the pretended plague-spot is a pimple. Drugsters will raise the horror of the timid and the amiable lovers of sweet repose, by howling at the men who probe and lance, regardless of the patient's cries, as butchers, murderers, and traitors. Let them.

> Dogs, or Men! (for I flatter you in saying
> That ye are dogs—your betters far), ye may
> Read, or not read, what I am now essaying
> To shew ye what ye are in every way:
> As little as the moon stops for the baying
> Of wolves, will the bright Muse withdraw one ray

* The political Disorder of Lower Canada being (as I have endeavoured to show) by the slow process of Emigration *incurable*, we are now driven to consider what would be the safest, the simplest, and the most effectual Method of *killing* it. I do not mean by personal Violence, but by the calm Legislative Powers of the Imperial Parliament.

It is useless at the present Hour retrospectively to regret the uncalculating Course of Policy which, ever since our Possession of the Canadas, has not only permitted but encouraged a few Individuals, who misrepresent the real Interests of the French Habitans of Lower Canada (whose Simplicity and Amiability of Character no one can fail to admire) to assume towards the British Empire a Tone of Arrogance and a Posture of Defiance which, considering their relative physical Strength and *the total Absence of any just Ground for Complaint*, is without a Parallel in Colonial History.—*Sir F. B. Head. Despatches, p.* 348.

From out her skies: then howl your idle wrath!
While she still silvers o'er your gloomy path.

In attempting to arrest disorder, a thorough knowledge of the cause is half the cure. But shall I leave my work half finished? That is not my intention. I profess to have no particular acquaintance with state surgery, no professional acquaintance with legislative pharmacy, but I do profess to know something about the scientific principles of each profession; and of such skill as I possess, the public—if it so please them—are welcome to the benefit.

Sir, I am no Agitator. I am no friend to agitation. What I mean by agitation is, that species of writing or harangue addressed by the O'CONNELLS of the day to large masses of the people, the tendency and aim of which is—not to instruct, but to inflame. Its appeals are not to reason, but to passion. Its force, instead of being, as is pretended, moral, is demoniacal.* It aims to overawe the Government by means of ignorant and infuriated mobs. Under pretence of seeking their benefit, it begs from the poor creatures their last copper; and having rendered them half frantic with its exaggerated pictures of their wrongs, and by its "brutal and bloody"† bayings at the men in power; having carefully pocketed the *rint*, it goes to those very men and sells to them *its power*—to quell the very tempest of its own creation. When I see an agitator playing a game like this, immediately the words recur,

O! for a law to noose the villain's neck!

I do not say, however, that agitation, in the simple sense of passionate appeals to the people, may not occasionally, or even frequently, be necessary, and so excusable. HUME has said—and his opinion is worthy of great respect,—"The spirit of the people must frequently be roused, in order to curb the licentiousness of the Court:" and if ever the licentiousness of the Court required a curb, it surely is now. I am not speaking with reference to Metropolitan Government, but Colonial. The range of the prerogative is limited enough as it res-

* I have called the *Toronto Patriot* a hell-hound. Let whoever is offended at the designation read its fiend-like curses and imprecations on Lord DURHAM. All I know of them is what I saw, by chance, at our Exchange, as quoted by the London *Spectator*. Is it possible that this *Patriot* can be the organ of the Government in Upper Canada? If the Government be not totally insensible to the opinion of the people, it ought to be made to feel this infamy as a burning blister.

† Some years since, O'CONNELL called the men in power, "the brutal and bloody whigs."

pects the former: in the latter it is so unlimited, that *licence* becomes LICENTIOUS BEYOND ENDURANCE.

I was speaking of our Legislative Councils. Now, I ask, Is there any thing in *such Councils* to curb the licentiousness of the Court? Are not they made the very creatures of the Court? "The majority," says Lord DURHAM, "was always composed of members of the party which conducted the Executive Government; the clerks of each Council were members of the other; and in fact, the Legislative Council was, practically, hardly any thing but a veto in the hands of Public Functionaries on all the acts of that Popular Branch of the Legislature, in which they were always in a minority." It cannot be pretended that such is the dependant puppet character of the House of Lords.* We have seen these hereditary independent Peers, while nobly sustained by an indignant people, curbing the licentiousness of the Court, when, under a pretence of curbing another species of licentiousness, all the power of the Crown was urging the whole pack in full cry, to hunt to death a persecuted Queen. With our Legislative Councils, the members thus obsequious, *and holding office for eight years*, we shall see nothing of this sort of curbing in Canada, I trow.

I cannot like the Whigs, they are so weak of intellect, so insatiable of power: so popular in profession, so *any thing to suit a present turn* in practice! As if conscious of their weakness, they are ever courting popular support; no matter at what risk, or at whose expense. On obtaining power, their first object is—permanent possession. To please the many, they give unwarrantable power to the many; (witness that monument of mad adventure, the Reform Bill; conceived and carried in a reckless spirit of hostility to a party—almost equally reckless of the consequences of a pertinacious opposition to the most reasonable wishes of the people):—to complete or to avert, *as the expediency of the moment may require*, the consequences of their conduct, they are willing to give unwarrantable licence to the Crown, even to the swamping of the House of Lords: willing to sell unwarrantable power to O'CONNELL, to the destruction of the church: willing to give unwarrantable power to the Crown

* In the year 1825, there was a supply bill passed by the Assembly, which passed the Council, only two dissentients. In the next year a bill, exactly similar, was rejected unanimously by those that were present. In the first instance the Governor approved of the bill, in the second the Governor disapproved of the bill. Q. *Was he a different Governor?* A. He was.—*Select Committee's Report*, 1828. *J. Neilson, Esq.*

again, to the rendering of our "image and transcript" House of Lords as dependent as a hireling, as subservient as a pampered menial, as crouching as a spaniel; and then again willing, in order to please the many, to cramp and insult the Crown, by requiring that its confidential Councillors be men possessing the indispensable pre-requisite of the confidence of the people! Allow me to explain.

The Assembly of New Brunswick, in an Address to His Majesty in March, 1836, recommended a material increase in the number of the Members of the Executive Council, and expressed their cordial concurrence with the views of Mr. SPRING RICE, relative to the summoning to that board of some Members of the popular branch of the Legislature. On these points Lord GLENELG writes, on the 31st of August, thus: "His Majesty can give only the general assurance that his selection of persons to sit in the Executive Council will be guided solely by a reference to the permanent interests of the Province." Five days afterwards he writes, with respect to the increase: "His Majesty, after a due consideration of the arguments urged, &c., is prepared to adopt the necessary steps for meeting the wishes of the Assembly." After stating that he would give no pledge as to the precise number of Members, he goes on to direct: "You will immediately report to me the names of several gentlemen whom you may think most eligible for seats in His Majesty's Executive Council. In making your selection, you will not confine yourself to any single class or description of persons, but will endeavour to ensure the presence in the Council of gentlemen representing all the various interests which exist in the Province [not forgetting the Republican!] and possessing at the same time *the confidence of the people at large.*" This popularization of the Privy Councils of the Crown throughout these North American possessions (for the instructions quoted were general) may, for ought I know, be very popular, very conciliatory, very expedient—for certain purposes, but I shall not easily be persuaded that they are very consistent with the principles of Monarchical Government, or with those of common sense. A very pretty state of Royal subordination truly, that the King of England, in a question (for instance) respecting the preservation of his prerogative against the encroachments of the people, must not be allowed to take the advice of any Councillor, who has not actually received a retainer from the people, and engaged himself as a confidential adviser on their side! This is guarding the pre-

rogative with a vengeance! Out upon such Ministers! A King of sense and spirit would soon walk them out.

As little disposed to see, on the one hand, the Crown despoiled of its rightful prerogative,—(which, in truth, is just so much *extraordinary right*, as is essential to the preservation of a *power extraordinary*; which power, for that reason, is exposed to *extraordinary envy*, but which, for the preservation of the Throne and Constitution, is *absolutely necessary*,)—as, on the other, to see that prerogative granting a licence to acts of Government pursued in violation of all right; I must beg to refer you to that passage in the third book of Lord CLARENDON'S History of the Rebellion, which relates the proceedings preparatory to the trial of the Earl of STRAFFORD; beginning with the two propositions of the Scotch Commissioners "of most fatal consequence to the King's service, and to the safety and integrity of all honest men." The first proposition was, "for a committee to be settled of both Houses for the taking preparatory examinations:" the second, "for the examining upon oath Privy Councillors upon such matters as had passed at the Council table." The Commissioners foresaw and stated, "that, without the King's consent, they (the Councillors) might not discover any thing that had passed at that board; so that the greatest difficulty would be, the procuring of the King's consent for the betraying himself: but (they add) this must be insisted on, for God forbid that it might be safe for any desperate wicked Councillor to propose and advise at that board courses destructive to the health and being of the Kingdom; and that the Sovereign Physician, the Parliament (which had the only skill to cure those contagious and epidemical diseases) should be hindered from preserving the public, because no evidence must be given of such corrupt and wicked counsels." To this second proposition the Commons at once, and the Lords "without much debate consented, and appointed some to attend the King for his consent; who, not well weighing the consequence, and being in public Council unanimously advised to consent to it; and that the not doing it would lay some taint upon his Council, and be a tacit confession that there had been some agitations at that place which would not endure the light; yielded that they should be examined: which was speedily done accordingly *by the Committee of both Houses appointed for that purpose*."

My object in referring you to this passage, is not so much to shew

the origin of the struggle for responsibility, (which, however, is both striking and instructive), as to propose for consideration this question: Were the Councillors right in their unanimous advice? Was the King justifiable in yielding to the demand? I answer, without hesitation, No: for allowing the King's ability to absolve the Councillors from their oath (which yet is very doubtful) his concession was a treacherous betrayal. Whatever the Earl of STRAFFORD might have counselled, was under a full conviction that he was not to be held responsible; and it is only reasonable to suppose that, had he known the contrary, he would have been more guarded. However much, therefore, I may rejoice at the result of this struggle, politically considered, I consider STRAFFORD to have been a martyr to Royal cowardice and treachery. The difficulty in such cases is, to know what ought to be yielded, and what ought not. In this case, Responsibility ought to have been yielded *for the future;* but the Scotch Commissioners were infamous for demanding, what the Commons and the Lords, and the Councillors and the King, were all infamous for yielding,—that counsel given on the faith of oaths of secresy, should, contrary to all precedent or reasonable ground of apprehension, be made the subject of a public accusation affecting life. All that can be said in extenuation is, that such a tragical result was probably not expected by the yielding party.

But the encroachment on the *prerogative* to which I had respect, comes after. Having succeeded thus far, "care was taken to infuse into the King by Marquis HAMILTON, that His Majesty having declared to his people that he really intended a reformation of all these extravagancies, which former necessities or occasions or mistakes had brought into the government of Church and State, he could not give a more lively and demonstrable evidence, and a more gracious instance of such his intention, than by *calling such persons to his Council, whom the people generally thought most inclined to and intent upon such reformation.*" I wish I could direct the attention of Her Majesty to this passage, and to Lord CLARENDON'S observations on it. I regret that their length forbids, what their importance so well merits, their entire insertion. This insidious attempt to popularize the Privy Council,—precisely the same as that so lately practiced,—took effect. "In one day were sworn Privy Councillors, much to the public joy," four Earls and three Lords, and another Earl in two or three days after, "all persons at that time very gracious

to the people, or to the Scots, by whose election and discretion the people chose." In this whole history I do not think there are three pages of more important facts and profound reflections than those which follow :—

> This digression,—[observes his Lordship,]—(much longer than was intended) will not appear very impertinent when the great disservice shall appear which befel the King by the swearing those Lords, formerly mentioned, Privy Councillors: for instead of exercising themselves in their new province, and endeavouring to preserve and vindicate that jurisdiction, they looked upon themselves as preferred thither by their reputation in Parliament, not by the kindness and esteem of the King. . . And therefore when the King required the advice of his Privy Council, in those matters of the highest importance which were then every day incumbent on him, the new Privy Councillors positively declared, that they might not give His Majesty any advice in matters depending in the two Houses, which was not agreeable to the sense of the two Houses, which they called his Great Council, *by whose wisdom he was entirely to guide himself.*

The consequence was, that "the King, in a moment, found himself bereaved of all public assistance and advice in a time when he needed it most: and his greatest, and, upon the matter, his only business being prudently to weigh and consider what to consent to, and what to deny, of such things as should be proposed to him by the two Houses, he was now told that he was *only to be advised by them*,—which was as much as to say that he must do *whatsoever they desired him !*" How consistent this would be with either public liberty, or the principles of the Constitution by which it is secured, may be seen by a reference to the quotation from MONTESQUIEU. How Mr. SPRING RICE and Lord GLENELG could advise and instruct on such pernicious principles, I cannot tell; but it behoves the Monarch to beware of consequences so fatal as must be those of compliance with such counsels. Not more resolutely ought the Crown to withstand the democratic endeavours of its open foes, than to guard against the more dangerous endeavours of its unsuspected but insidious friends.

To conclude my remarks here respecting the Legislative Council, I observe :—Once let the intervening power between the Crown and people be laid prostrate, (I speak especially of England, for here we have no effectual intervening power; and hence those disorders which, if *we had the necessary power as a people, would lead to worse disorders)* you will see the consequence. The people will seize—*what they cannot keep :* the army will sell—*what they cannot use :* and whether it be a golden crown put up at auction, (as once was that of the Roman Empire) or an iron sceptre exchanged for civil plunder, God have mercy on the people that come under its dominion! I now turn to the Executive Council.

Of this Council Lord DURHAM has well observed :—

An institution more singularly calculated for preventing the responsibility of the acts of government resting on any body can hardly be imagined. It is a body of which the constitution somewhat resembles that of the Privy Council; it is bound by a similar oath of secresy; it discharges in the same manner certain anomalous judicial functions; and its "consent and advice" are required in some cases in which the observance of that form has been thought a requisite check on the exercise of particular prerogatives of the Crown. But in other respects it bears a greater resemblance to a cabinet, the governor being in the habit of taking its advice on most of the important questions of his policy. But as there is no division into departments in the Council, there is no individual responsibility, and no individual superintendence. Each member of the Council takes an equal part in all the business brought before it. The power of removing members being very rarely exercised, the Council is, in fact, for the most part composed of persons placed in it long ago; and the governor is obliged either to take the advice of persons in whom he has no confidence, or to consult only a portion of the Council. The secresy of the proceedings adds to the irresponsibility of the body; and when the governor takes an important step, it is not known, or not authentically known, whether he has taken the advice of this Council or not, what members he has consulted, or by the advice of which of the body he has been finally guided.

Respecting this Council I intend to say very little, because, in its present Constitution and functions, the people are not much interested. It is any thing rather than what the public require; and to attempt such a reformation as would make it what is wanted, would be, as it has been hitherto, the height of folly. Lord DURHAM has said, what a little attention might have enabled any man to see, that such Councils are "singularly," and, without doubt, were *designedly* "calculated, for preventing the responsibility of the acts of Government *resting on any body.*" I propose, therefore, to abandon them to the Ministers altogether, and, according to the wit of the young rascal whose father prayed—*Lord mend me!*—to turn my thoughts from mending to a new creation. So far as it may seem necessary to induce the public to adopt, in this respect, my policy, I shall think it worth while to expose the anomalous character and functions of these Councils, but no further. I shall therefore shew briefly, as far as circumstances and materials will permit, what they *are*, what they *do*, and what they were and were not *intended* to do. Perhaps it will be seen as the result, that they were intended to serve the double purpose of a Privy Council for the Governor, and of a stalking-horse to screen from public observation, the measures taken by the Government to thwart the public will.

And first, these Councils were not constituted by the Act of 1791: whence it follows, that, unless there has or have been one or more subsequent enactments respecting them, Imperial or Provincial, (and I know of none) they are the mere creatures of Prerogative, dependent, even for existence, on the Sovereign's pleasure.

The first mention of an Executive Council is in the 34th section of the Act of 1791.

And whereas by an Ordinance passed in the Province of Quebec, the Governor and Council of the said Province were constituted a Court of Civil Jurisdiction, for hearing and determining appeals in certain cases therein specified, be it further enacted by the authority aforesaid, That the Governor, Lieutenant-Governor, or person administering the Government of each of the said Provinces respectively, together with such Executive Council as shall be appointed by His Majesty for the affairs of such Province, shall be a Court of Civil Jurisdiction within each of the said Provinces respectively, for hearing and determining appeals within the same, in the like cases, and in the like manner and form, and subject to such appeal therefrom, as such appeals might before the passing of this Act have been heard and determined by the Governor and Council of the Province of Quebec; but subject nevertheless to such further or other provisions as may be made in this behalf, by any act of the Legislative Council and Assembly of either of the said Provinces respectively, assented to by His Majesty, his heirs, or successors.

This clause, we see, speaks of the Council as something to be by His Majesty afterwards "appointed." The same form of expression occurs in section 38.

And be it further enacted by the authority aforesaid, That it shall and may be lawful for His Majesty, his heirs, or successors, to authorize the Governor or Lieutenant-Governor of each of the said Provinces respectively, or the person administering the Government therein, from time to time, with the advice of such Executive Council as shall have been appointed by His Majesty, his heirs, or successors, within such Province, for the affairs thereof, to constitute and erect, within every township or parish which now is or hereafter may be formed, constituted, or erected within such Province, one or more parsonage or rectory, or parsonages or rectories, according to the establishment of the Church of England; and from time to time, by an instrument under the great seal of such Province, to endow every such parsonage or rectory with so much or such part of the lands so allotted and appropriated as aforesaid, in respect of any lands within such township or parish, which shall have been granted subsequent to the commencement of this Act, or of such lands as may have been allotted and appropriated for the same purpose, by or in virtue of any instruction which may be given by His Majesty, in respect of any lands granted by His Majesty before the commencement of this Act, as such Governor, Lieutenant-Governor, or person administering the Government, shall with the advice of the said Executive Council, judge to be expedient under the then circumstances of such township or parish.

Here we see that the appointment of a Council—any "such Executive Council,"—might be by His Majesty, "his heirs, or successors." The third and last time the Council is mentioned in this Act, is in the concluding section.

Provided always, and be it further enacted by the authority aforesaid, That during such interval as may happen between the commencement of this Act, within the said Provinces respectively, and the first meeting of the Legislative Council and Assembly of each of the said Provinces respectively, it shall and may be lawful for the Governor, or Lieutenant-Governor of such Province, or the person administering the Government therein, with the consent of the major part of such Executive Council as shall be appointed by His Majesty for the affairs of such Province, to make temporary laws and ordinances for the good government, peace, and welfare of such Province, in the same manner, and under the same restrictions, as such laws or ordinances might have been made by the Council for the affairs of the Province of Quebec, constituted by virtue of the above mentioned Act of the four-

teenth year of the reign of his present Majesty; and that such temporary laws or ordinances shall be valid and binding within such Province, until the expiration of six months after the Legislative Council and Assembly of such Province shall have been first assembled by virtue of and under the authority of this Act; subject nevertheless to be sooner repealed or varied by any law or laws which may be made by His Majesty, his heirs, or successors, by and with the advice and consent of the said Legislative Council and Assembly.

This clause supposes, like the preceding, what will be done by His Majesty in appointing, &c., but it imposes no *obligation* to appoint, and much less does *it* appoint; nor is there in the Act a single line prescriptive of the *Constitution* of the Council to be appointed. What, then, is the consequence? Just what I have said: that, so far as respects this Constitution Act, these Councils are the mere creatures of the Crown, dependant even for existence on the wearer's pleasure. They may be constituted—no matter in what form or of what materials,—Whig or Tory; Aristocratic or Democratic; English, Irish, French, or Yankee; Tartar, Turk, or Negro; male or female!

Were it worth my while now, I could easily shew, that Sir FRANCIS HEAD, in his bickerings about his Councils with his Councillors and your Assemblies; and that they, in their not more dignified or honourable bickerings with him; have published a world of nonsense, and something greatly worse. Take an instance. Your House of Assembly, in their Address of the 14th of March, 1836, speak thus:—

May it please Your Excellency,

We, His Majesty's dutiful and loyal Subjects, the Commons of Upper Canada in Provincial Parliament assembled, humbly beg leave to inform your Excellency, that this House, considering the Appointment of a responsible Executive Council, to advise your Excellency on the Affairs of the Province, to be one of the most happy and wise features in the Constitution, and essential to the Form of our Government, and one of the strongest Securities for a just and equitable Administration, and eminently calculated to insure the full enjoyment of our civil and religious Rights and Privileges, has lately learned, &c.—*(Despatches, p. 153.)*

Now can you believe that these gentlemen really believed "the appointment of *a responsible* Executive Council" to be a feature of the Constitution at all? How could they? If, *to a man*, they did not *know*, that by the very Constitution Act the "appointment" of that Council was committed to the King; and if, *to a man*, they did not *know*, that by the King's appointment that Council had *not* been made "responsible" as they pretended; you may account for their ignorance if you can, or they may if they can, but for my life I cannot. This is ugly work, my Master. Again.

The six members of the Executive Council who afterwards resigned, plied His Excellency thus: "As the Constitutional Act prescribes to the Council the latitude of 'the affairs of the Province,' it requires an equal authority of law to narrow those limits, or relieve the Council from a co-extensive duty." Now I ask, Does that Act prescribe any thing about latitude to the Council? Does it prescribe to the King so much as an "appointment" of such a Council? It doubtless supposes such appointment, and prescribes that, in the event of such appointment, the Council shall be a Court of Civil Jurisdiction, &c., but it does not, in the event of such appointment, prescribe any thing about "latitude" of duty, nor even any thing *about* duty, beyond its duty as a Court of Civil Jurisdiction, and its duty of rendering such assistance to the Governor as by this Act is contingently prescribed, or such as by the King or any subsequent Act might be required or enjoined. This Act supposes that His Majesty would confer titles of hereditary honour and rank; and prescribes that, in such case, parties so distinguished were to have a right to demand their writ of summons to the Legislative Council. What then? In both cases the prescription was contingent, it took effect in only one. As to the pretence of a prescription of any "latitude" of duty, it is a perfect hum. And His Excellency. In his reply to the communication of his six Councillors, he writes:

In the Fifty Clauses of this Act in question the Executive Council, which in Section 34 is merely described as "such Executive Council as *shall be* appointed by His Majesty," is scarcely mentioned; and as regards even its existence, the most liberal construction which can possibly be put upon the said Act only amounts to this,—that as an Executive Council was evidently intended to exist, the remnant of the old one ought not to be deemed totally extinct until its Successor was appointed.

However, this latent intention of His Majesty to create a Council for each of the Provinces of His Canadian Dominions, was soon clearly divulged in a most important document, commonly called "*The King's Instructions,*" in which an Executive Council was regularly constituted and declared as follows:—

"Whereas we have thought fit that there should be an Executive Council for "assisting you, or the Lieutenant-Governor, or Person administering the Govern- "ment of the said Province of Upper Canada for the time being; we do by these "presents nominate and appoint the under-mentioned persons to be of the Executive "Council of our said Province of Upper Canada," &c. &c. &c.

In subsequent clauses it was equally precisely defined upon what affairs of the Province the Lieutenant-Governor was to act, "*with the advice of the Executive Council;*" but with the view distinctly to prevent the new Council being what the old one had been (which indeed under the new Constitution was utterly impossible), in short, to set that question at rest for ever, it was declared in Section 8, "that to the end that our said Executive Council may be assisting to you in all affairs relating to our service, you are to communicate to them *such* and *so many* of our instructions *wherein their advice is mentioned to be requisite,* and likewise all such others from time to time as you SHALL FIND CONVENIENT for our service to be imparted to them."

Now here we have His Excellency Sir FRANCIS BOND HEAD, Knight of the Royal Hanoverian Guelphic Order, Knight of the Prussian Military Order of Merit, Lieutenant-Governor, &c. &c., occupying a very enviable position, both as a disputant, and as a man. For, *first*, the King's Instructions here quoted, which so "soon" and so "clearly divulged" the "latent intent of His Majesty to create a Council for each of the Provinces of his Canadian Dominions," bear date on the 9th day of May, 1818, (seven-and-twenty years after the passing of the Act!) and are addressed to "CHARLES Duke of RICHMOND, &c., our Captain-General and Governor-in-Chief in and over the Province of Upper Canada in America," *and relate to that Province exclusively. Secondly;* the eighth section of these Instructions, instead of being as quoted,—"You are to communicate to them such and so many of our instructions"—generally; runs thus: "You are to communicate to them such and so many of *these* our instructions:" without any the slightest intimation that those contained in ordinary despatches were to be only partially communicated: and if, as would appear, no part of *these* Instructions had ever been communicated to the Council till this rupture with Sir FRANCIS, he was not the first Governor that had been "keeping dark!" *Thirdly.* His Excellency further informs us, that what was declared in this eighth section, was "with the view distinctly to prevent"—what "was utterly impossible!" which I take to be a very deep discovery! and, *finally*, His Excellency helps us to a "most liberal construction," according to which, as he had just before observed, "a vestige of the ancient one [Council] is, for the purpose of a Court of Appeal, recognised" in this Constitution Act, when, by the first clause of this vestige-recognizing Act, the Act to which that vestige-tailed Council owed its existence, had been REPEALED. "As an Executive Council was evidently intended to exist," though the Act by which it existed was repealed, and the Council, by consequence, was extinct, "the remnant" of the Council ought not so to be considered! If this man's head had not been full of "bubbles," could he have written thus? As to the little touch at stratagem, having my opinion, others shall have theirs. I must on.

What are the functions of an Executive Council? They are, what no man *not in the secret*, can know. What they now are may be known—ten months perhaps, or ten years hence. All that we can say is, we know what were the functions of the Council in

the Upper Province in 1828. Beyond this, with a very few exceptions, all that has been done respecting the constituting, or re-constituting, or instructing, or re-instructing of this Council since, or of any of the other Executive Councils since the passing of the Constitution Act, has been kept secret.* In a word, they are at present, just what, the law permitting, (and the law, as we have seen, is not very restrictive in the matter),† Her Majesty pleases. During the interval between the commencement of the Act of 1791 and the first meeting of the first Legislative Councils and Assemblies, they were respectively, if then created, endowed with *Legislative* functions as well as—as well as what? Can any man define or properly designate a power so eccentric and anomalous? I cannot. An Executive Council is undoubtedly, in its functions, a Privy Council, but it is something more, and it is something less. In certain cases it is an essential part of the Executive Authority: the Governor cannot act without it: such are his instructions. In certain other cases its concurrence is required by an Imperial Statute, and then *the Crown* cannot act without it. Some of its acts must be,—not as in England, by the Queen *in* Council, but—by the Queen's Representative *and* Council. The difference is this. The Queen must consult; but having done so, she is at liberty to act as she thinks proper. There are no counting of votes in an English Privy Council: no legal injunction on the Crown to act—only with a majority: but, in extreme cases,—in all cases of appeal, for instance; and in several others of a nature strictly Executive,—there is a legal injunction on the Colonial

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* One of the greatest of all the evils arising from this system of irresponsible government, [I should rather have said, of *unconstitutional* government, according to the English Constitution,] was the mystery in which the motives and actual purposes of their Rulers were hid from the Colonists themselves. The most important business of Government was carried on, not in open discussions or public acts, but in a secret correspondence between the Governor and the Secretary of State. Whenever this mystery was dispelled, it was long after the worst effects had been produced by doubts and misapprehension; and the Colonies have been frequently the last to learn the things that most concerned them by the publication of papers on the order of the British Houses of Parliament.—*Lord Durham's Report.*

† Lord GLENELG, in a Despatch to Sir A. CAMPBELL, Lieutenant-Governor of New Brunswick, dated 31st August, 1836, says: "At present it is open to the Crown at its own discretion, to select members for the Executive Council from all descriptions *of His Majesty's subjects.* The prerogative is unfettered, and it is, in the opinion of His Majesty's Advisers, most advantageous for all parties that so it should remain."—*(Despatches, p. 62.)* It would seem by this, that I have been mistaken in supposing a more extensive latitude; and if so, I shall be glad to be corrected. I must, however, require something more explicit than the above, in order to be convinced. As it respects the Privy Council in England, there is no question. By 12 and 13 WM. III. c. 2, persons born out of the dominions of the Crown of England, unless born of English parents, *even though naturalized by Parliament*, are excluded.

Representative of the Crown. He must take the votes of the Councillors present, and without the concurrence of a majority of a quorum, he cannot act, nor could his Royal Mistress. And here we behold another feature of our British Constitution. As to that vile one to which I have already pointed, of taking cognizance, as a Court of Civil Jurisdiction, of matters of private property, not the Crown itself is allowed that power in England. "Be it likewise declared and enacted, by the authority of this present Parliament, that neither His Majesty, nor his Privy Council, have, or ought to have, any jurisdiction, power, or authority, to examine or draw into question, determine or dispose of, the lands, tenements, goods or chattels, of any of the subjects of this Kingdom."—(16 *Car.* 1 *c.* 10.)

When the Governor has no legal directions or royal instructions, what then is his Council? Just what he pleases—a unit or a cipher. The rule of Sir F. B. HEAD was, in bankers' language, this: "Upon their sterling fund he must constitutionally draw, *whenever embarrassment requires it.*"—(*Despatches, p.* 157.) "I also consider," says he, "that to absolve the Governor's Council from secrecy, would render it absolutely impossible for him to consult them, for as *he is supposed to consult them on subjects upon which* HE FEELS *his judgment to be* RICKETTY," &c.—(*Despatches, p.* 230.) How often the Council would be honoured by being consulted, according to this rule, and how often the Crown or the Province would be likely to have the benefit of their advice *under a Governor like Sir* FRANCIS, let those whom it concerns determine.

I now come to the question of Responsibility; and here, too, I shall endeavour to be very brief. The grand objection of Sir FRANCIS was, the oath of secrecy: which he maintains to be, as it respects the Council, an oath of non-responsibility.* In this objection there appears to be great force. Observe the oath.

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* If it be true, as Sir FRANCIS HEAD asserts, that the Queen herself can never know any thing respecting "individual opinions," the Governor being, as well as the members of his Council, sworn to secrecy, what follows? That though a Governor should be advised and urged by one, or all, or any intermediate number of his Councillors, to attempt the life of the Queen and the subversion of her Throne, neither Her Majesty nor her Ministers, nor her faithful Commons, nor her gallant Peers, so long as the conspiracy stopped short of overt acts, could have any legal means by which it would be possible either to detect the traitors or sift out the treason! And is this also according to the British Constitution? I call on our very MAWWORMS to unite in prayer,—From traitor-cloaking Constitutions such as these, "*God save* THE QUEEN!" while I most solemnly respond, "*Good Lord, deliver* US!"

COPY of the OATH taken by every Member of the Executive Council.

You do swear, that so far forth as cunning and discretion sufficeth, you will justly, truly, and evenly counsel and advise the King, and his representative in the government of this province, in all matters to be communed, treated, and demeaned in the Executive Council, or by you as the King's counsellor, without partiality or exception of persons, not leaving or eschewing so to do for affection, love, meed, doubt, or dread of any person or persons.

You shall keep secret the King's counsel, and all that shall be communed by way of counsel in the same, and shall not discover it by word or writing, or in any otherwise, to any person out of the same Council, or to any of the same Council if it touch him or be party thereof.

You shall not gift, meed, good, or promise of good, by any man, or by promise of any other person, accept or take, for any promotion, favouring, letting, or hindering any matter or thing to be treated or done in the said Council.

You shall with all your might and power, help and strengthen the King's said Council for the good of the King and this province, and for the peace, rest, and tranquillity of the same.

You shall withstand any person or persons, of whatever condition, estate, or degree, that should attempt or intend the contrary; and, generally, you shall observe, keep, and do all that a good and true councillor ought to do unto his sovereign lord, or his representative in this province.

(Signed) JOHN BEIKIE,
Clerk, Executive Council.

From this mountain battery Sir FRANCIS opens upon the hosts of his assailants a most tremendous fire; while they, poor souls, can neither take the battery nor return a shot! He sends them an insulting message, that they had better have mercy on themselves and surrender at discretion, for that they are "dead-beaten:" and so, in fact, they evidently felt. In this extremity, did it never occur to one of these dead-beaten gentlemen to enquire, how the oath of the Privy Council,—*said to be the same as the above*,—was dealt with in England? They must have known that, *as it respects the King's Ministers*, there is no oath of non-responsibility there. First, then, I enquire, Is the oath indeed the same? or is it such an "image and transcript" as is our Constitution? I confess I cannot answer this question; for though I have made some little enquiry of lawyers, and some little search in books of law, I have discovered nothing more exact than the sketch in BLACKSTONE, which is not sufficient for the purpose. I make no doubt that the form required might easily be found; but the fact is, not being one of the dead-beaten, nor in any wise concerned in their attempt to silence this objection, I am not careful in the matter. Enough for me that those Ministers and Officers of State, who in England are members of the Privy Council, are held responsible, are liable to impeachment: that there is no one act of mal-administration for which some one or more are not so liable; and that what, in this respect, is the case in England

spite of impossibility and treason, might be and ought to be the case in Canada.

If, for example—[says DE LOLME]—the public money has been employed in a manner contrary to the declared intention of those who granted it, an impeachment may be brought against those who had the management of it. If any abuse of power is committed, or, in general, any thing contrary to the public weal, they prosecute those who have been either the instruments *or advisers of the measure.*—*(Constitution, p. 92.)*

Our author proceeds:

But who shall be the judges to decide in such a cause? What tribunal will flatter itself that it can give an impartial decision, when it shall see, appearing at its bar, the Government itself as the accused, and the Representatives of the People as the accusers?

It is before the House of Peers that the law has directed the Commons to carry their accusation; that is, before Judges whose dignity, on the one hand, renders them independent;* and who, on the other, have a great honour to support in that awful function, where they have all the nation for spectators of their conduct.

When the impeachment is brought to the Lords, they commonly order the person accused to be imprisoned. On the day appointed, the Deputies of the House of Commons, with the person impeached, make their appearance. The impeachment is read in his presence; counsel are allowed him, as well as time to prepare for his defence; and at the expiration of this term, the trial goes on from day to day, with open doors, and every thing is communicated in print to the public.

But whatever advantage the law grants to the person impeached for his justification, it is from the intrinsic merits of his conduct that he must draw his arguments and proofs. It would be of no service to him, in order to justify a criminal conduct, to allege the commands of the Sovereign; or, pleading guilty with respect to the measures imputed to him, to produce the royal pardon. It is against the administration itself that the impeachment is carried on: it should therefore by no means interfere. The King can neither stop nor suspend its course, but is forced to behold, as an inactive spectator, the discovery of the share which he may himself have had in the illegal proceedings of his servants, and to hear his own sentence in the condemnation of his Ministers.

AN ADMIRABLE EXPEDIENT! which, by removing and punishing corrupt Ministers, affords an immediate remedy for the evils of the State, and strongly marks out the bounds within which power ought to be confined: which takes away the scandal of guilt and authority united, *and calms the people by a great and awful act of jutice:*—an expedient, *in this respect especially so highly useful, that to a want of the like* MICHIAVEL *attributes* THE RUIN OF HIS REPUBLIC.

Respecting the Representative Assemblies, I find nothing in their constitution requiring remark. Their continuance for four years instead of seven, the English term, is a deviation rendered necessary by circumstances, and of no material importance; and as to qualification of Members, it is little more than nominal in England, and would be worse than nothing here.

I have had occasion to notice the anomaly of the Representative of the Crown having a constitutional right to preside in a Canadian

* It might be well that the people generally should consider, how much *their interests* require an independent Legislative Council; and how strenuous should be *their efforts* to prevent its Constitution being such, as to render it dependent on the Court. Of what avail would be RESPONSIBILITY without an INDEPENDENT JUDGE?

Court of Equity; and have only now to add, that the not very frequent exercise of the right does not affect the question. The danger is where the representative, being disqualified, by want of the necessary knowledge and independence, has too little prudence, or too much presumption, to permit or induce him to decline the honour. Such danger ought not to be permitted. But what now shall I say respecting the legal qualifications and official independence of the Judges of our Courts of Law? Of course, as to qualification, I shall venture no opinion of my own; but it is an announcement somewhat startling, that "throughout the Colonies a body of gentlemen are acting as Judges, who, however accomplished in other respects, are TOTALLY DESTITUTE OF A LEGAL EDUCATION!" When was this spoken, and by whom? It was spoken on the 21st of June, 1828, by JAMES STEPHEN, Jun. Esq., Counsel to the Colonial Department, in evidence before a Select Committee of the House of Commons. There is the fact. Beyond one observation, I make no comment on the character of the evil. It is too bad to be endured.

But can we not trace its course? Whence comes it? Nothing can be plainer. The Crown will have the Judges—not independent, as they are in England, and as they ought to be every where: not appointed during good behaviour,—which, in fact, is during life,—but *during pleasure*. This, of course, excites suspicion and popular displeasure, resulting in an effort, in the Assemblies, to countermine. 'You keep them dependent on the Crown: we will keep them dependent on the people. Their stipend shall be a sorry pittance, voted from year to year.' Here is the proof.

AUSTIN CUVILLIER, Esq., questioned. With respect to the Judges, the Committee understand that they are appointed only during pleasure?——They are appointed during pleasure.

Would it, in your view, be safe and wise, to appoint them *quam diu se bene gesserent*?——No question that holding their commissions during good behaviour, subject to impeachment in the colony,* would be more advantageous: it would make them more independent of the Crown, and the people would have no objection to make them independent of them, giving them permanent salaries and retired allowances. That has already been proposed, but rejected in the Legislative Council. —*Report*, p. 158.

J. STEPHEN, Jun., Esq., questioned. Are you aware that in those disputes which led to the separation of the North American Colonies, which at present form the United States of America, from the mother country, this question of the independence of the Judges formed a great part?——Yes.

* Impeachment of Judges *in the Colony*, is out of all character. Who could form a proper tribunal here? They ought undoubtedly to be held responsible for their behaviour, as in England; otherwise their appointment *during good behavionr*, would be a farce. I should think the proper tribunal would be, *as yet*, one selected from the Judges in London.

Are you aware of Dr. FRANKLIN's expressed opin'on on this subject, of the utter impropriety of people, in any free State, allowing Judges that were dependent on the Crown, to become independent of them, as being utterly subversive of every free Constitution?——When the Canadas shall have grown into a nation, large and extensive as the United States had become, even at the time when Dr. FRANKLIN spoke, I should say that the time had arrived for constituting independent Judges.—*Minutes*, 229.

Here we have a fact:—*Judges totally destitute of a legal education!* Here is another fact:—*Judges entirely dependent on the Crown!* Here is Dr. FRANKLIN's commentary:—*being utterly subversive of every free Constitution!* and here is Counsellor STEPHEN's commentary:—*not exactly English, but—as yet—exactly right!* Now mark one other question put to Mr. STEPHEN, and mark his answer. "In your opinion, would any inconvenience be likely to arise from appointing Judges upon the same footing upon which they are appointed in this country?——Yes, I should regret the appointment of Judges independent of the Crown, *in any Colony*." No doubt!

Nor is the state of the Law less objectionable than that of the Judges. Indeed, were I like you, a lawyer, I should hardly know how to refrain from writing a volume on the subject. Unqualified for the duty, as I am, (and yet, I am not so unqualified as not to feel it a duty,) the difficulty is,—having but now discovered the disorder, and looking at it through a mist of ignorance, as upon a battle-field of most extreme confusion,—to know where to begin the description, or how to convey even a tolerable image of what I conceive to be the situation of such affairs. I can only hope for the indulgence which, whatever may be thought of my want of modesty or ill-desert, I would not deny to my worst enemy in such a fearful situation. I declare most solemnly, that though I began this investigation in a spirit of gamesome and even wanton self-sufficiency; and though, till more than sixty pages of this pamphlet had been printed, however the growing difficulties daily arising had convinced me of the necessity of proceeding with greater and still greater wariness and circumspection, I still had retained entire self-possession, such has been the impression produced by reading Minutes of Evidence before the Select Committee, 1828, that I have been ready to regret my having entered on the subject at all. It is not that I fear whatever enemies I may make, but I do begin to fear the consequences of getting entangled and bemazed in trackless woods and wilds, being now compelled to tread my way on ground so slippery and swampy, as to render unavailing my utmost efforts.

My purpose then is, an inquiry into the character of the Laws of this Lower Province, with a view to test the truth of that which is pretended by some, and apparently believed by all, that we men of British origin, living under all the blessings of the English Constitution, enjoy "as much of English Law and Liberty as the nature of our situation will allow." I am not without hope that this enquiry will serve to answer another question which has frequently brought me to a stand: *What is it that arrests our progress, that paralyses all our efforts for improvement?* It cannot be—so I have argued—altogether owing to what Mr. ELLICE calls "the eternal squabbles" about measures of Government. What can it be? I can answer now; but I cannot answer without shame and indignation. It is owing to our having been paternally betrayed, as British Colonists, in the teeth of what had been promised by Royal Proclamation, into the clutches of a system of Laws not only ANTI-ENGLISH, but infinitely more barbarian than were the laws of France before the Revolution. And is this according to the British Constitution?

When we see a multitude of people so befooled and wrought upon by certain craftsmen, that with all the fury of popular infatuation, they are not ashamed to vociferate for hours, "Great is DIANA of the Ephesians," it is impossible to be otherwise than shocked, either with pity, or indignation, or inhuman mirth. When, from the contemplation of such a scene, I turn my eyes upon the loyalists of Lower Canada, the men of British origin, living, for fifty years together, under the laws of feudal France, and all the while vociferating like men possessed, *Great is the British Constitution*, my spirits sink within me, and in my shame and chagrin I am ready to exclaim,

> Plus je connois les hommes, moins j'estime la vie!
> The more I know mankind, the less I value life!

In the little intercourse that I have had with my fellows, it has not been my fortune to see or experience much to raise my admiration of the species: but for MY COUNTRY, and for *my countrymen* till now, I have been able to preserve a feeling of pride and glowing exultation. And are *these* the countrymen of whom I have been proud? And are these the men to scoff at *other men's stupidity?*

> I'd rather be a dog and bay the moon,
> Than such a Roman!

And for whom now do I thus labour? and for what?

Men live at random and by chance,
Bright Reason never leads the dance.
Whilst in the broad and beaten way
O'er dales and hills from Truth we stray,
To ruin we descend, to ruin we advance!

Mere hazard first began the track,
Where custom leads her thousands blind
In willing chains and strong.
There's scarce one bold, one noble mind,
Dares tread the fatal error back.
Crowds hand in hand each other bind,
And drag the age along.

I hate those shackles of the mind,
Forged by the haughty wise.
Souls were not made to be confined,
And led like SAMPSON, blind and bound.—
But when his native strength he found,
He well avenged his eyes. WATTS.

The men of British origin in this Province have allowed themselves, most strangely, to be led, like SAMPSON, blind and bound; nor is it for me to hope, whatever I may endeavour, to prevent its being said hereafter as truly as hitherto—

There Custom leads her thousands blind,
In willing chains and strong.—
For who can drag up to the poles,
Long fetter'd ranks of leaden souls?

Truth may be mighty—*and is;* and might prevail—*and would,* if men would only hear, and judge, and act *like men.* But what can truth effect on men that close their eyes and stop their ears?—that shield themselves, like shell-fish, in bigot prejudice?—that roll themselves, like the dogged hedge-hog, in dark and dogged prepossession? No! I may labour, and so may others; but what more or better we shall get for our pains than hate and execration, will be more and better than I expect. What ROBERT HALL of Leicester said of another kind of monster,* so may I say of craft-begotten Bigotry, "The sword of ethereal temper loses it edge, when tried on the scaly hide of this Leviathan."

However, it will not do to sink. There have been Romans, if there

* Antinomianism.

are none now: and there have been Giants in the earth; and, seeing there is a time for all things, may be again. Let us call to mind our school-boy copy—

> Despair of nothing that you would attain,
> Unwearied diligence your point will gain.

The time may not be yet: for us it may never be: are there not others to follow after?

> Nelson was once Britannia's God of war,
> And should be still so, but the tide is turned.

Will it not turn again? This is, indeed, the day of small things: but shall we therefore let the *small things* have their way in this their day? That is not my temper.

In the Appendix to the Report of 1828, I find a Petition to the House of Commons from "Merchants and others connected with the Canadas," containing these extraordinary words: "That, in the honest conviction of your Petitioners, the Act of 31 Geo. III. c. 31, whereby the late Province of Quebec was divided into the Provinces of Upper and Lower Canada, *has been the fruitful source of all the evils with which the Canadas have been and are now afflicted.*" Though I cannot but wonder how a company of gentlemen could dare to put their names to a confession of faith so heterodox, however honest, I must admit that the conduct is entitled to entire approbation; and that the conviction, though in my opinion it falls very short of truth, comes nearer to it than any other that I have met with. "The fruitful source," in fact, is seventeen years beyond.

On the tenth day of February, 1763, was signed the Treaty of Peace between the Kings of Great Britain and France, the fourth article of which contains the cession of Canada; and on the seventh day of October in the same year, His Britannic Majesty issued a Proclamation, in which I find as follows:

> And whereas it will greatly contribute to the speedy settling our said new Governments [Quebec, East Florida, West Florida, and Grenada] that our loving subjects should be informed of our paternal care for the security of the liberty and properties of those who are, and shall become inhabitants thereof; we have thought fit to publish and declare, by this our Proclamation, that we have in Letters Patent under our Great Seal of Great Britain, by which the said Governments are constituted, given express power and direction to our Governors of our said Colonies respectively, that so soon as the state and circumstances of the said Colonies will admit thereof, they shall, with the advice and consent of the Members of our Council, summon and call general Assemblies within the said Governments respectively, in such manner and form as is used and directed in those Colonies and Provinces in

America, which are under our immediate Government: and we have also given power to the said Governors, with the consent of our said Councils, and the Representatives of the People so to be summoned as aforesaid, to make, constitute, and ordain Laws, Statutes, and Ordinances, for the public peace, welfare, and good government of our said Colonies, and of the people and inhabitants thereof *as near as may be agreeable to the Laws of England*, and under such regulations and restrictions as are used in other Colonies. *And in the mean time, and until such Assemblies can be called as aforesaid, all persons inhabiting in or resorting to our said Colonies, may confide in our Royal Protection for the enjoyment of the benefit of the Laws of our Realm of England:* for which purpose, we have given power under our Great Seal, to the Governors of our said Colonies respectively, to erect, and constitute, with the advice of our said Councils respectively, Courts of Judicature and public Justice within our said Colonies, for the hearing and determining of all causes, *as well criminal as civil*, according to Law and Equity, and, as near as may be, agreeable to the Laws of England, &c.

We have also thought fit, with the advice of our Privy Council as aforesaid, to give unto the Governors and Councils of our said three new Colonies upon the Continent, full power and authority to settle and agree with the inhabitants of our said new Colonies, or any other persons who shall resort thereto, for such lands, tenements, and hereditaments as are now or shall be hereafter in our power to dispose of, *and them to grant to any such person or persons upon such terms, and under such moderate quit-rents, services, and acknowledgments, as have been appointed and settled in other Colonies*, and under such other conditions as shall appear to us to be necessary and expedient for the advantage of the grantees, and the improvement and settlement of our said Colonies.

And whereas, &c. we do hereby command and empower our Governors of our said three new Colonies, and other our Governors of our several Provinces of the Continent of North America, to grant without fee or reward, to such reduced officers and soldiers as have served in North America during the late war, and are actually residing there, and shall personally apply for the same, the following quantities of land," &c.

Now, Sir, I ask you, as a Lawyer; and I ask any man that knows any thing about such matters; Is there any thing in these words to admit a doubt, whether the Laws of England were as much intended to be introduced into "the Government of Quebec" as into those of East or West Florida? Is there any thing to countenance or give a tolerable colour to a doubt, whether they were actually so introduced into this Lower Province? Is there any thing to give a tolerable colour to a doubt, whether grants of land were actually made in this Province, and if made, whether they were made and held according to any other Laws than those of England? I ask these questions now, and shall have occasion to refer to them by and by.

In violation of this solemn pledge, the Act of 1774 handed over the inhabitants of this whole Province of Quebec, as to all matters "relative to property and civil rights," to the Laws of Canada; revoking, annulling, and making void all and every the Ordinance and Ordinances made by the Governor and Council, relative as aforesaid.

To ascertain the precise force of the phrase, "according to Law

and Equity, and as near as may be," &c., it will be necessary to recur to a very important principle of public law—namely: that in the case of a country newly acquired by conquest or treaty, if there be nothing in the articles of capitulation or treaty to the contrary, it is competent to the Sovereign either to adopt the laws of the conquered or acquired country; or, rejecting them, either to introduce at once some other laws,—any other he thinks proper, so they be not contrary to the principles of natural Equity and Justice,—or to order the inhabitants to be governed according to those principles, without the introduction of any positive enactment; leaving a *tabula rasa* for the reception of such enactments at a future and more convenient season. It is not competent to the Sovereign to say to a conquered or acquired people, "You shall have no Laws;" because this would be to reduce them to a state of war, and so would be, in fact, a declaration of war: but it is competent to him, if not otherwise engaged by promise, or terms of treaty or capitulation, to prescribe at pleasure as above-mentioned. Now, then, I ask, Had the King of England, in the case in question, pre-engaged himself by promise, or terms of treaty or capitulation, so as not to be perfectly at liberty to act, in this matter, exactly as he thought proper? Had he, especially, pre-engaged himself, by any of the means above-mentioned, to the adoption of the Laws of Canada, either Criminal or Civil? I have spoken to nobody on the subject, and scarcely on any other subject treated on in this pamphlet, and so am very liable to error; and the reason is, that, with one honourable exception, I do not find that viva voce evidence on subjects of this nature is worth having; but I do not find any engagement of the kind in question, and do not believe that any can be found. Now, presuming that there is none, what could any man infer from the words of the Proclamation?—or rather, what less would any man infer from the words of the Proclamation than that the King, though he did not wish to shock the feelings of the conquered inhabitants of Canada by saying so expressly, did yet undoubtedly mean to signify, that he did not intend to adopt their Laws, nor yet immediately to introduce the Laws of England? That what he intended to accomplish was, the gradual introduction of the Laws of England by the more gentle and unobjectionable means of local legislation; and, in the mean time, that he would govern according to those natural principles above-mentioned, with a special regard to the positive enactments and common-law principles of the

British Government? If less than this is meant, if less than this is promised, either I am ignorant of some material circumstance bearing on the question, or I am not capable of judging on the subject.

Eleven years after the date of this Proclamation—namely, on the 15th of November, 1774, the American war commenced; and in the Act 14 GEO. III. c. 83, (passed in the same year), I thus read:

Whereas His Majesty, by His Royal Proclamation, bearing date the seventh day of October, in the third year of his reign, thought fit to declare the provisions which had been made in respect to certain countries, territories, and islands in America, ceded to His Majesty by the definitive treaty of peace, concluded at Paris on the tenth day of February, one thousand seven hundred and sixty-three: And whereas, by the arrangements made by the said Royal Proclamation, a very large extent of country, within which there were several colonies and settlements of the subjects of France, who claimed to remain therein under the faith of the said treaty, was left without any provision being made for the administration of civil government therein*; and certain parts of the territory of Canada, where sedentary fisheries had been established and carried on by the subjects of France, inhabitants of the said Province of Canada, under grants and concessions from the Government thereof, were annexed to the Government of Newfoundland, and thereby subject to regulations inconsistent with the nature of such fisheries: May it therefore please Your most Excellent Majesty that it be enacted; and be it enacted, &c.

IV. And whereas the provisions, made by the said Proclamation, in respect to the civil government of the said Province of Quebec, and the powers and authorities given to the Governor and other civil officers of the said Province, by the grants and commissions issued in consequence thereof, have been found, upon experience, to be inapplicable to the state and circumstances of the said Province, the inhabitants whereof amounted, at the conquest, to above sixty-five thousand persons professing the religion of the Church of Rome, and enjoying an established form of constitution and system of laws, by which their persons and property had been protected, governed, and ordered for a long series of years, from the first establishment of the said Province of Canada: Be it therefore further enacted by the authority aforesaid, that the said Proclamation, so far as the same relates to the said Province of Quebec, and the commission under the authority whereof the government of the said Province is at present administered, and all and every the ordinance and ordinances, made by the Governor and Council of Quebec for the time being, relative to the civil government and administration of justice in the said Province, and all commissions to Judges and other Officers thereof, be, and the same are hereby revoked, annulled, and made void, from and after the first day of May, One thousand seven hundred and seventy-five.

VIII. And be it further enacted by the authority aforesaid, that all His Majesty's Canadian subjects within the Province of Quebec, the religious orders and Communities only excepted, may also hold and enjoy their property and possessions, together with all customs and usages relative thereto, and all other their civil rights, in as large, ample, and beneficial manner, as if the said proclamation, commission, ordinances, and other acts and instruments had not been made, and as may consist with their allegiance to His Majesty, and subjection to the Crown and Parliament of Great Britain; and that in all matters of controversy, relative to property and civil rights, resort shall be had to the laws of Canada, as the rule for the decision of the same; and all causes that shall hereafter be instituted in any of the Courts of Justice, to be appointed within and for the said Province by His Majesty, his heirs and successors, shall, with respect to such property and rights, be determined agreeably to the said laws and customs of Canada, until they shall be varied or altered by any ordinances that shall from time to time, be passed in the said Province by the Governor,

* *Left without any provision being made for the administration of Civil Government therein?* Be astonished, O heavens! I appeal to the Proclamation.

Lieutenant-Governor, or Commander-in-Chief, for the time being, by and with the advice and consent of the Legislative Council of the same, to be appointed in manner herein-after-mentioned.

IX. Provided always, That nothing in this act contained shall extend, or be construed to extend, to any lands that have been granted by His Majesty, or shall hereafter be granted by His Majesty, his heirs and successors, to be holden in free and common soccage.

Here we have, in characters so legible that he who runs may read, the first verse of the first chapter of the first book of —— that curse of Canada, *anti-national* CONCILIATION. As more immediately connected with my more immediate purpose, permit me to direct your attention to the ninth clause of this Act, and to ask you, as a Lawyer, what, in this extraordinary case, you would understand to be its legal effect? Was it intended to except from the operation of this Act, *lands only, as such*, granted, or to be granted, in free and common soccage? or was it intended to exempt from the laws of Canada in toto, *all such lands, and all the inhabitants residing on such lands?* English Lawyers maintain the latter; French Lawyers in general, *and some English Lawyers and even Legislators* maintain, that *no exception whatever* was intended! that the Laws of Canada were meant still to extend, as they have, in fact, been made to extend, to the inhabitants of the townships, and to the very lands in their occupation in the townships—all granted in free and common soccage,—even to the right of dower, descent, and conveyance. A declaratory Act was passed by the Imperial Parliament in 1804, disallowing all such ignorant or perverse proceedings, as illegal, *and still the French Lawyers persisted in their former course; and Mr.* VIGER *had the face to tell the Committee of the House of Commons, in* 1828, *that they* WERE RIGHT *in so persisting.* Such has been the consequence of this first measure of conciliation! That which I have said, I now call witnesses to prove. I begin with the Proclamation. What was its legal effect? Do the French Lawyers indeed maintain that it was *nil?*

D. B. VIGER, Advocate. The Committee will observe, that after the conquest a Proclamation was issued by the King, which went upon the supposition that the conquest had the effect of destroying the Laws of Canada. After an examination, it was found that *this was not consonant with the principles of Public Law between civilized nations: that a conquest could have no such effect: that by the conquest allegiance only changed; but that property remained, and of course the Laws, which are the safeguard to that property, and without which it could never be kept: and, finally,* THIS PROCLAMATION WAS LOOKED UPON AS A NULLITY.—*Minutes*, 152.

Secondly, if the effect of the Proclamation was, as to any change in the Laws of Canada, *nothing*, it follows, that no subsequent alter-

ation could be effected by means less direct than positive enactment; and consequently, that the effect of the Act of 1774, annulling that Proclamation, was *nothing*; and that the pretended exception from its provisions (section 9) was a perfect *farce*. Call the witness.

D. B. VIGER. [With reference to the provision in the 9th section of the Act of 1774.] Now it was understood, at that time, that this exception could relate only to the incumbrances with which, by the feudal laws, those lands might be charged, but that it did not apply to the ordinary laws which affect every citizen. It was not understood that the property in the townships should be governed by another system in that respect. *We could never imagine that* WE *were to be shut out from the townships by the want of knowledge of the system of laws with which we were about to be affected in entering those townships:* that the Government meant to establish two systems of law in the same country, and to establish the confusion that would result from such a division in the Province; and I understand that it was the opinion of some of the best Lawyers in England, who have been consulted on the subject, that this exception could not be understood in a different way from what I have stated.—*Minutes*, 152.

These French-Canadians had no difficulty in imagining that WE *were to be shut out from Lower Canada*, by the unknown operation of a system of laws and customs, the like of which is not to be found existing in any civilized country under heaven. Call another witness.

JAMES STEPHEN, Jun. [Counsel to the Colonial Department.] *Question.*—You are probably aware, that subsequently to the enactment of that law (of 1774), the Courts of Justice in Canada, and the people in Canada, both seem to have concurred, that the old French Law should be applicable, in all its parts, to those lands that had been granted in free and common soccage: and *those lands have therefore descended from that time to the present according to the principles of the old French Law.* Does it occur to you that that circumstance of the Courts of Justice having governed themselves upon the principles of French Law, does not give validity to those titles which have been thus conveyed? *Answer.* MY OWN OPINION IS, THAT THE COURTS WERE RIGHT IN THOSE DECISIONS.—*Minutes*, 238.

NOTE. Perhaps it may serve, in some measure, to account for this extraordinary opinion of Mr. STEPHEN, to consider in what way the intended change of tenure would affect the business of Appeals to the Queen in Council,* and his business as Counsel to the Colonial Department. And here I shall suggest for consideration, the very pretty figure which the Councillors must cut—(I say nothing, of course, about the figure of the Queen)—sitting in judgment on such

* Are there many appeals from the Superior Court to the Court of Appeal?——I could not exactly tell the number, but I know there is a pretty large proportion.—D. B. VIGER. *Minutes*, 140.

Are there frequent appeals to this country from the decisions in Lower Canada?——There are frequent appeals; and they are encouraged by the uncertainty which prevails with respect to decisions under the French Law, there being no settled practice to refer to in Europe on the subject.—E. ELLICE. *Minutes*, 54.

appeals, they having to be decided according to the Laws of Canada. In such cases Mr. STEPHEN, or some other Counsel equally disinterested, must play—à la PAGANINI—first fiddle with a vengeance! Parmi les avenges! &c.

To give some idea of the *patriotic* views of certain English Legislators, I quote a question put to Mr. (now Judge) GALE, by one of the Members of the Select Committee of the House of Commons.

Do you mean to say that, after the separation of the two Provinces of Upper and Lower Canada, in 1791, *the object of which separation was to give* THE EXCLUSIVE POSSESSION OF THE LOWER PROVINCE TO THE FRENCH-CANADIANS, &c.—*Minutes*, 32.

Can we wonder, after this, that the French-Canadians should maintain their pretensions to the exclusive possession of this Province? I return to the question of the townships. Here is another witness—not as to fact, for that were superfluous, else I could produce plenty; but as to right.

D. B. VIGER. Another reason for which the Lower Canadians must be supposed to think that they have a right to their own laws in those lands which were open to their own industry, was, that the greatest number of the people who have come to settle in those lands [i. e. in the townships] were foreigners.—*Minutes*, 151.

Is this a rule, I ask, by which to interpret an Act of Parliament? or is it a reason with which to justify rebellion? One of this gentleman's reasons is strictly critical, and I quote it for the curiosity. Perhaps Mr. STEPHEN will have the goodness to favour us with *his* canon of criticism.

We thought that from the general rules of interpretation of laws of a public nature, although the words might imply something in contradiction to the principles which the law seems to intend to lay down, [i. e. which the interpreter seems to intend to make it lay down] as all public laws should be interpreted *rather according to the intention of the Legislature than the ordinary grammatical meaning of words* [inasmuch as Legislators frequently intend to say one thing, and, according to the ordinary grammatical meaning of the words they make use of, do in reality say the very opposite!] *it was thought that the Government of England did not intend* to establish two different systems of law in the same country, and particularly one for *persons* in the townships, and another for *real property*. . . . . But supposing even that this was not the intention of the Legislature at the time, an error which has been fallen into by every body in Canada [and maintained by Mr. STEPHEN not to have been an error!] should certainly be looked upon at least *as respectable*. This would be a case for saying, *error communis facit jus*.—Mr. VIGER. *Minutes*, 151.

What a pity that the *error* of rebellion was not sufficiently *communis* to make it *jus!* Mr. VIGER might now, instead of being in jail, have been King of Canada! and Mr. PAPINEAU, by popular election, Heir Apparent!

It is well known that, after the passing of the Declaratory Act,

placing this question beyond the future reach of pettifogging quibble, lands continued to be conveyed and distributed according to Canadian Law; and I understand there are not wanting Lawyers to advise their clients still to continue their perseverance in the good old practice. Will Mr. VIGER advise that this is right? Hear him:

Do you think the establishment of the English Laws which relate to property held in England on free and common soccage, and bringing them into operation in the townships in Lower Canada, and also applying them to all property wherever held in Lower Canada, which is held on the tenure of free and common soccage, would be an infringement of the rights of the ancient Canadian inhabitants of the country?——The least that I should say of it is, that *it would be* UNJUST.—*Minutes*, 156.

One reflection. How dignified the conduct of the House of Commons, in allowing their Select Committees to be thus bearded and insulted by barefaced treason! Another. How profoundly politic the conduct of the Cabinet, in still striving to conciliate such men; by measures, too, that injure even more than they disgust: measures of which the consequences have been, and ever will be,

To plunge a Province or a Realm in grief!

And now that I am upon this subject, I will take occasion to record a thought, which otherwise may not recur. It is this; that it is bad policy in a Metropolitan State to allow, in any instance, any one of its dependent Legislatures to alter, or in the slightest degree to modify, any one of its enactments respecting such dependency or any of its affairs. The reason is very obvious, and the case before us affords a striking illustration. Question.

You have referred to a clause in the Act 31 GEO. III., which, after empowering lands to be granted in free and common soccage, contains the following words: "Subject nevertheless to such alterations with respect to the nature and consequences of such tenure of free and common soccage as may be established by any law or laws which may be made by His Majesty, his heirs or successors, by and with the advice and consent of the Legislative Council and Assembly of the Province." Do you understand any thing more by that clause, than that it is open to the Legislature of Lower Canada, with the consent of the Crown, to make any alteration in the law of property? [The question is very vague: the answer is very subtil. Observe.] The manner in which this is inserted there shows, that probably the Parliament must have meant a little more than an ordinary intention of conferring upon the Parliament of Lower Canada *the power of making laws!* [Why yes, to be sure it did; but what was this little more? Mark. After some admirable special pleading, here it comes.] Supposing we had interpreted the Law in a manner different from what the Parliament had interpreted, have not we the right even of repealing Acts of Parliament? Do not we change, every day, the Laws of England in Canada? Is not the Criminal Law, as it sood in 1774, altered every day in our Provincial Parliament? No body could deny that the Parliament of Lower Canada had a right to legislate upon these subjects; and as we had even a special right of making alteration, with regard to that particular subject, we might have

made any change supposed to be advantageous to the country without referring to the Parliament of England.—Mr. VIGER. *Minutes*, 155.

The plain English of which is: Give us a special licence, and we will claim a general right. As this is a subject of great importance, I must beg to pursue it a little further, even at the risk of being thought tedious. The following is a very close question.

Are you aware that it is in the power of Great Britain to impose what laws it chooses upon a ceded Colony; and that when the Act of 1791 gave Lower Canada an independent Legislature, [a very improper phrase, because very open to abuse], as it provided that the law of free and common soccage should be the law in future grants, if it had not given, at the same time, specifically, a power to alter that character of property, it would not have been within the power of the Assembly [Legislature] of Lower Canada to have made any alteration in it; and consequently it became necessary at the same time that the Law of Great Britain established the law of free and common soccage, to give a power to the Assembly [Legislature] of Lower Canada to make such alterations in it as the King might choose to consent to: are you prepared to adopt this explanation?——I do not consider that the Parliament of England has more power with regard to a conquered country, than is allowed by international laws, and public laws, which I consider to be part of the Laws of England.—Mr. VIGER. *Minutes*, 155.

Was ever answer more disingenuous and evasive? The truth is, Mr. VIGER would not deny, what yet he thought it not prudent to avow. I could easily show, that the same refractory Republican spirit runs through the evidence of Mr. CUVILLIER,* and that there is something very suspicious in some expressions of Mr. NEILSON.† How long will England allow herself to be thus treated? Will she never learn to distinguish between her enemies and friends?

I am writing this pamphlet with a view to its being read in Upper Canada as well as Lower, conceiving that a Union of the Provinces

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* Do you not conceive that, in a Government which admits of any Monarchical principles in its Constitution, it is essential that there should be certain officers of State who are independent of the popular voice?—I will not enter into the merits of any form of Government, [who asked him?] but I will merely say, that it is my opinion generally that the *Judges only in the Colony* should be made independent of the people.

Do you conceive that all other officers whatever belonging to the State should be subject to an annual vote of a popular Assembly?—I do so, with the exception of the Governor-General, who, I think, *should be paid by the Empire.*

You state that there can be no Aristocracy in Canada. What makes you say so?—The laws of the country are against the acquirement of property sufficiently large to create an aristocracy in the country, and the manners of the people of America are decidedly against the system of Aristocracy.

What is it that prevents the accumulation of property in large masses in the hands of individuals?—The subdivision of property.

What produces the subdivision of property?—The laws of descent.—*Minutes*, 161.

☞ Is not this the main reason why these laws are clung to and supported?—At any rate it is a good and sufficient reason why they ought no longer to be tolerated.

† I admit that *where there is no representation*, there should be some supreme legislative power.—*Minutes*, 72.

is at hand; and that I shall be able to impart to the inhabitants generally, much information respecting matters more or less connected with the Union, to which their attention may not hitherto have been directed; and to induce them to prosecute enquiries for themselves, much beyond what otherwise they would have considered necessary. It is with a view to the Upper Province principally that I have determined to lay open, as I may be able, the character of the laws obtaining in Lower Canada; and though the attempt should prove a failure, and though the derision which I may have to endure in consequence should be that of an entire city laughing in chorus, I shall not be daunted; for what I am doing requires to be done, and though I should fail in even the sixth attempt, I should not despair of succeeding in the seventh. For this resolution I am partly indebted to a question put by the Select Committee of 1828 to Mr. MERRITT, and to his answer. They both evince such want of information respecting this subject, now especially so important, that I will count the danger nothing and the labour a delight, so I may but have the satisfaction resulting from success.

Are you a native of Upper Canada?—I am.*

What is the law that prevails with respect to personal property in Upper Canada?—The same as here.

Does it differ in any way from the administration of *the law*, [the law differ from the *administration* of the law?] *as to personal property, in Lower Canada?*—I CANNOT SAY.

Mr. VIGER (Min. 157) informs me, that "the Civil Law of Canada is, generally speaking, the Roman Law, wherever there is no special enactment of the *Coutume de Paris*, and the *Ordonnances* of the King of France, and other enactments, which are the smallest part of the Laws of Canada." Now I should be glad to know *what* "Ordonnances of the King of France," and *what* "*other enactments*,"

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* On this question's being subsequently and more significantly put, Mr. M. answered that he happened to be born in the State of New York. This reminds one of the story of a certain Irish Nobleman, who, being asked his serious opinion, whether there was any foundation for the vulgar prejudice about Irish *bulls*, and if so, how he accounted for their prevalence in Ireland more than elsewhere, answered, that he must ingenuously admit the fact; and that he had no doubt, if an Englishman were to be born in Ireland, he would be quite as liable to bulls and exposed to laughter as were *his* countrymen.

By the by, whence comes this word *bull?* what is its etymology or origin? You will not find it in JOHNSON, nor have I been able to find it any where. I am no philologist, because, though extremely partial to such pursuits by way of amusement, having no memory, I could never acquire a tolerable knowledge of any one foreign language. However, following my humour, I guess (as friend JONATHAN says) on occasion; and upon this occasion I have been induced to guess as follows.

After the Norman Conquest, the French language was introduced into all the higher circles

go to make up the composition. The Laws of Canada, by the lovers of the system, are above all things extolled for their beautiful simplicity. I suspect there is much of professional prejudice in this opinion, and more of fudge. If I be asked the ground of this suspicion, I answer,—the extravagance of the pretension, and its notorious inconsistency with facts. It signifies nothing to me that the late Chief Justice MANK is reported by Mr. VIGER to have said on the Bench, that a common Notary in Canada, after a couple of years' practice, understood conveyancing better than the most able conveyancer in England. (Min. 143.) If the late Chief Justice MANK made use of these words, and meant to say what they literally signify, he was either a fibber or a fool; and if he merely meant to

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of society, but spread very slowly among the rustics. That it was very prevalent among the *scholars* of the nation is proved by the well-known fact (vide *Blackwood's Magazine*), that even our most admired old songs are translations from the French, almost verbatim; and that it was exclusively used at Court admits no question. The consequence was, that English gentlemen began to make use of terms and phrases, which English citizens and bumpkins could scarcely understand. The bumpkins in the country (as country bumpkins ever will) shielded their ignorance with obstinacy, and stuck to their Saxon; but the citizens (citizen-like), were all for fashion, and JACK aspired to be as fine a Frenchman as his master. But in his ignorance JACK blundered—*awfully*,—and, for his conceited ignorance, got—(just as I shall get for writing about Canadian Law, knowing no more about the subject than my *fauteuil*)—awfully laughed at! and hence the sarcastic song—

JOHN BULL for passtime took a prance
Some time ago—to peep at France.

This would lead one to suspect that "*Bull*" was originally French, and applied, in ridicule, to the bumpkind blundering English, learnedly endeavouring to adopt their language. This in general.

But, whence its origin precisely, and its signification?

Some years ago, travelling into London on a coach, I saw a sign—a horrid daub,—a bull's head, and under it a most tremendous human mouth. Beside me sat a young lady, and on the further side of her, a very intelligent Quaker gentleman, who had been conversing with the lady (a stranger to us both) during our journey from Exeter, principally in the French language; and had amused us not a little (for I could understand the foreign conversation, though I could not join in it *in French*) with an inexhaustible store of information, anecdotes, charades, &c. Pray Sir, said I to the gentleman, can you explain to me the meaning of that—to me inexplicable—*Bull and Mouth?* It is the mouth of the *Bologne Harbour*, said he; just as thou mayest have seen *la Belle Sauvage* pictured as a great Savage and a Bell! Then there, said I, is the origin of our JOHN BULL, and of the word *bull* as signifying *blunder*. Well friend, said he, I never thought of that, but I think thou'rt right. It was no bad thought in Mr. BULL, said I, to turn the joke on PAT! No, pretty good, observed our friend, and joined us, for the first time, in a laugh! A reflection.—You may spare yourself the trouble of looking for the origin of words of this kind in JOHNSON's Dictionary. See his etymology of our interjection *Marry*, the old French adjective *Marri*. "*Bucanier*," he calls "a cant word." It is from the American word *Boucan*, the meaning of which may be seen in TREVOUX. "*Budget*," (adopted by the Fr.) JOHNSON derives from *Bogette*. Fr. I find no such word, It is from the Fr. *bougette*, Gaulish *bulga*; and hence our verb to *bulge*, which JOHNSON could not trace. *Complice* is Fr. to the letter, as are *Dernier*, *Couchant*, *Comportment*, and hundreds more. See also alarm, cleave, engross, (Fr. *grossoyer*, mettre *en grosse*) cupidity, clerk, &c.

say that such a Notary would have less trouble, and be less liable to *legal error* in cōnveying an estate in Canada, than would the most able conveyancer in England, what he meant was nothing to the present purpose. If St. PAUL was right, it is no hard matter to avoid transgression where there is no law; just as it is no hard matter for a Notary in Canada to effect a mortgage on the whole of a man's estates, possessed, or at any future time to be possessed: when all that is necessary amounts to little more than a minute in writing, without any reference to any estate, of an acknowledgment in his presence by the debtor of the debt. Such simplicity of the law may be very *taking* to the ignorant, just as is *cheap* Government to the *democrat*. To the man of sense such law and Government appear as they are, the curse and destruction of any country.

A gentleman whom I am proud to call my friend,—though we are, in opinion, respecting Responsible Government and Canadian Law, far as the poles asunder,—yesterday lent me Commentaire sur la Coutume de la Prevoté et Vicomté de Paris, per M. C. DE FERRIERE. The occasion of the favour—much greater than I had asked, was this. Having engaged to write on the subject, and knowing nothing, I took the liberty to ask him to help me over a grand difficulty; which was, whether, as I had understood, the said Coutume was territorial merely; the few books in my possession serving only to create and increase, not to resolve the doubt. On opening the first volume, the first words that caught my eye were —page 5: La matiere des fiefs est la plus difficile de celles qui se trouvent dans la Jurisprudence coutumiere, et peu de personnes en ont une parfaite et entiere connoissance. "Of all the matters embraced by the Jurisprudence of French customs, that of fiefs is the most difficult; and few persons possess a perfect and entire knowledge of the subject." Very pretty encouragement for one who thought to obtain a perfect and entire knowledge of its beautiful simplicity in a few hours! However, if this difficulty discourages, it all but renders unnecessary all further search; for if the subject be so complex that few Lawyers understand it, what must be the situation of our ignorant vassals, living under cunning and accomplished Seigneurs, to whom they are liable for forfeitures et Droits pecuniaires? It may be very true which Mr. NEILSON says *(Min.* 82*)* that, in truth, the inhabitants in Lower Canada, descendants of the original settlers, care not much about the tenure. Allowing it to be

so, this carelessness may be the result of ignorance, just as was that wise opinion recorded in Minutes, 127. "I am confident," (so says this Canadian Solon) "that every system of Law is good for a country, when it has been long established!" Do the subjects of his Satanic Majesty judge thus? Mr. VIGER tells us, (149) "The Committee are perhaps not aware, that what is called feudal law in Canada, has no precise analogy with what is called feudal law on this side of the Atlantic. In Canada the land is conceded to the farmer generally for a very small annual rent, and there is an end of all duties to his Seigneur;" which is about as correct as his assertion (148) "that for one deed which there is to register in a country like England, we have a thousand that would require to be registered!" or as the opinion of Mr. CUVILLIER, (168) in answer to the question, how he accounted for the circumstance of there being so few settlers, "*I do not consider that there is any thing in the Laws of the country that prevents their settlement in Lower Canada!*" Now this is just the question which I wish to investigate, and much regret my present inability to do any thing like justice to a subject of such vast importance.

The Custom of Paris:—what is it?—what its origin, its history, its character? That it is not, as I had understood, merely territorial, will be seen by the following titles of the sixteen chapters or divisions under which are classed its contents. 1, Of fiefs: 2, of *censives* and seignorial rights: 3, what goods are movable, and what immovable: 4, de complainte en cas de saisine et de nouvelleté, et simple saisine. Of complaint or interdict (vindiciarum petitio) in case of trouble or disturbance in ones possession of a heritage or real right: 5, of personal actions, and of *hypotheque:* 6, of prescription: 7, de retrait lignager. Of the reclamation of an estate improperly alienated, by a relation of the same lineage: 8, of arrests, executions, and liens (gageries): 9, of servitudes *(obsequium clientelare)* and reports of sworn arbiters or appraisers *(jurés):* 10, de communauté de biens. Of marriage partnerships: 11, of dowers: 12, de garde noble et bourgeoise. Of guardianship of children and grandchildren: 13, of donations and death-bed presents: 14, of testaments, and their execution: 15, of succession, lineal and collateral: 16, des criées (auctio). Of seizures, proclamations, and sales.

In the debates in the House of Commons, on the Constitutional Bill, Mr. Fox said:

With regard to the French laws, they (the Canadians) might be allowed to have constitutional and municipal laws, if they were desirous that these laws should not be taken away. But, in fact, these were not the French laws at the conquest of Canada. They had sent only a part of their laws to their Colony; they formed merely what was called the *Custom of Paris;* but that had been long since abrogated. Hence arose the utmost difficulty in appeals to the Privy Council; the law to which they referred no longer existed; it was necessary to consult, not the French lawyer, but the antiquarian.

In saying that the Laws of Canada formed *merely* what is called the Custom of Paris, Mr. Fox was undoubtedly in error,—unless we suppose the extension to have been made subsequently, which seems not probable. I find, however, in Ferriere, what makes me somewhat in doubt about the truth of Mr. Viger's definition of the Law of Canada.

It is a question—[says he]—whether the Roman Law *is* the Common Law of France *coutumiere*. In the rest of France (dans les payes de droit écrit) it serves for Law, because the Kings have been pleased to accord to some provinces of France, which we call pays de droit écrit, the favour to govern themselves thereby; but in the provinces which are governed by custom, that Law is considered only as a written Rule of Right, (raison) founded on undoubted equity, but from which the Judges are at liberty to depart when they think proper.

Now, if such judges as we have in Canada, destitute of the benefit of a legal education, are permitted this licence, one may guess what sort of uniformity and precision is to be found in their decisions. In truth, however, I should think it makes very little difference whether what is recorded in the Institutes, &c. be Law in Canada, or not; for I doubt whether some of our Judges have ever so much as read it, or are able to read it in the original. As to the *question*, however, Montesquieu, I find, says expressly, l. 28, c. 42, that "Philip *le bel* caused to be taught the Laws of Justinian, in the Provinces governed by Custom, merely as a written Rule of Right; and that they were adopted as Law only in the provinces where the Roman Law obtained:" and the French and Latin Dictionary which goes under the name of Trevoux, says (Droit Francois): "Thus France is divided between the Roman Law, which reigns in the southern provinces, and the Droit Coutumier. The ordonnances of the Kings make also a part of the Jurisprudence." (Ed. 1752, 7 vol. fo.) With respect to Canada, therefore, I must still beg leave to doubt. After Mr. Fox,

Mr. W. Grant said, that, in general, commercial laws differed but little from one another. The commercial laws of England and of France were nearly the same. All commercial laws were founded on the principle of contracts, either expressed or implied. He begged leave to correct a mistake, on a subject of which he was enabled to speak from his local knowledge. The *Custom of Paris* had no

reference to the regulations of commerce, but of real property. The merchants were aggrieved, not in consequence of commercial decisions, but of insolvency. The relief granted to creditors was very different in different countries. It was granted in France, according to the nature of the debts. The merchants thought that they had reason to complain, when they found the whole of the bankrupt estate run away with by French deeds, of which they knew nothing.

Mr. Fox, (we then are told) after paying a compliment to the abilities of the honourable and learned gentleman that had spoken last, thanked him for having corrected his mistake. How had he corrected it? He had corrected it by concealing what was true (that the said Custom was only a portion of the antiquated Law of Canada) and by insinuating and asserting what was false. The false insinuation was, that the commercial laws of Canada were those of modern France,—but little different from those of Great Britain; and the false assertion was, that the Custom of Paris had no *reference to the regulations* of commerce (understood as signifying, *no injurious effect* on commerce), but of real property,—plainly meaning, of real property *exclusively*. This was what (in connection with what I found on the subject in MONTESQUIEU) puzzled me; and it seems to have served but little in removing the difficulty, and less than nothing in allaying the suspicion, of Mr. Fox, "Notwithstanding what had been urged, he was still in as much doubt as ever about the UNINTELLIGIBILITY of the laws."

Respecting the Customs of France, their origin, the different sources whence derived; how, from being particular, which they were for each seigniory, they became general for each Province; when and how they were reduced to order and writing, and afterwards reformed, I must beg to refer to the Spirit of Laws, l. 28, c. 45, and especially to GUIZOT, Cours d'Histoire Moderne. All this barbarian and barbarizing stuff has been long since swept away from the country of which it was too long the curse; and that the British Government should prolong its existence in Canada, to be at ōnce our scourge and its disgrace, is to me beyond measure marvellous and disgusting.

Mr. GRANT,—(a *learned* gentleman, you will observe, as well as honourable)—wished it to be understood, that the Commercial Laws of Canada were those of modern France. There are not wanting English merchants, London merchants, directly and deeply interested in the trade of Canada, who act as if they thought that our Commercial Laws were those of England! The Directors of the

BANK OF BRITISH NORTH AMERICA (for example) when they sent me out as Manager to Montreal, sent with me three copies of CHITTY on Bills of Exchange; one for Toronto, one for Quebec, and one for Montreal. They might as well have sent the latter two to China! Let the merchants of England know,—let the Members of the British Legislature learn from me,—what, spite of the learned and honourable Mr. GRANT, they will find to be the fact, that our Law of Bills of Exchange is neither that of England, nor that of Modern France, nor any thing akin to either: and further, as to what Mr. GRANT was pleased to call "the bankrupt estate," let them know that there has never, since the Act of 1774, been such a thing existing in the Province! that we have never had so much as a *barbarian* Bankrupt Law—till now! I say *till now*, because I have just been told that our barbarian Bankrupt Ordinance *has been allowed.* I call upon "learned" gentlemen, members of the Metropolitan Legislature, to examine this production, as being a choice specimen of the brain-born lawyer-forged Legislation of Lower Canada. When they have examined it, let them answer this question: *Had we not better be lawless than have such laws?* That Canada, thus governed, in its agriculture, in its commerce, cannot flourish, what but IGNORANCE can wonder? "Do men gather grapes of thorns, or figs of thistles?"

When a Manager in England, I thought I knew as much about the Law of Bills of Exchange as one Lawyer in a hundred; and, if required, I can give something in confirmation,—this, e. g., that though I was Manager for years without a Director, and took and paid many hundred bills, numbers of which were returned dishonoured, (for they were generally Sheffield wasters), I neither lost a shilling nor was once questioned, legally or otherwise, respecting the propriety of my management, as to a Bill or other Bank transaction. When I reached Canada, instead of being able, as I expected, to turn to good account my imported Law Library and stock of legal knowledge, I found myself——just as you may suppose. I was a member of the Board in Montreal, and in my ignorance began to talk about what was right respecting Bills, and what was contrary to Law; and to vouch, in proof of my assertions, my big octavo,—and got laughed at for my pains! and when I wanted to play the student, and to be furnished with the necessary books, I found that I was considered a Mr. Busy-body, a would-be Mr. Somebody, who must

be taught to be Mr. Nobody. In short, I found the policy of my Directors respecting me (as I now find the policy of the Seigneurs respecting the censitaires) to be—KEEP HIM DARK, AND KEEP HIM DOWN! When my Directors found that I was not a man to be so repressed and snubbed, they wrote the Court (the London Directors) that I was a dolt: that I entertained a project of dispensing with *my* Board! and that, in their opinion, I ought to be dismissed: and when, on the capital offence of duncery, and the still more capital offence of treason, I was tried by a secret inquisition, and nothing found to justify such treatment; because *the Court* found that I was a man whom even *they* could not *keep down*,—and one whom, under such treatment, not even they were able to make *dumb*,—in the most brutal manner *they* KNOCKED me down.* "Rejoice not against me, O mine enemy! when I fall I shall arise."

The Custom of Paris was first reduced to order and writing in 1510, and, being found, like the other Customs, very faulty and defective, was reformed in 1580. These reformations were by the authority of the King, and with the consent of the three estates of the Provinces. The Custom in question is divided into sixteen heads or chapters, containing 362 articles or sections. I have given the titles of the chapters in the order of succession, and intend to add a few explanatory observations on the contents.

Chapter I. Of Fiefs. The very mention of fiefs gives rise to a question, the full solution of which is a desideratum. The question is this: How comes it that our agricultural, even more than our commercial interest, is,—instead of being, as it ought undoubtedly to be, if not the most honourable and lucrative, at any rate the most independent interest in the Colony,—almost excluded the pale of political or legislative recognition? How comes it that the occupation of the *farmer* is considered, in Lower Canada, only one step exalted above the meanest and most servile? It will not do to answer, because of the French Canadians. Do they engross the whole of the land? Is there not room enough for English settlers? Why then do they not settle? "From May, 1817, to the end of the

* For a full and particular exposition of this disgraceful transaction, see *Montreal Gazette* of 5th of October. I sent 277 copies to the General Post Office, London, addressed to the principal proprietors of the Bank. My object was not their injury, but their information. That Institution, if properly conducted, might be of immense advantage to these Possessions; but its direction has fallen into the hands of a company of poor incapables, ignorant and all-sufficient, who know not how to Bank, and are too proud to learn.

year 1820, there arrived at the port of Quebec, 39,163 settlers, the great majority of them, intimidated by [something] . . . have ascended the St. Lawrence, and are now dispersed over the lands of Upper Canada and the United States."* What is that something, said and thus proved to be so intimidating? It will not do to answer, as our House of Assembly have answered this question, that the cause of the intimidation was "the length and rigour of the winter of this country," and a want of acquaintance with "the laws and language thereof." British emigrants are not, in general, so ignorant, as not to be aware of the length and rigour of a Canadian winter; nor would they allow the foreign language *of the French*, to be any the least impediment to them. There is no occasion that they should even live among the French. But the foreign laws? Well; even these would not *very much* intimidate them, provided they were good:—witness Mr. CUVILLIER, who, maintaining that they *are* good, also maintains that they oppose no obstacle whatever! Consider further therefore, whoever intends to give a full and convincing answer: and when you have so considered, I will tell you, lastly,—It will not do to answer, that the grand cause of the intimidation is the feudal tenures. There is nothing in the feudal tenure, simply as such, to revolt or terrify an Englishman, and much less a Scotchman.

'But the banks do nothing for agriculture here.' Why do they not? 'They do nothing because they can do nothing.' Then is it not a shame that they can do nothing? By why can they not? 'Because of the feudal tenure.' Not so.

I am no friend to feudal tenure, nor to any thing feudal, except in history or romance; but I cannot allow the public to be led away with the erroneous opinion, that the feudal tenure, as such, is such an enemy to the proprietors or to the occupiers of the soil, as this supposes. "All the land of Scotland, so far as it belongs to individuals, is vested in them either in superiority or in property; the

* The entire passage reads thus:—"From May, 1817, to the end of the year 1820, there arrived at the port of Quebec 39,163 settlers; the great majority of them, intimidated by the length and rigour of the winter of this country, and unacquainted with the *laws* and *language* thereof, have ascended the St. Lawrence, and are now dispersed over the lands of Upper Canada and the United States, where they have found a more genial climate, their own language, and institutions analogous to those to which they have been accustomed." That is an extract from a Report of a Committee of the House of Assembly in Lower Canada.—Judge GALE. *Min.* 32.

The object of this Report was evidently part and parcel of a regular system of Canadian hostility to British interests and British Government. Whence this public statement of what "intimidated," and whereof—*if not to intimidate?*

former called DOMINIUM DIRECTUM; the latter is called by our Lawyers, DOMINIUM UTILE;" i. e. all the land of Scotland is under feudal tenure; and yet notwithstanding this, you will hardly find another country under heaven where the land supports so many banks, or where within the fifty years last past, the banks have so advanced in wealth the proprietors and occupiers of the soil.* Allow the insertion of another quotation, both from "Commentaries on the Laws of Scotland, and on the Principles of Mercantile Jurisprudence, by G. J. BELL."—2 *vol.* 4*to.* 1826.

According to the prevailing spirit of modern law, land is considered as a commercial property. While the rules of its succession are clear and uniform, *all undue restrictions on alienation are discountenanced;* and the rights of creditors in regard to it are ample and of ready access.

With one single exception in the case of entails, the rules and proceedings of the law of Scotland relative to this sort of property, are simple, just, and efficient. The obstructions of the old law of feudal tenures have been in a great degree removed by the legislative wisdom of more modern times; called into action on occasion of political convulsions and rebellion, but with effects as salutary for the purposes of trade as if devised in the true spirit of commercial policy. The forms of voluntary alienation and security are plain, simple, and intelligible. The modes of execution by creditors are prompt, effectual, and equal, in process and in operation. And although it has been doubted by some, whether there ought to be, in public records, a complete disclosure of the state of a man's property as charged with debt, while by others it has been suspected that our system of records is fast tending to a state of inextricable confusion and practical uselessness; the fact is, that the whole landed property of Scotland is registered in volumes deposited in the Register House, and exhibiting at one view, to those desirous to purchase land, houses, or other heritable subjects, *or meaning to lend money on the security of such property, or desiring to have a correct notion of their debtor's land estate as a ground of general credit, the extent of that estate; the conditions under which it is held; and the securities which may already have been created over it.*— *Vol.* 1, *p.* 20.

I cannot let pass this most valuable passage without one remark. The removal of the obstructions of the old feudal law "by the legislative wisdom of more modern times, *called into action on occasion of political convulsion and rebellion.*" How strange! how melancholy the reflection! that while individuals have been brought to yield, almost universally, and almost mechanically, prompt obedience to the Governments under which, respectively, they happen to be born, not one in twenty of those Governments can ever be induced to yield obedience to the law supreme, the welfare of the governed, by means less fearful than political convulsion and rebellion! From the bar-

* Since the American war, the progress of improvement in Scotland has been decidedly more rapid than in England, or perhaps in any other country.— *Wealth of Nations.* M'CULLOCH's Note, p. 41.

The system of husbandry in Scotland has been vastly improved since the close of the American war. In all the lower districts of the country it is now fully equal, if it be not superior to that of England.—*Id.* p. 102.

barism of those very feudal laws which now are grinding the farmers of this Province to powder, France was delivered only by means of gory Revolution. MUST NOTHING LESS SUFFICE FOR CANADA? Another reflection.

Let no one presume to tell us, after this, that nothing can be done for our farmers without a commutation of the feudal tenure. The Imperial Parliament has all the power, and the right, to do all that is required. If, so qualified and required, the Imperial Parliament will do nothing, on that Parliament be the penalty of the refusal.

Our Franco-Canadian farmers are sunk, degraded, ignorant, and stupid. What wonder? So were the farmers in France before the Revolution. Why have the barbarian customs of by-gone ages been so long tolerated here? Is the British Government stone-blind, stone-dead, to what so nearly concerns the honour and the interest of Britain? Are they weary of a connection with the Canadas? Is it that they would force our habitans to be in love with republican America, that they refuse them emancipation from barbarity the most intolerable. 'They do not ask for emancipation: they have their choice.' What if a doctor, sent for to your dying child, should set before it unpalatable physic and sweet poison? Would you be satisfied, when your boy was dead, with the reply, He had his choice? Men can sneer at the ignorance of these poor habitans; will they never feel the force of the claim on their benevolence, of misery resulting from such ignorance? The Government pretends to be paternal; and produces, in proof, its licence to a long-neglected, spoiled, and wayward child, to do whatever it thinks proper—so it does not fire the house! What is it prescribes the duty of the Government?—the *welfare* of the governed, or the *whim?*

Why have these horrid soul-subduing customs been so long tolerated here? By whose fault? for whose advantage? Let no man pretend that it is by the fault, or for the advantage, of the poor degraded farmers. They hate and curse the system, whatever may be pretended, and nothing makes it even tolerable to them but their ignorance of what is better. Let them spend a month in France; could you hope to bring them back to feudal bondage? It is proposed to educate them. Will those who reap the harvest of their degradation unite in the endeavour? Who reaps that harvest? The Seigneurs. Who are these Seigneurs? *About half of them are English!* Is it possible? And are not then these English all

for commutation of the feudal tenures? I should not be surprised to hear that some of them are its stoutest opponents.

Mr. ELLICE was a noble exception. With all his might he laboured to effect a change, and failed. Hear him.

> The chief obstacle to the improvement of Lower Canada arises from the objections of British-born subjects to the [an] investment of the large profits that have resulted to them from the trade of the country, in real property, and the impediments to the circulation of capital so invested, by the feudal tenures, *and the heavy fines on every alienation.*

Observe. The chief, or more properly, the proximate obstacle to improvement, is an unwillingness to invest: but whence that unwillingness? From impediments to the circulation of capital invested. What are these impediments? Heavy fines on every alienation. Now allowing this to be (what indeed it is very far from being) a full and exact, though to a certain extent it is undoubtedly a true account of the matter, I next must ask, What is the nature of the connection between the feudal system, and those *heavy fines?* Will any man pretend that it is a necessary connection? It may be—*according to Canadian Law*, but are there then no other Laws? or can there be no change in this? The feudal system of Canada *may be*, as Mr. VIGER pretends it is, of a very *superior* species: but be it so, or be it otherwise, if these heavy fines are of its blood and marrow, it is not of a species to suit the taste of Britons. To them it is (whatever it may be to others) a Horrid Monster, savage, huge, and blind!

The truth, however, is, that this Monster, so far as respects these fines, is horrid,—not to the Capitalist intending to invest, and whose object is to be a Seigneur: No! For him, as well as any Frenchman, it will make an admirable Bailiff! These fines are horrid, not to him, as being a purchaser, but to the seller. "Taxes upon the sale of land," says ADAM SMITH, "fall altogether upon the seller."—(Wealth of Nations, p. 389. ed. 1838. 8vo.) The reason is very obvious. "The seller is almost always under the necessity of selling, and must therefore take such a price as he can get: the buyer is scarce ever under the necessity of buying, and will therefore only give such a price as he likes." Of the seller of land where the fine is one-twelfth of the price, there needs no "almost" to qualify the assertion of his necessity to sell; since no man, under such circumstances, would think of selling, that was not almost and altogether necessitated. What then is it that obstructs the purchaser, since

these fines on sales do not? Something must, or with the abundance of English capital wanting investment, where land could be got so good, so cheap, so profitable—as a distant view of our affairs would promise, there would be a rush for land. I know what obstructs the purchaser. It is the same thing that obstructs the Banker as a lender. It is not the feudal tenure, simply as such. What then is it? We shall see presently. In the mean time, take the balance, weigh carefully these words of the Author of the Wealth of Nations, (p. 181) and estimate our loss. "Merchants are commonly ambitious of becoming country gentlemen, and when they do, they are generally THE BEST OF ALL IMPROVERS." With Mr. CUVILLIER's good leave, Canada *could* furnish an Aristocracy,—*equal, perhaps, in wealth to that of* ENGLAND, if our good Government would let her. Why will they not? Hearken! (I like old honest ADAM!) "ALL FOR OURSELVES, AND NOTHING FOR OTHER PEOPLE, seems, in every age of the world, to have been THE VILE MAXIM OF THE MASTERS OF MANKIND."—W. of N. 183.

Fiefs are divided into (1) corporeal and incorporeal: (2), noble and ignoble: (3), divisible and indivisible: (4), frank (FERRIERE says *simple)* and liege: (5), simple and *de danger*. What is a fief de danger? How can I answer? Is there a lawyer in Lower Canada that can tell me? I question it,—if required to state *positively*. FERRIERE says: "Fiefs *de danger* oblige the acquirer to do faith and homage before taking possession, on pain of losing the fief; and from this it is that they take their name, seeing it is very dangerous to possess such fiefs without the consent of the Lord paramount." An admirable condition certainly! but is this true? I question it: and if any one of our lawyers will give me his authority for insisting on its truth, I will give him mine for continuing to doubt. Again: What is a fief liege? FERRIERE answers, that fiefs liege oblige the vassals to serve their Seigneurs against all the world, even to death; ensorte que cet hommage ne peut être rendu qu' au Souverain: "so that this kind of homage can be rendered only to the King." Now I beg leave to doubt the truth of this also. I can quote quite as good authority as that of FERRIERE, to shew, that *hommage-liege* might be taken from his vassals by a Seignior, ensorte que le *Seigneur* les pouvoit employer envers tous, et contre tous, au-dehors, et au-dedans du territoire, *fors contre le Roi:* "so that the Seignior might employ them against all the

world, within the territory or without, *except against the King.*" I mention these disagreements among feudal doctors (and were it worth the search, I believe I could discover them by hundreds) merely in illustration of the beautiful and so much praised simplicity of the system.

I cannot afford to be spending time and occupying space with trifles of antiquarian dispute. My purpose, therefore, is to run my eye over this Custom of Paris, not in the order of the sections, but of the subjects; and to bring before the public such particulars as appear worthy of special observation. This done, if any gentleman whose name is likely to carry authority with the public, will venture a repetition of Mr. CUVILLIER'S assertion; I hereby pledge my promise to sit down to the study of the whole subject of our Canadian Law, (should it not, in the interim, be either swept away or thoroughly reformed,) with the avowed determination to hold it up, in all its naked turpitude, to public execration.

The right which, in certain cases, the Seigneur may exercise over the fief depending on him, are seizing the estate,—retraction (redhibitio) or retention (jus retinendæ) of the heritage sold; and lastly, the confiscation of the fief. A word on each.

1. La saisie féodale, is a seizure of the estate for want of a vassal, or qualified man; or a dispossession of the vassal by his Seigneur, for neglect or refusal to render fealty and homage, or for rights and dues not paid; during which the Seigneur holds and takes the produce of the estate. I have had the curiosity to read what POTHIER says on this subject, and though I cannot but admire the ability of the writer, and the equity of the principles according to which he takes up and solves all sorts of doubts and difficulties; I still must be allowed to execrate the iniquity of a system which gives rise or room to such a host of subtil questions where the vassal must meet his Lord at infinite disadvantage.

The dispossessed vassal is not allowed to make legal complaint against his Seigneur, pretending that the seizure is unjust. How is this? I ask. According to the common opinion (selon la commune opinion) the Seigneur can seize only in virtue of the commission of *his Judge* (de son Juge)—who, of course, would be *his creature*,—or of the Judge of the place. Monsieur AUZANET, in his notes on the first section of this Custom, avers that it had been so adjudged by an arrêt of the 9th December, 1595. DUMOULIN opposes this interpretation—with strange *simplicity* no doubt!

The law respecting this kind of seizure is, that the Seigneur takes the natural fruits of the fief, provided, at the time of seizure, they are still attached to the soil, and that he has collected them during his possession. Can English farmers be expected to hold land of either French or English Lords at this rate? Observe. The Seigneur does not take the produce of the farm in proportion to the time he holds possession, but in proportion to the quantity which he has time to take and actually takes, of that kind of produce which the law pronounces seizable, and which law or lawyers pronounce or judge *ripe, or fit for cutting, gathering, digging, felling, &c., as well as seizable, at the time of seizure.* And again observe. If any thing is seized which cost the vassal money, seed, or labour, in order to the production; for these he must be allowed. How much? By whom to be determined? Further: What if the crop was good? What if it was bad? What if the fault was in the season? What if it was in the land? Would these considerations amount to any thing, or nothing? Lastly, feudal seizure, contrary to the maxim, *saisie sur saisie ne vaut,* deprives other creditors of that which they may have previously seized, and takes precedence of even hypothecary rights. What follows? That registers of such mortgages as Canadian law allows, would afford a sorry security to lenders on mortgage, without a further registration of legally preferable claims, as dower, legitime, arrears of cens, &c.

2. Article 20, du retrait féodale, runs thus: "The feudal Seigneur may take and retain, by right of feudal custom, the fief held and depending on him, which has been sold by his vassal, on paying the price which the purchaser had paid, and the costs, fines, &c. (loyaux-coustumens), in forty days after the notification to him of the said sale, and exhibition of the contracts (if there were any written) with a delivery of a copy." Such is the law. But the comment tells me, that in case of fraud by the vassal in the sale of the fief, to the prejudice (a l'encontre) of the Seigneur, the forty days are not to commence according to the text, but according as it has been adjudged by arrêts of the years 1558, 1569, and 1596—namely, from the date of *the discovery of the fraud.* Now which, I should be glad to know, is Law in Canada,—the *comment* or the *text?* N.B. Without a notification and exhibition as prescribed the right of retraction, instead of forty days, continues for thirty years!

3. De la commise, ou du desaveu. *Commise,* in feudal language, is

the confiscation of a fief: *commissi culpa:* which is an entire forfeiture by the vassal, of his fief, to the Seigneur. The crimes are either a denegation by the vassal made to his Seigneur, of the dependance of his fief on him; or, some act of violence amounting to felony. The 43d section of the Custom runs thus: "The vassal who denies the fief to be held of the feudal Lord, of and on whom it is held and dependant, forfeits the fief." But here again the doctors are at issue, as to the sort of denial or disavowal which carries this penalty; some maintaining that it must be deliberate, and with knowledge of the fact, &c., and others the contrary. Then comes another question on which the authorities are at issue: Is the vassal obliged to avow or disavow the Seigneur who has seized his fief? Thirdly, what if the vassal, in such case, *knowing the contrary, with premeditated design,* professes to hold of the King? Does he, in that case, forfeit his fief? Here again the doctors disagree.

Of the rights and pecuniary profits which the vassal is obliged to pay to the *Seigneur dominant.* These are, the quint, or fifth part of the price or value, in case of sale or exchange of the fief, *ou d'acte equipollent a la vente,* as, for instance, transferring it for a debt; and the relief, which is, a year's rent or revenue of the fief, in case of certain other mutations.

The sections which treat of quints are 22, 23, 33, 51, 82, 83, and 84. I translate the former. "When the feudal Lord has seized and retained, by seignorial right, (par puissance de fief) the fief held and dependant on him, and is afterwards dispossessed by a lineal reclaimant (évincé par retrait lignager) such reclaimant is held obliged to pay to the said Seigneur the dues of quints, before he can be obliged to receive him in faith and homage for the said fiefs." This is not exactly what is commonly reported and understood respecting quints. Can any one show that it is exactly right? I take it to be, not only a sharp, but a *sharper* sentence! Il semble toutefois que le lignager retrayant ne devroit pas être tenu de payer les droits au Seigneur, en ce qu' il entre en sa place, et que le Seigneur vendant un fief ne peut pas exiger des droits de l'acquereur. The case is this:—at least so I understand it. A Seigneury is sold—in the opinion of the Lord, too low. He therefore, by his right of pre-emption, pays to the purchaser the cost and charges, and takes it himself. But the estate proves to be liable to a preferable, and therefore further pre-emption, by a lineal descendant. The Lord,

however, you will observe, is not obliged to relinquish the fief on the equitable terms on which he obtained it. He obtained it by taking the place of the purchaser, but the heir must not obtain it by taking *his* place. Over and above the price paid by the Lord, the heir must pay the quint; because, by this equitable *Coûtume*, he (the heir) is made to take the place of the original purchaser,—the *alien!* Had the estate come to him direct, he would have paid no quint. It is generally understood, I am told, that a prompt payment of the quint *entitles* the payer to a *rabat*, or discount of two-thirds. I find nothing of this in the Custom of Paris? Is it really law in Canada? No: nothing of the kind. It is further to be observed, that the quint is due for a sale between father and son; and still further, that when a vassal has let or relinquished (laissé) a part of his fief on cens or rent, to the amount of two-thirds, and afterwards sells to the tenant the rent or cens of that part, the tenant, in such case, is considered to hold the entire estate of the Seigneur, and must pay him the entire quint, as well for the (supposed) sale of a part of the fief, as for the price of the cens. Lastly, a fief let or transferred for a redeemable rent (baillé à rente rachétable) is reputed to be sold, and the acquirer must pay the quint on the principal sum of which the rent is reputed the interest, without waiting for the redemption. And this, by section 83, extends to estates in roture as well as in fief.

Relief is a mutation fine, embracing mutations by descent, but due to the superior Lord for almost all mutations, excepting those by lineal descent. Section 47 of the Custom runs thus: "Relief is the produce of a fief for one year (revenue, i. e. récolte annuelle), or its value according to the estimation of appraisers, (ou le dire de prud'-hommes), or the tender of a sum of money by the vassal, at the choice and election of the Lord:" and the Commentator tells us, that the vassal that owes this fine, *is obliged* to make these three offers! This relief was formerly termed *rachat*, from *racheter*, *(redimere)* to redeem: the plain English of the case being, that all mutations involving this fine, are considered, in feudal law, a forfeiture of the estate; which can be *bought back* (redeemed) only by allowing the Lord to take the fruits of his fief during one year.

But estates produce other kinds of valuables besides annuals, and if the Lord elect to take the relief in kind, how are these matters managed? Is he allowed to cut down all the wood! to empty all

the fishponds, &c.? The next section provides,—I cannot stop to say how, except thus far,—that the arrangement is admirably simple.

Franc-alu. This is a species of inheritance which is not subject to any dues or Seignorial rights; whether honorary, as faith and homage; or pecuniary, as cens, quint, relief, &c., in acknowledgment of direct Seigniory. In this respect it is equivalent to our free and common soccage, being, in fact, no other than the *allodum* of the law Latin, from *aleu*, or *alodes* of the ancient Gauls. After the conquest of Gaul, it appears that lands were divided among individuals in two manners,—in benefices, and in alodes. Benefices were lands given by the Prince to his warrior chiefs, either for life, or for a certain time fixed; and alodes are said to have been estates left in propriety to the ancient possessors. These estates are spoken of in the Salick Law as patrimonial and hereditary. Franc-aleu signifies, a Seignorial estate, either noble or roturier, owing simply jurisdiction. According to the French doctors, who hold the maxim, *nulle terre sans Seigneur*, every heritage is presumed to be a fief; whence it follows, that franc-aleu can be proved only by a special title. See more on this subject in Spirit of Laws, l. 31. c. 8 and 25.

Franc-aleu noble, i. e. which has a jurisdiction annexed to or dependent on it, or lands held of it in fief or cens,—is divided after the manner of a fief, according to the law of primogeniture; whereas, in franc-aleu roturier, all the heirs, male or female, take equal shares.

Primogeniture, (droit d'amesse) or *preciput*, signifies the advantage of the eldest son or male heir, in the legal succession to estates noble. In the division of such estates, the eldest son has always the principal fief or manor for his preciput. By the old Custom, the eldest son took the manor-house and entire garden or enclosure; but as this enclosure might be made to include the entire Seigniory, this custom was reformed. He now takes, besides the manor-house and court yard, an arpent of the garden or enclosure, and must either relinquish or pay for the remainder. By this law or custom, daughters of the eldest son take in preference to their uncles, and a son born before marriage, being rendered legitimate by the marriage, is entitled to the right. It is worthy of notice that this right cannot be prejudiced by father or mother, by any means, directly or indirectly, either by marriage contract, gift, sale, or devise. Even a renunciation of the heir in favour of the other children, if effected during his father's life, might easily be annulled by letters of rescission.

The distribution of fiefs noble, including estates in franc-aleu noble, is this. Where there are two children, (and here the word children includes all the lineal descendants) the eldest male takes the principal manor-house, and two-thirds of the estate. Where the number exceeds two, the eldest son, besides the manor-house, takes half.

But a question arises here, respecting which the authorities are greatly divided: Does this right of the firstborn extend to estates coming immediately from the grandfather or grandmother? What say our Canadian authorities? Are they agreed? I think I know what the text says; but I find that, in Law as in Divinity, the commentators say ten times more than the text does, not unfrequently to the making void the law through their traditions.

The eldest son, I perceive by the 17th section, in certain cases, takes the whole estate: i. e. when there is only one fief: but, in case the defunct has not left other property, or not sufficient, to pay the other children their legitimate portion of the property, *(legitime;* legitima portio hæriditatis; which, by the Custom, art. 298, is the moiety of that which each would have had *ab intestat;)* or of the dower; he takes the estate subject to these prior claims. The words are: sauf tontefois aux autres enfans leur droit de légitime, ou droit de douaire, coutumier ou préfix, à prendre sur ledit fief. The reason assigned is, that the legitime is considered a natural right, whereas primogeniture is that of a merely legal benefice. I mention this to show how little this kind of primogeniture is calculated to create an Aristocracy similar to that in England, or any Aristocracy sufficient for the purposes of a Monarchical Government. And query: What proportion of the land of Lower Canada is held as estates noble? N.B. Females, in the collateral line, do not concur with males of the same degree, so that a brother succeeds to the estate of a deceased brother, to the exclusion of his sisters. (461.)

Chapter 2 treats of *censives* and seignorial rights. The word *censive* sometimes signifies the fief on which *cens* is payable, and sometimes it signifies the same as *cens*. Here it evidently means the latter. The word *cens* is the Latin *census*, from *censere*, which signifies to value or estimate, because the Roman *censores*, afterwards termed *censitores*, valued, from time to time, the real and personal estates of individuals, in order to their being taxed. The *census* was the authentic declaration, furnished to the magistrates by the citizens, of the value of their property. These declarations were accompanied

with a catalogue or inventory, including all particulars of quantity, quality, situations, abutments, &c. *Cens*, or *censive*, in feudal language, is an annual revenue, pecuniary or real, in grain, poultry, fruit, &c. which the *censitaire* agrees to pay the seigneur *censier* for the estate held under him. There are also *chef-cens*, and *sur-cens*, answering to *primitivum vectigal*, and *secundarium vectigal*. By the custom of Paris, the *chef-cens* always carries *droits de vente*, commonly called *lods et ventes*. How this latter phrase obtained here I cannot tell, since I do not find the word *lods* in the whole Custom. I suppose it must have been borrowed from some of the other Customs of France. I must further observe, that he who takes an estate *à cens*, cannot underlet it *à cens*, because he is not the seigneur of the estate. If he underlet it, the *chef-cens* will be payable to the seigneur, and the *sur-cens* to him. For lods, see Du Cange, *loer* and *laudare*. In French the word is frequently written loz, and lots.

And what now are these *droits de vente*, or *lods et ventes?* They are pretty little trinkets which Seigneurs have to sell, and of which they have a very nice method of forcing feudal farmers to pay the price. "Droits de vente dûs au Seigneurs censier, sont de douze deniers un denier," &c. (Section 76): in plain English, they are fines payable to the Seigneur *censier* in money (in recognition of his title, as some tell us: or, as others say, in consideration of the permission which he is presumed to have given the vassal to alienate his estate) amounting, at every turn, to one-twelfth part of the price! Such and so moderate is this *jus ratæ emptionis!* Had *error communis* nothing to do with making such a *jus?* I should be glad to have something to do with *un*-making it as it respects this Province. If they like it at Paris, let them take it back! At any rate, if it do not make its exit quietly—and quickly, it will run some risk of getting a kick from Canada! Were it not that our poor *habitans* are so shrouded in Cimmerian darkness, I fancy I could soon teach them to burst these barbarian bonds in sunder, though they be from Paris.

What circumstance is most likely to make a good tenant continue in his farm? A good Landlord. And what more likely to make him quit his farm than a bad Landlord? But the difference, as it respects a tenant, between a good Landlord and a bad one, is as nothing in comparison with the difference, to a censitaire, between a good

Seigneur and a bad one. Why? Because the English farmer lives under a kind of government (so to speak) where, as in the English constitution, all is fixed and well defined; whereas the censitaire is subject to a sort of domination, where almost all, as in our "image and transcript" constitution, is arbitrary—undefined—chance-medley. Yet bad as this is, (and it is too bad to be endured), in comparison it is as nothing. When a good tenant quits his farm, he quits it to his Landlord's loss: when a censitaire sells his farm, does he sell it to his seigneur's loss? What then is the conclusion? In that country where the farmer's Lord possesses a tenfold power to harass and oppress, the Law actually offers, as a premium for oppression, *quints* and *lods et ventes;* and the more the oppressor plays the vampire and the shark, the greater is the value of the legal bribe! The interest of the English Landlord is to treat his tenant kindly: the interest of the Canadian Landlord is to force those alienations which bring him golden harvests!

By section 83 I learn, that "for heritages sold or adjudged by legal sentence (par decret, *decretum*) subject to a charge of a redeemable rent, whether the said heritage—(so in the original. Pour héritages—ledit héritage) be fief or roture, there is due to the seigneur of the fief the fifth part (quint denier) of the price: and to the censier the droit de ventes, as well for the price determined by the contracts or decree, as for the principal sum of which the interest is the sum of the said rents—(so again in the original: rent—rentes)—although the said rents may not then have been redeemed." Now let any man consider this. One-fifth, plus one-twelfth, is equal to seventeen-sixtieths. That is, for an estate thus sold or adjudged, for every £60 of price, £17 must go for fines—namely, £12 for *quints*, £5 for *lods et ventes*. As to any rebate or discount on either of these payments, whatever may be customary or conventional, the Law knows nothing of it.

Consider, for one moment, how these fines operate to prevent improvements. No Englishman that has seen, and especially no English farmer that has felt, how tythes obstruct them, will need instruction in this matter: yet tythes are trifles, considered as obstructers, compared with fines like these. Suppose a man builds a barn, how much of it is his own? Suppose a man builds a house that costs him ten times more than did the land it stands on: for

whose benefit has he built it? For the benefit of some upholder and defender of this soul-subduing barbarizing Custom.

Great pains are taken to persuade us, that there is no repugnance to these burdens in the minds of our habitans; and I am surprised to find that even Mr. ELLICE falls into this erroneous opinion. For example.

> Is not that principle of the French *Coûtume de Paris* to discourage mutations in property as much as possible, the very principle that attaches the French population to the present state of law in that country?—That principle, so contrary to all the principles upon which the British Government have proceeded in the government of their other Colonies, has tended to retard the improvement of Lower Canada, while the improvement of other parts of America has been advancing with rapid strides; and although I should be as adverse as any one to deal forcibly with the prejudices and feelings of the Canadians, who certainly are attached to, and imagine themselves interested in, the preservation of their present system, still, as a matter of necessity, time will so deal with them, unless they can accommodate themselves to a gradual amelioration either under our Government or under some other.—*Minutes*, 44.

In order, as far as possible, to test this question, I shall make a distinction as to the French population of the Province; proceeding on the very obvious principle (well known to have some small influence in such matters) of self-interest. That the receivers of *cens* and *lods et ventes* have an interest respecting them contrary to the payers, is evident; nor can it be thought strange if they should be found not exactly one in their attachment to the system by which these impositions are maintained. What interest can our French farmers have; what interest can they suppose or be induced to think they have, in the continuance of the system? I can see many reasons why others should by all means possible, endeavour to deceive and cheat them into such a supposition. THEY want to prolong the existence of the system; but in order to prolong its existence, those who suffer under it must not be allowed to contrast their state of suffering and degradation with that of the happiness and elevation of others, and especially with that of their brethren in France. Knowledge is power, ergo—education must be resisted, *manibus pedibusque*, tooth and nail, *lest the sons of education should run riot.* If, to save appearances, there *must* be education, it must be only that of the catechism; or, at most, the catechism and the lives of the Saints; and even these they had better not be taught to *read*, but only to repeat by rote, *like parrots.* As to Commerce! By all that is dear in *cens* and *lods et ventes*, don't encourage—countenance—even whisper Commerce. Teach them, as the Chinese

are taught, to hate and abjure all nations, except their own. In short, KEEP DOWN THE PEOPLE. For God's sake keep them DARK AND DOWN! Educate a few, but only just so many as will help, *and of such professions as have interest in helping, to keep* THE BULK OF THE PEOPLE DARK AND DOWN. No fear of LAWYERS, no fear of PRIESTS: they'l be loyal to the SEIGNEUR SYSTEM—loyal to the last man!* Keep off emigrants: drive them from the Seigneuries: frighten them from the Province! They know too much: they talk too much. Keep still! keep dark! and KEEP THE PEOPLE DOWN. *If once they see and rise,* WE FLY OR FALL.

This is what, a priori, I should have inferred from the known principles of human nature, and the circumstances of the parties, to have been and to be the policy and practice of the Seignorial party. On the other hand, if any one will tell me precisely what are the feelings and wishes of the farmers or censitaires, English or French, I will tell him to a nicety what is the degree of their mental degradation below the common level. If, as is asserted, they are content with present circumstances, attached to the system, opposed to any change, their degradation is not only deplorable, but awful. They are not merely sunken and sinking, they are absolutely perishing for lack of knowledge. But no: it is not so: it is not true.

'While the leading men of the French party—[says Lord DURHAM,]—thus rendered themselves liable to the imputation of a timid or narrow-minded opposition to these improvements, *the mass of the French population, who are immediate sufferers by the abuses of the Seignorial system, exhibited, in every possible shape, their hostility to the state of things which their leaders had so obstinately maintained.*

Is it possible that the English Government can have read this passage? Is it possible, having read it, that though they can smile upon and persist in their endeavours to soften down with favours the very leaders of rebellion, they yet can show no favour, have no bowels of compassion, for the tens of thousands of amiable, hard-working, silent, suffering farmers? It is even so. In a note his Lordship goes on to mention a petition from the inhabitants of the County of Saguenay, and supported by Mr. CHARLES DROLET, late M. P. P., for that County.

The petitioners, who represented themselves as suffering under a degree of distress of which the existence is too deplorably certain, prayed to be allowed to settle on the wild lands at the head of the Saguenay. They expressed their willingness to

* This must be taken with some grains of allowance. There are some honourable exceptions.

take the lands on any conditions which the Government might propose, *but they prayed that it should not be granted on the feudal tenure.*

Was this prayer attended to? Were these men allowed to settle on the wild lands? O! how my soul does sicken at such conduct.

Where are our Patriots—our Statesmen?—our public men of sterling sense and virtue? Is the race extinct? On whom do our present Rulers shed their favours? Will they never learn from others' conduct, what all the world can read in theirs,—the truth of this old French proverb?

Orignez vilain, il vous poindra;
Poignez vilain, il vous oindra.

I cannot give a translation, but I give something like an imitation.

Caress a curst cur,—he'll snarl and bite your fingers.
Kick a curst cur,—he'll fawn and lick your fingers!

Will our Rulers never cease anointing villany, to see themselves *kicked and cuffed by their* ANOINTED VILLAINS?*

It is with no pleasant feelings that I find myself reduced to the necessity of foregoing, for the present, my purpose respecting the Custom of Paris. Were I to persevere, my pamphlet would swell to a volume, and its publication must be delayed till those great measures would have been taken, blindly, and at random, which it is my object to cause to be prosecuted *cautiously and with the utmost circumspection.* It is now the 7th day of December: a hundred pages of my pamphlet are printed or in type: by promise it was now to have been published; and I seem to have travelled scarcely half my journey. "On, STANLEY! On!" If those who wish to know more about the beautiful simplicity of our Canadian Laws will insure me the sale of five hundred copies, I hereby undertake to publish the Coûtume de Paris, with a Translation and Commentary, embracing,

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* This *anointing (oignement)* puts me in mind of the tale of the Spanish barber.—*Montreal Herald, Dec.* 7.

An Irish gentleman travelling through Spain, went into a barber's shop to get shaved. The man of foam, with great obseqiousness, placed his customer on the chair, and commenced operations by spitting on the soap and rubbing it over the gentleman's face. Blood and 'ounds! was the *illigant* remark of the Irishman; is that the way you shave a gentleman? *at the same time preparing, in his wrath, to overturn the wig minister.* "It is the way we shave a *gentleman*, Senhor." Then how do you shave a *poor man?* "We spit in his face, and rub the soap over that," was the Spaniard's reply.

N.B.—In one respect the illustration fails. When our Whig Ministers get kicked and cuffed by their Irish and other customers, it is for want of more of their anointing!

as far as possible, the opinions, *concordant and contradictory*, of all the leading authorities on the subject. The necessity for such a work will of course depend, in great measure, on the decision of the Imperial Parliament respecting their further toleration of a system so destructive of the Province. That it is destructive of the Province I have shown in part; and though greatly pressed for and impatient as to time, the paramount importance of the subject compels me to proceed to a more complete exposure. The truth is, the more I search into this mystery of iniquity, the greater is my shame and indignation.

I now come to speak of a subject even more important, more pernicious, more obstructive to transfers and improvement of estates, to the creation of a Landed Aristocracy, and to our prosperity as a Province, than either *quints*, or *lods et ventes*;—a subject, besides, much less understood, and much more difficult to understand—namely, *hypothèques*. On a subject so difficult and important, though I cannot enter without a painful sense of ignorance and liability to error, I shall, however, not hesitate to run the risk of speaking and attempting an exposure, knowing that much is wrong, and of most pernicious consequence; and wishing, if possible, at least to excite attention and create enquiry.

Whoever has read the Minutes of Evidence so often quoted, must have observed the surprising ignorance and prejudice prevailing in this Province,—for what purpose fostered and propagated one may easily conjecture,—respecting the Law of England in relation to Mortgages and Landed estate. I allude especially to the evidence of Mr. VIGER, recommending—not a registration similar to that of Scotland; not a Bankrupt Law, in accordance with the late astonishing extension and improvement of Commerce and Commercial Science, but—a re-establishment of the *cessio bonorum* of the Romans as barbarized in France, accompanied with an amelioration of the Law of Canada, by the adoption, I suppose, of his projected *bureaux de conservation d'hypothèques*. My explanation must be very brief. Mr. VIGER speaks.

I must observe here the very great difference between the laws of England and the laws of Canada upon a particular point. The great necessity of these registry bills in provinces where the laws of England are in force, is, that there is no record of sales as with us. Notaries are, by the laws of the land, obliged to keep the original act of the sale, and they only deliver copies; every body has a right to get a copy of the Act, provided that he has an interest in it. In provinces, where the laws of England prevail, on the contrary, the original remains with the buyer, that

makes it necessary, *in order to know the proprietor*, that there should be a public office where such sales should be recorded.

You probably are aware that in Scotland, where the law is a mixture of the feudal law and the Roman law as in Canada, they have a perfect system of registration ?—Yes; I do not exactly know the principles upon which they are established, but they have the *cessio bonorum*. In our country, before we adopt this system, we should take means of ameliorating our laws, re-establish the *cessio bonorum*, and subdivide the country.—*Min.* 148.

Mr. VIGER speaks here as if the sole object of registration was, to ascertain the nominal proprietor. He must have known better. The object is that set forth in the quotation (p. 98) from BELL, "There is no record of sales—*as with us.*" This may be true; but there are records of sale—of ten times more value than any "with us," for all the purposes for which registration is required—namely, undoubted title, safety of mortgage, and Bank accommodation. I state the fact, and challenge contradiction.

The owner of an estate not mortgaged, is, in England, in possession of the deeds; except when, for the sake of safe custody, (as is frequently the case), he deposits them with his Solicitor or Banker. In that case a prudent man will deposit them under his own lock and key. If the proprietor requires a mortgage, he signs a mortgage deed, which, together with the deeds of the estate, is delivered to the mortgagee. The consequence is, that without a knowledge by the party applied to for a second mortgage on the estate, of the prior incumbrance, *it is impossible to be effected*,—except by means of forged deeds, or of some other kind of barefaced fraud. I know there are such frauds, but I never knew or heard of one that was not attributable to shameful neglect on the one hand, as well as of gross delinquency on the other. Now, what, in this respect, is the case in Lower Canada? We shall see presently.

But besides legal mortgages, there are equitable; and as this is a subject of immense importance, respecting which I feel myself perfectly competent to speak, I must request attention to what follows.

Every one, whether Attorney or not, has, by the Common Law, a lien on the specific deed or paper delivered to him to do any work or business thereon, but not on other muniments of the same party, unless the person claiming the lien be an Attorney or Solicitor. *So where a Banker has advanced money to a customer, he has a lien upon all the securities which come into his hands belonging to that person for the amount of his general balance;* unless there be evidence to show, that he received any particular security under special circumstances, which would take it out of the general rule.—SELWYN, Jun., Abr. of Law of Nisi Prius, v. 2. p. 1279, 4th ed. 8vo. Trover.

This passage I extracted in 1823. The Bank in which I had then

been five years, and in which I continued ten years longer, though one of the oldest and most extensive country Banks in the Kingdom, knew nothing of this prerogative of Bankers respecting equitable mortgages, and were incredulous at first, even when I had shown my authority; and I have reason to believe that not more than half the Country Bankers in the Kingdom are yet aware that such is the Law. The consequence, with respect to those that know it, is this. A landed proprietor, requiring a temporary loan—say for three, six, nine, in some few cases for twelve months,—having his deeds in his possession, and not wishing to expose his affairs, or subject himself to an unpleasant obligation by asking a friend or neighbour to sign a joint note, takes his deeds to his Banker, deposits them, takes a memorandum of his having done so, signs a single note,—and *there is his money.* I have had in my possession, as Manager, scores of parcels of deeds pledged for money in that manner, nine in ten of which were not so much as shown to the Bank Solicitor. If, on examination, I saw any thing to create a doubt, the Solicitor was sent for, whose charge for the examination would generally be from 2s. 6d. to 7s. 6d.—seldom 10s. Would the censitaires of Canada have any objection to this kind of accommodation? Would the Bankers? Not if we had, as we ought to have, THE LAWS OF ENGLAND.

For what now is the situation of the Landed Proprietor in this Province, with respect to Bank accommodation? and, per contra, what is the situation of the Banker, with respect to the Landed Interest? Is it, as Mr. VIGER would have us believe, vastly superior to that of the corresponding parties in England? What though Notaries are obliged to keep the original act of sale? and what though every body interested has a right to get a copy of the act? Is any body, however interested, any the better for having got a copy? Can he tell that the possessor is any thing more than the *nominal* possessor? Can he tell, or can the Notary tell him, that the estate has not been subsequently encumbered with *twenty* hypotheques? Can he tell, or can the Notary tell him, any thing that would warrant his advancing five pounds on the faith of any *claim on the estate* which the proprietor can give him? I answer No, and will prove it presently. A word, in the first place, about the *cessio bonorum.*

By a Provincial Statute passed in 1785, power was given to merchants and traders to take the body of their debtor, though he

were not a trader, and after seizing and selling all he had, to keep him in jail *forever*,—unless he found means to discharge the balance; *and such is the law at present.** By that Ordinance, or, as he expresses it, "by an interpretation which has been given to that Ordinance," Mr. VIGER tells us "it has been understood, that the *cessio bonorum*, which *is* a part of the Law of Lower Canada, had been abolished." (p. 148). In such a case, to talk about "interpretation" is absurd: inasmuch as the co-existence of the *cessio* with such a Statute, is impossible. But I have heard a gentleman of the profession deny, that the *cessio bonorum* ever was the Law of Lower Canada. So much for *simplicity* again! Granting, however, that it was, ought it to be restored? If it were, in what kind of garb would it come invested? In that of the age of the *Coûtume de Paris?* or would it be imported direct from Rome? I quote from BELL.

The law of cessio bonorum had its origin in Rome. It was introduced by JULIUS CÆSAR as a remedy against the severity of the old laws of imprisonment; and his law, which included only Rome and Italy, was, before the time of DIOCLETIAN, extended to the Provinces. This institution, having been greatly improved in the Civil Law, was adopted by those of the European nations who followed that system of jurisprudence. In France, the institution was adopted very nearly as it was received with us. Perhaps, indeed, it was from France that our law on the subject received its distinguishing features. The law in that country was, during the 17th century, *extremely severe*, not only against bankrupts (which name they applied to fraudulent debtors alone), but against debtors innocently insolvent. It was in 1592 that the Parliaments in France established, by arrêts, the green bonnet, as the habit of the *cessionaire*. Within fourteen years after this, in 1605, the Court of Session in Scotland made an Act of Sederunt, requiring the magistrates of Edinburgh to erect a pillar near the market-cross, with a seat upon it,—quhairupon, in time coming, sall be sett all dyvoris, and sall sit thairon ane marcatt day from ten hours in the morning quhill ane hour after dinner; and the saidis dyvoris, before their liberty and cuming furth of the tolbuith of Edinburgh, upon their awn charges, to cause mak and buy ane hatt or bonnet, of yellow coloure, to be worn be tham all the tyme of thair sitting on the said pillerie, and in all time thairafter, swa lang as they remane and abide dyvoris, with speciall provissioon and ordinance, if at ony time or place efter the publicatioun of the said dyvoris, at the said marcatt-croce, ony person or personis declarit dyvoris beis fundin wantand the foresaid hatt or bonnet of yellow coloure; toties, it sall be lawful to the baillies of Edinburgh, or ony of his creditors, to tak or apprehend the said dyvour and put him in the tolbuith of Edinburgh, thairin to remane in sur custodie the space of ane quarter of ane year, for ilk fault and fellie foresaid." In 1669, "a whole habit was ordered to be worn, the one half yellow, and the other brown, with a cap or hood, which they are 'to wear on their head, party-coloured, as said is.'"—*Commentaries, v.* 2, *p.* 582.

Whether this is the kind of harlequin cessio which Mr. VIGER wants, I cannot say. If, as now modified in Scotland, it were to be

* The report of the allowance of our Bankrupt Ordinance proves to have been incorrect. I am glad to find it so.

introduced, together with their unrivalled Bankrupt Law, adapted to our circumstances, I should think the measure admirable. I am no Scotchman, but I can easily see that their Bankrupt Law is far better adapted to our wants and circumstances than is that of England. Its leading and best feature is, that the creditors do all, the lawyers next to nothing. The SCOTCH for money matters—Bankruptcy and Banking!

The word *hypothèque*, as well as our *hypothecate*, to pawn or pledge, is from the Latin *hypothēca*, a pledge, or a mortgage; or the thing or heritage so mortgaged or pledged. These all are from the Greek *hypotheke*, res quæ pignori datur; and this from *hypotithemi*, suppono, to put in the place of, quia supponitur pro pecunia, alive re quæ debetur. Originally, therefore, the word signifies strictly, a pledge actually delivered; but neither in the Roman Law, nor in the French, nor in the Scotch, was delivery essential. In this respect it differs from a pledge.

The old French hypotheque appears, so far as I have seen, to be the Roman precisely.* For instance; that of Rome was divided into three kinds,† the conventional, the judicial, and the legal or tacit; being respectively, a simple convention, a judgment of a court, and a mere implied, or legally presumed, assent of the parties. For this legal knowledge I am indebted to BELL's Commentaries,—an admirable work, imported by me on occasion of the passing of our Bankrupt Ordinance last spring, for the purpose of furnishing materials for publishing on the subject, in case that Ordinance should be allowed. For the benefit of the hypothecary-ridden, as well as of the hypothecary-terrified public, I quote as under.

> Conventional hypothecs have, in almost all the commercial states of Europe, been either banished entirely, or subjected to such restrictions as may prevent material injury. On the continent, it is a rule, almost universal with respect to hypothecs on immoveables, that *they have no efficacy unless entered into by solemn deed, and recorded:* Ne, si eadem res pluribus semel obligetur, homines decipiantur.‡ In Holland and the Low Countries, in Germany, in the Italian States, in France and in Spain, this Law was adopted both with respect to general and to special hypothecs on immoveables.—*Com.* v. 2, p. 25.

The author refers, in a note, to his authorities; and the reference,

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* I find I am mistaken here. L'hypothèque judiciaire, according to a French authority, is purely French; and was unknown in the Roman Law. Le *gage* judiciaire was acquired, under the latter, only by a judicial seizure of the debtor's goods; whereas l'hypothèque judiciaire proceeds from the judgment itself, without execution or actual seizure.

† So says BELL, and he ought to know. I had understood that it was divided into four kinds.

‡ Lest, if the same thing should be repeatedly hypothecated, men should be deceived.

with respect to France, is to POTHIER. Œuv. Posth. v. 1, p. 426. How stands the matter in Scotland?

In this country the common law very early declared itself against conventional hypothecs. This repugnance may be traced back to the days of Sir JAMES BALFOUR, (p. 194,) and even to the Regiam Majestatem, (lib. 3, c. 3.); but it is sufficient to refer to Lord STAIR, who (in the end of the 17th century) lays it down, that 'our customs have taken away express hypothecations of all or part of the debtor's goods without delivery.' And the principle, as he represents it, is, 'THAT COMMERCE MAY BE MORE SURE, *and that every one may more easily know the condition of him with whom he contracts.*'* So strongly has this doctrine been established during all that period to which our printed reports reach, that though many questions are to be found relative to *tacit* hypothecs, *there does not appear a single case in which it was attempted to give effect to a conventional hypothec;* and the law, as delivered by Lord STAIR, is almost verbatim repeated by ERSKINE.—*Com.* v. 2, p. 26.

What is now the law of hypotheque in France I regret that I cannot state—excepting that it has undergone a thorough reformation. How is it here?

By way of preface: Un traité des hypothèques est un recueil de précautions contre les frauds et les infidéletés des hommes. 'A treatise of hypotheques'—so says St. EVREMONT,—'is a collection of precautions against the frauds and perfidies of mankind.' The Greek precaution was, that when any thing was hypothecated,—pledged, *but not delivered*,—it was required to be visibly marked or branded. Roman and French debtors did not like this kind of precaution. The latter, it seems, chose rather to run the risk of wearing the green bonnet!

In proceeding to state, as briefly, but as clearly as I am able, our Canadian law of hypotheque, I observe—that the thing hypothecated has this in common with the pledge (gage), that both are accorded to the creditor by way of surety: and that the debtor cannot engage the same thing to a second creditor to the prejudice of the first. Secondly, that the hypotheque differs from the pledge (gage), in that the former term is applied, in general, to immoveables; the latter to moveables: that the hypotheque *gives to the creditor the right of following the thing hypothecated, into whatever hands it may have*

* If the honourable and learned gentleman, Mr. GRANT, knew, as he professed to know, the Law of Canada, according to the provisions of the Custom of Paris, and especially *with respect to hypotheques*, it was infamous that he should deceive the House of Commons by pretending, as he did, that it was not injurious to commerce. But for this blessed Custom, Montreal might now have been the rival of New York! *And it will be yet*, spite of our winter; AND IT SHALL BE SOON—if I do not reckon without my host. By what means? By means of BRITISH LAWS TO FOSTER BRITISH COMMERCE. Hitherto we have had FRENCH LAWS—TO FOSTER ITS EXCLUSION.

passed, and to force the holder to this alternative—either to discharge the debt, or to give up the property in question to be sold: and that (as before stated) whereas, in case of pledge, there can be no security to the creditor without possession; the hypothecary security requires no tradition, no possession; no particular or even special designation; nothing, in short, beyond a *tacit* obligation to abandon the property hypothecated in case of need.

Hypotheques are divided into simple and privileged. The simple gives to the creditor no other preference than that of date; so that the first in time is the first in right. The privileged do not follow the order of time, but take precedence of the simple, as presently to be explained.

Hypotheques are further divided into general and special: the former affects all the debtor's goods, generally speaking (tous les biens généralement quelconque) *as well those afterwards to be possessed as those in actual possession:* the latter is restricted to the particulars marked out and designated in the contract. It is worthy of observation here, that, in a contest of creditors, the specialty carries no preference, and, consequently, creates no exception to the rule of priority of date. In some respects, the general hypotheque has decidedly the advantage.

Respecting the goods which are susceptible of hypothecary obligation, I find (contrary to what the words above quoted might induce one to suppose), that moveables are excepted: que meuble n'a pas de suite par hypothèque. Nevertheless, this kind of obligation is not restricted to the material part of the immoveables (so to speak), but includes the real rights depending on them. I may instance in, rent *fonciere;* rent in kind (droit de champart); right of usufruct (so that, if sold, the price must be distributed in the order of hypotheque); certain venal offices, seized by authority of justice before resignation accepted, &c.

A man may hypothecate his estates for any kind of lawful debts whatever,—his own, or those of any other party; actual or contingent. For instance; I promise a woman a dowry, the husband obliging himself, by the marriage contract, to return me the money after his wife's decease, and assuring the payment by engaging to me all his property. Some time after he gives a hypotheque to a third party; and it is not till afterwards that he receives the dowry which I had promised. Shall it be said (asks the writer whom I follow)

because it was competent to him to refuse my money, that my hypotheque ought to bear date only from the day of payment? No, replies the law. Non, répond la loi. This, however, is a question fiercely contested; but the law and the weight of authority are clearly as above stated.

What is called a conventional hypotheque, is yet not purely conventional, as in Rome. It requires the concurrence of a third party—public authority. The agreement must be attested by a Notary and two other witnesses, or by two Notaries. It is this *titre* rather than the convention, which gives it the force of a hypotheque.

But by the 107th article of the Custom, I find that the force of a tacit hypotheque may be given to *a promissory note*. The article runs thus:

A private schedule which contains a promise to pay, carries a hypotheque, from the day of its recognition or confession in judgment, or before a Notary, or when, by judgment, it shall be held to be confessed *(as in case of default)*, or from the day of the denegation, in case it should afterwards be verified.

I further read, that in the jurisprudence of the Parliament of Paris the surety (caution) has a hypotheque on all the goods of a principal debtor, for principal and interest, from the day when the instrument was passed before a Notary: and the vender of an estate has a *privileged* hypotheque on the estate sold for the payment of the price.

We have seen that the judicial hypotheque of the French, is essentially different from the judicial pledge of the Romans, inasmuch as the former leaves the debtor in possession of the property. This kind of hypotheque, as well as the general conventional, comprehends the whole of the debtor's estate, present and future.

The woman who marries without a special contract, has a *tacit* hypotheque in the estates of her husband, from the day of the celebration of the marriage. And is not this a pretty sort of a law? Nota bene.

On ne peut s'empêcher d'observer que cette hypothèque - - - est une porte ouverte aux fraudes, par le moyen de laquelle on peut avantager des créanciers postérieurs, au préjudice des premiers: car les créanciers postérieurs qui ont la femme pour obligée sont colloqué sur ses reprires,* qu'elle exerce jusqu'à ce qu'elle sorte

* It is not one of the least of the difficulties I have to encounter in this antiquarian search into hiper-barbarian law, to understand the terms. What for instance, are the wife's *reprises?* They include, says my guide, all that she is entitled to resume or recover from the common stock, or from the goods of the husband after his decease. But what is that all? I have not unfrequently had to spend hours in hunting for an answer to such questions, and sometimes to no purpose.

indemne. On epuise par-là tous les biens du mari, et les créanciers qui n'ont pas la femme pour obligée, sont frustrés, quoiqu' antérieurs a ceux qui sont payés. C'est pourquoi il est prudent de ne pas contracter avec un homme marié, à moins que la femme ne consente à s'obliger avec lui, ou que ce soit pour quelque cause privilegieé.

One cannot help observing that this hypotheque - - - *is an open door to frauds*, by means of which subsequent creditors may be advantaged to the prejudice of those preceding; for posterior creditors who have the wife for a surety, rank with her in her marriage rights, which she, of course, will exercise till she goes forth indemnified. By this means, *the entire property of the husband may be exhausted, and the creditors who have not the wife for a surety, though anterior to those that are thus preferred, will find themselves defeated—fairly balked!* FOR THIS REASON IT WERE PRUDENT NOT TO CONTRACT WITH A MARRIED MAN (except where your debt will be privileged) UNLESS HIS WIFE ACCORD YOU HER JOINT OBLIGATION.

Here's a law for the encouragement of Commerce! for the security of Banks! for an extension of the benefits to be derived from banking! for the prosperity of Canada! for the glory of Old England—the Queen of Nations!

Having thus sketched the history and the law of *hypothèque*, I come now to speak of its effect. In doing so, I must beg a special reference to the evidence of those gentlemen who, as representatives of the Franco-Canadian interest, endeavoured,—and, as it should seem, successfully endeavoured,—to persuade the British Government, through the Select Committee of the House of Commons, that there is nothing in the Franco-Canadian laws of Canada injurious to British interests, nor any thing repulsive to British settlers. I allude especially to the passage quoted (p. 92) from the evidence of Mr. CUVILLIER, which, in substance, may be found iterated and reiterated both by himself and Mr. VIGER.

We have seen that *quints* and *lods et ventes* obstruct transfers of estates, (see p. 101), by deterring parties wishing to sell. I shall now shew that *hypothèques* obstruct such transfers by deterring parties wishing to purchase: that they further obstruct them by inducing, in addition to the fines above-mentioned, a heavy tax, and, not unfrequently, a tremendous loss upon the seller: that *general* hypothèques almost entirely supersede, as well they may, those *special* ones, which alone bear any analogy to an English mortgage, and which alone are capable of being registered: that they frequently cheat the British Merchant of his supposed security, and of the debts which he supposed to be secured, and by so cheating greatly discourage commerce: and, lastly, that they oppose an impassible barrier to bank accommodation in any other shape than joint personal security *(discounts)*, thereby restricting such accommodation almost

entirely to British merchants; excluding altogether the lower grades of the landed interest (the *censitaires*), and so keeping the country unimproved and unproductive; and driving the retail trader, whose business creates no paper for discount, (whatever may be the value of his real property), to manufacture *fictitious paper*, such as a prudent Banker will not discount; and then driving him to the SHAVING BANKING PEDLER to get it cashed. That such a system, in this boasted age of light and political economy, should be upheld; and by Great Britain too,—the greatest financial and commercial nation under heaven! and by the most enlightened and liberal Whig Government that ever Britain had to boast!—O, how sweetly grateful must be the thought! How soul-expanding to

> The generous mind that's not confined at home,
> But spreads itself abroad through all the public,
> And feels for every member of the land!

The first witness which I shall call to my assistance is D. B. VIGER.

Supposing a person borrows a sum of money upon his bond, does that carry *hypothèque*?—It does not, unless executed before a notary.

Must it have reference to the estate?—That is not necessary, provided it is passed before a notary, that carries by itself the right of *hypothèque*.

Then a person who sells an estate, wishing to deceive the purchaser, might keep back those *hypothèques*?—Yes; and that is the very reason why we have recourse to a sheriff's sale.—*Minutes*, 147.

'A Sheriff's sale!' an immigrant would be ready to exclaim:—'what does that mean?' O! nothing to be alarmed at. It's only a rather expensive—I should say, a rather profitable sort of purge, which Canadian lawyer-doctors prescribe and sell;—rather *griping* perhaps sometimes to weakly patients, but very necessary to the health of the *incoming*, whatever it may be to that of the drastic-driven *outgoing* one. All this, however, as to the evil, is nothing to the purchaser. He neither pays nor purges—unless he foolishly refuses to let the said lawyer-doctors sweat and purge the seller. If he be so foolish, he'll catch, by contagion, what will make him sweat.

What, then, is the effect of a Sheriff's sale? It "removes," says Mr. ELLICE, p. 54, "all incumbrances." I marvel that Mr. ELLICE, a gentleman so deeply interested in this matter, should have been so dangerously mistaken. I give this public warning to all whom it may concern, that it does nothing of the kind. Call Judge GALE.

Supposing that land is mortgaged for any given sum, and that that land is to be

divided under the French Canadian law amongst all the children, how would such a division be consistent with the security of the mortgage, and what is the operation or nature of the mortgage ?—The mere division of land under the French law among children, is not inconsistent with the security of a mortgage under that law, because the creditor's right would extend to each and every portion ; that right could only be defeated by claims superior in privilege, or, if of the same nature, prior in date. What, however, the English in Lower Canada commonly know and call by the name of a mortgage is rather the *hypotheca* of the Roman or civil law, and the French style it an *hypothèque*. It establishes a right to be paid out of the real estate the sum stipulated or due, for which purpose all lands may be brought to sheriff's sale. . . . . .

Some of the consequences of such a state of things may not be difficult to be imagined, although it could be hardly possible to state them all. I may suppose a case : *A. B. C.* & *D.*, like most others in Lower Canada, may have respectively passed notarial acts, or otherwise constituted general and tacit mortgages or *hypothèques* in any of the various modes in which they can be effected. *A.* sells a farm to *B.* ; the farm is liable for years to be brought to sheriff's sale, not only for all the hypothecary or mortgage claims constituted by *A.*, but also for those constituted by *B.* *B.* sells the farm in a few months to *C.*, and it becomes further liable to the hypothecary claims against *C.* *C.* in a year or two sells the farm to *D.* The farm has gone on with increasing burthens, and is now charged with all the claims against *A. B. C.* & *D.*, when perhaps a British emigrant purchases, pays for it, and after increasing its value by the outlay of money and labour, is called upon to pay some of the claims, and in consequence abandons the property. The case supposed is not fancy, but fact. I have known even a lawyer purchase property, which, after making payments to the vendor and creditors, be afterwards abandoned to the claims of other creditors, whose demands he had previously no means of knowing ; and I have known lawyers lend money on mortgage or *hypothèque*, and after a lapse of eight years be deprived of principal and interest by an unsuspected claim of twenty years standing. I have been in this predicament myself. Sheriff's titles are indeed held to bar all hypothecary claims *except the French dower*, and I have sometimes, for this object, obtained a sheriff's title. On one occasion it cost me upwards of £30, and on another upwards of £25, which last was more than the land for which I obtained the title would sell for.—*Minutes*, 263, 264.

Here we see that the right of dower takes precedence of an ordinary hypotheque. Now this dower, by the Custom of Paris, where there is no stipulation in the marriage contract to the contrary, consists of the usufruct of half the immoveables or real property of the husband, (commencing from the day of his decease), which he either possessed at the time of marriage, or which fell to him during the marriage by direct inheritance. This usufruct belongs to the widow during her life, the property being reserved to the husband's heirs, who have, in security of this their customary right, a hypotheque on the entire property of their father from the day of the espousals and marriage benediction : the father not having it in his power either to alienate or hypothecate those estates subsequently to the marriage, except as subject to this prior charge.

But I go further. There are various other charges which a Sheriff's sale does not purge, and every lawyer in the Province knows it. Call Mr. NEILSON.

Are sheriff's sales very common?—They have been very common.

What is the cause of their being so common?—They have become very common since the close of the last war, because the country became poor; real property particularly diminished in value; those that had claims upon it insisted upon payment, and sued, and then it was seized by the sheriff and sold.

Has that been resorted to as the securest mode of conveyance in consequence of the defect of the law?—It has in several instances; the Legislature passed a bill providing for voluntary sheriff's sales. That is a proceeding something like a décret under the French law; the parties come into court and say that they wish to have the benefit of a décret; under this proceeding there is public notice to all the world that such property is to be sold, so that every one may come forward and put in his claim; then the sale takes place, and the whole is under the inspection of the court to see that every one gets his due; then every one having got his due, the title to the property is more secure than it would otherwise be.

Then a large portion of public property has fallen under sheriff's sales on account of the defects of the law? . . . . . .

Do they bar a prior mortgage upon the estate?—Yes, all mortgages except rights of minors and persons absent; persons in fact that cannot come forward and answer for themselves.

Then it is not a secure title against them?—It is not a secure title against persons that have it not in their power to exercise their right of coming forward, they cannot be deprived, that is universally so understood.—*Minutes*, 118.

But I shall venture to go still further. There are various *other* charges which a Sheriff's sale do not purge. Is it not thus with the *chef-cens?* So I understand article 357 of the Custom. Is it not so with le droit d'emphytéose? If not, what mean these words? Les auteurs décident que le propriétaire des héritages donnés à bail emphytéotique, n'est obligé de former opposition au décret qui s'en poursuit sur le preneur, que quand la durée du bail est expirée. These leases may be for any term exceeding nine years, and under a hundred. Lastly, is it not so with *substitutions dont le droit n'est pas ouvert?*

Of the effect of this insecurity respecting a clear title, on parties wishing to purchase or to lend on mortgage, but incapable of forming any tolerable estimate of the risk, one may judge confidently without the help of testimony. However, that nothing may be wanting in this respect, I must beg to appeal again to Judge GALE.

Does that mode of conveyance which you have described as existing in the seigneuries interfere at all with the transmission of real property?—It renders it always very uncertain and very insecure. And I have known a number of persons that have come from England to settle in Canada, who had brought money to purchase property, quit Lower Canada in consequence. I have known some with £1,000, and others with more. It drives people out of the country: they cannot think of settling and laying out money in the purchase of land, where, after having possessed the land for a number of years, they may find an individual with a mortgage upon it, which divests them of their right.

What effect has it upon the interest of money lent upon mortgage?—It has this effect, that it is generally very difficult, and that there is often no such thing as getting it upon mortgage; and that keeps back the improvement of the country; because if money cannot be borrowed upon the credit of land, there must be a great deficiency of requisite capital to be employed in its improvement.—*Minutes*, 113.

And what is the effect as it respects improvements? Witness Mr. ELLICE.

Is it consistent with your own knowledge, that many persons who come out with the intent to settle in Lower Canada, have been induced from the difficulties that obstructed them to pass over the boundary and settle in the United States?—There can be no doubt of it. I have had, in particular instances, two or three successions of British and American tenants upon the same land, who, after experience of the French tenure and restrictions, have abandoned their improvements, which my agents have re-entered into possession of, and sold to a considerable profit.—*Min.* 55.

And what effect have these hypothèques on commerce? and how does it appear that they cheat the British Merchant? Answer Mr. GILLESPIE.

In what way do the dissensions which prevail in the Lower Province obstruct the operations of commerce, and the improvement of the Canadas?—By preventing the enactment of laws necessary for the security of trade. There is no such thing as knowing, at present, when real property is mortgaged or not, and we are, in the general course of our trade, in the habit of advancing to different people merchandize, taking security on their property, and frequently finding, in the end, that this security is good for nothing, inasmuch as it has been mortgaged before to its full value, and we lose the whole advance: this I know from experience as a merchant.

In what way have you experienced the inconvenience you mention?—In consequence of taking security for goods advanced to people who were ready to offer their property as security; but when we came to discuss the property, we found that others had previous mortgages on it.

Have you any reason to think that this has frequently happened?—In our general trade it has frequently occurred to us.—*Minutes*, 210.

If Mr. GILLESPIE had sought as closely into the policy and legal maxims of the Franco-Canadians as I have been seeking lately, he would hardly have attributed the prevention of enactments necessary to the security of commerce to "dissensions" as the cause, but rather to *the cause* of those dissensions—namely, *a determination to withstand whatever would be likely to further British interests, or interfere with French Supremacy.* Had Mr. GILLESPIE been aware of this, perhaps his house had been less frequently exposed to imposition. If further evidence to this effect be wanted, I refer to Mr. M'GILLIVRAY, p. 101.

Mr. VIGER having, in the course of his evidence, observed,—"the laws of our country with respect to prescription are, generally, pretty simple;" and offered some statements in proof, was asked this question:—

Then how are you satisfied that a good title is produced, either for ten years, or for twenty years, or for thirty years, as the case may be?—It would depend upon particular circumstances; you must examine whether there are absentees, and [whether] there are minors, or other persons incapable of exercising their rights; all this is very easy for a man of experience, but it would be difficult to explain it

to persons not exactly acquainted with the principles of our law. . . It would be necessary to say, that if there is any fear of *hypothèques*, the only means we have at present, and the only possible means, I think, *in any good system*, is to have recourse to a décret (sheriff's sale), that would, to use a technical phrase, be sufficient to purge all charges except dower.—*Minutes*, 146.

This gentleman must have thought—and perhaps he was not much out in thinking—the Select Committee "pretty simple," or he would never have thought to gull them after this fashion. It is not true that Sheriff's sales purge all charges except dower: and what means this "If there is any fear?" Mr. VIGER evidently wished the Committee to believe that the fearful cases were very rare! Then how comes that to pass which every body knows, and in proof of which I quote Mr. M'GILLIVRAY, p. 101, that they "are so general, that if you take up a Canada newspaper, particularly the *Quebec Gazette* [now the *Official Gazette*], you generally see half of it occupied with Sheriff's sales." This *fetch* of Mr. VIGER reminds me of the passage quoted *ante*, p. 92. Let us suppose him addressing a new-catched JOHNNY thus. 'You, Mr. IMMIGRANT, are not aware, perhaps, that what is called feudal law in Canada, has no precise analogy with what is called feudal law on your side of the Atlantic! Ours is of the ancient pedigree and noble parentage: yours is of a low-born bastard breed! Ours was brought direct from the father-land of feudality, and is still preserved in all its native purity and simplicity: yours has been defiled with what your commerce-lovers are pleased to call improvements and reforms! No *quints* and *lods et ventes*, no hypothèques and sheriff's purges in your system! Ours is the feudality—[aside,—at the same time winking to his right-hand friend,] for us!'

How do you know the former state of the title of any property which you may wish to purchase?—THERE IS NO POSSIBILITY OF KNOWING IT.

Must not that lead to a great many lawsuits?—AN IMMENSE NUMBER OF LAWSUITS AND FRAUDS. I have seen widows and orphans, whose money had been lent upon mortgage, deprived of their all. There is scarce a term in any of the Courts that passes, without numbers of those frauds being brought to light.—Judge GALE. *Min.* 28, 29.

Now, is not this an admirable system for harpy Seigneurs, sustaining and sustained by harpy Lawyers?

> Such fiends to scourge mankind,—so fierce, so fell,
> Heaven never summoned from the depth of hell!
> A virgin face, with wings and hooked claws,
> Death in their eyes, and famine in their jaws!

Besides the heavy tax imposed on the seller, in addition to fines,

by the expense of a Sheriff's sale, (see the above-quoted evidence of Judge GALE, from p. 264), I have spoken of a further "tremendous loss" as not unfrequently resulting. To explain my meaning I will suppose a case. A gentleman wishes to sell a property worth £800. The *confirmation of title*, as it is called, and which now takes place of the *décret volontaire* of the Custom of Paris, will cost £10. The expense of the Sheriff's sale depends on circumstances. I will be very moderate, and suppose £20; and these together reduce the value to £770. But £770 less *quints* and *lods et ventes*, must come down to £600; and this is all the seller must expect to get. But what now if, at the sale, £500 only should be offered? Does the law of Canada, like that of England, allow the seller a reserved bid, so as to save his fines? I trow not. What, then, can be done? The owner, to prevent the sacrifice of his estate, can get a friend to buy it *in*, as they say in England: but mark the consequence. That friend, too, must have a confirmation of title, with all the beautiful machinery of Sheriff's purge and Seignorial fines, before the owner must venture to take back the property. Why? Because, though that friend should have it in his possession only half an hour, in half that time he may have involved it for more than it is worth; and not only so, but he may have so involved it twenty, thirty, fifty years ago! in which case, observe, should he be found insolvent, the estate is gone forever! Such are the conditions imposed on transfers of estates by the simple, admirable system of Canadian Law. 'No road but this, Sir Vendor! and if you pass this gate, you pay the toll!' Now mark ye, men of Canada! All this JAMES STEPHEN Jun. knows: all this the Colonial Department, of which he is the Counsel, must all along have known! and if less than all this be known to all the members of Her Majesty's Privy Council, it is a shame that they should exercise the functions of a Court of Civil Jurisdiction, in the last appeal.

I put a plain question;—let those who please consider it,—let those that please take fire. Canada is distracted—soulless—sunken. Does the British Government wish to see it otherwise? Mark me;—*the event will presently discover.* All things, as if by miracle,—*unless it be the want of will,*—concur for its immediate and complete emancipation and prosperity. Why do I say *unless?* Canada has been treacherously handed over, in the teeth of a Royal Proclamation, to the tender mercies of a code of antiquated, anti-commer-

cial, anti-English laws and customs: have the Government, notwithstanding all the light that has lately burst in upon them respecting Canadian affairs, so much as yet begun even to entertain a thought of our redemption? In a case of such importance, I would not judge rashly: but actions have a voice, and I have eyes and ears. The Minutes of Evidence which I have so repeatedly quoted, do they not contain proofs the most convincing of the obstructing, cramping, terrifying, locust-like devouring influence of our barbarian laws? What then? Did the Parliamentary Committee, in their Report, urge the necessity of a reformation? Here is the answer.

> The Committee cannot too strongly express their opinion, that the Canadians of French extraction should, in no degree, be disturbed in the peaceful enjoyment of their Religion, Laws, and Privileges, as secured to them by British Acts of Parliament.—*Report.*

To my judgment, this one fact is more convincing, as to the real purpose of the parties, than would be fifty thousand fine-spun speeches and professions.

Religion forsooth! For what purpose is this obtruded? Had any body said a word or even whispered a wish for its disturbance? Some Protestant Liberals are mightily attached to, and wonderfully sensitive about the enjoyments of, the Roman Catholic Religion. What can be the fellow-feeling that makes them so wondrous kind? Is that religion so very friendly to the spread of light, and truth, and liberty? Is it so very zealous to diffuse among the people the power resulting from mental cultivation? Its priesthood, instead of being *leaders of the blind*,—are they so emphatically LIGHTS OF THE WORLD? The Liberals can court the people,—rouse the people,—give knowledge and frightful power to the people,—when they happen to want their help; just as they can court and convert to liberality the Catholics: but when, instead of being the *outs*, these gentlemen happen to be the *ins*, they presently begin to sing,—"Now the case is alter-ed!" and now you shall see them set to work to soothe the people, and to bamboozle them with empty professions and high-flown promises of future blessings: and you shall see them engaging, as their worthy coadjutors in this turncoat work of wheedling and selling lying expectations, those who, like O'CONNELL, are Dons at blarney; and those who, like his Master, best know how to forge shackles for the mind, and to lead the people blind and bound. I have no wish to interfere with any man's religion, nor would I now have mentioned the subject if it had not

thus been needlessly obtruded. If certain men are pleased to make themselves apes and owls, thinking thus to do God service, or wishing others so to think of their rational and dignified doings,—why let them; but they must not think to make apes and owls of all men, nor yet to make all men admirers of their apish tricks and owl-songs:—no, nor must our Rulers think to make us, *for their sakes*, aliens and outcasts,—hewers of their wood, and drawers of their water. We were not born for this, nor will we bear it.

Our Governor, in his Message to the Legislative Council of the Upper Province, observes,—"For several years the condition of the Canadas has occupied a large portion of the attention of Parliament;" and again, "the experience of the last few years amply testifies, that the Imperial Parliament has been sparing neither of the time it has devoted to the investigation of their affairs, nor of the expenditure it has sanctioned for their protection." I admit that troops have been sent for our protection, and supported by the Parent State; and that, so far, is generous and kind. Steam-ships, too, are about to be established and maintained without charge to the Provinces: and this again gives proof of kindness. What then? Neither this nor that gives proof of *kindness of the proper kind.* What has Canada to do to live on charity, and be a pauper? Is it for this that God has given us "unbounded materials of agricultural, commercial, and manufacturing industry?" Why, I ask, possessing these unbounded elements of wealth, do we continue poor and helpless? Because, when we demand our birthright, our Rulers give us a mess of pottage! We are faint and famishing by their fault, and for their low-souled liberality we are expected to be grateful! They ought to know—what now I tell them plainly,—they are mistaken. We are not the men to be thus cheated. Much time has been devoted to investigations of our affairs! Yes indeed! and much to little purpose!

Investigation of men's conduct, as contrasted with their professions, has been the most serious and arduous occupation of my life. Of these investigations the object has been twofold,—a knowledge of what is true in principles, and a thorough knowledge of humankind. What was the course of my proceedings? Did I go to work as the Government go to work in their investigation of our affairs? Not so. If I wanted to know the doctrines &c. of the Church of England, I read HAMMOND, HOOKER, TAYLOR, PEARSON, &c. If I

wanted to know what Methodism was, I read the writings of JOHN WESLEY and JOHN FLETCHER. If I wanted to investigate the Calvinistic system, rigid and moderate, I read the works of CALVIN & Co. If Philosophical Necessity excited my curiosity, I read PRIESTLEY, CROMBIE, HOBBS, and COLLINS. If Metaphysics, BERKELEY, LOCKE, HUME, MALEBRANCHE, BROWNE, and DUGALD STEWART. In short, I never drank from a muddy ditch when I was able to reach the spring. Is not this the proper course? But has this been the course of the Government investigations of our Canadian affairs? When I wanted to search into the character of our Canadian Constitution, I did not go about to enquire of JOHN, JAMES, and PETER, what were their opinions: I read the Articles of Capitulation, the Proclamations, and the Acts. When I wanted to investigate the character of our Canadian Law, I studied, as far as circumstances would permit, the Coûtume de Paris; and to see the working of the system, and to ascertain the sources and the character of the evidence which furnished the ground or pretext for the measures of the administration, I read the Minutes and Report of the Select Committee, and the Despatches, &c. of Sir F. B. HEAD. Have the Home Government, ardently desiring—(so says our Governor)—as does every British Statesman, our contentment and prosperity,—have they proceeded thus? The Canadians, of French extraction, are not to be, in any the least degree, disturbed in the enjoyment of their laws. What knows the Home Government, what knows the Imperial Parliament, about the character of those laws? Have they investigated like men who wished to know? Has so much as a single man among them read the Coûtume de Paris? I doubt it. But they have heard the evidence of Mr. VIGER respecting it; and the evidence of Mr. CUVILLIER; and the evidence of Mr. NEILSON, the author of the wise criterion of a good government! (ante, p. 92); and the evidence of Mr. WILLIAM PARKER, who said of the French Canadians, "They are, in my opinion, *the best subjects that this country has in any part of the world!*" Yes, and they have heard the all-subduing dictum of the Counsel for the Colonial Department! and they have heard the solemn admonition of the Right Hon. R. G. WILMOT HORTON, a Member of the Committee:

I think the Union Bill of 1822 was defective in not more explicitly securing the rights, privileges, immunities, and advantages enjoyed by the French population

under their own laws, *and making such laws so far permanent, as to be incapable of repeal by the operation of this United Legislature.**—*Minutes*, 301.

The British Parliament may, if they think proper, attempt to make those laws permanent; but the British Parliament, before it ventures on such a wise proceeding, had better pause a little longer, and investigate a little further.

But (it will probably be objected) beside the evidence above mentioned, did not the Committee hear that of Messrs. ELLICE, and GILLESPIE, and M'GILLIVRAY? Yes, and they heard that of Judge GALE: and because it exposed the iniquity of their favourite system, never was witness in a jury-box more severely cross-questioned,—with the hope that he might be confounded, and so convicted of self-contradiction. Was any feeling of this kind manifested to any of the favoured—all but treason-preaching—Franco-Canadian witnesses? For his manly testimony, Judge GALE was attempted to be hunted down, expelled society, blasted in character, and ruined. SPRING RICE pursued him like a bloodhound.

The Parliament of the United Kingdom, in all their plenitude of power, would not dare to do directly, what, by maintaining our Franco-Canadian Laws and Privileges, they are doing indirectly. The Province is barbarized. The British population, though living under British Government, and promised, by Royal Proclamation, the Laws of ENGLAND, find themselves subjected to old—barbarian—long since exploded from the land of their nativity—FRENCH laws and customs, by which they are robbed and driven out. Seeing this (as any man may see who reads this pamphlet); seeing also that the Home Government know it: that they have been told it by witnesses whose word they dare not call in question: and seeing, notwithstanding, that they receive with all complacency, and adopt without a dissenting voice, the cannot-too-strongly-be-expressed opinion, that the institutions which work such consequences should,

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* Why was this Right Hon. Gentleman examined? It could not be for the information of the Committee. No, but that his evidence might be published, and so form part of that apology for measures that had been pre-determined, the materials for which it was the very object of this investigation to collect. Through all this serpentine proceeding I can clearly trace a pre-determination to uphold, and as far as possible to *perpetuate* those French Canadian "rights" which are our wrongs; those "advantages" for them, which deprive British Canadians and Britons born of the advantage of living under British Laws; thus robbing us of *our* "rights"—our very *birthright*, by making us aliens and outcasts in a conquered Colony. And was it for this, shade of the valiant WOLFE! that Britain mourned her victor slain?

notwithstanding, be maintained inviolate,—have I not a right to conclude, that jealousy instead of generosity stands at the helm of our affairs?—that it is feared that no bonds of union, however strengthened, will have strength to hold us, unless we be kept down, —divided, poor, and paralyzed? In a word, have I not a right to conclude, that the keeping of the Province poor and paralyzed, distracted and dependent, *by means of the French system of British robbery and expulsion*, is part and parcel of the low-souled policy that now prevails?

But why say now prevails? Has it not all along prevailed? Perhaps not. The situation of affairs in 1791 was very different from the present. However much we may deplore the consequences of the division of the Province, that was not the original transgression. The fatal Act was that of 1774. I know it is pretended by French Lawyers and their English friends, that the Laws of England never were introduced into Lower Canada, and that the King of England never had the right to introduce them. Some persons found their opinion on the Articles of the Capitulation. Will any one among them have the goodness to point me to the part that will justify this conclusion? Mr. VIGER grounds his objection (see ante, p. 84) on the *civilized* law of nations. I think I can quote authorities and precedents against him quite as civilized as is his beautifully simple and civilized Coûtume de Paris. I have already quoted CHITTY (p. 58), but he is English. I have also quoted PUFFENDORF (ibid.), but *he* is not *French*. I had thought to appeal to GROTIUS, and for that purpose had read chapter 8 of the third book of his admirable work on the Law of War, &c. (that chapter treating on the Sovereignty acquired over the people and territory conquered) but he too, I suppose, would be rejected as anti-civil! In vain does ALEXANDER the Great inform us, in Q. CURTIUS, that "it belongs to the conqueror to give the law, and the vanquished to receive it." Who is ALEXANDER the GREAT, compared with Mr. VIGER? Well, turn we then to MONTESQUIEU: he at least *is* French, and will hardly be rejected as *anti-liberal*. In his Spirit of Laws, l. 10, c. 3, he not only admits the right of the conqueror to give the law, but even to reduce the vanquished people to slavery, and to continue them slaves, when and so long as the preservation of the conquest shall require. In truth, the matter is so plain, the right so obvious, that one would think it needed only to be mentioned in order to

admission. GIANNONE says, (Civil History of Naples, v. 1. l. 1.) "By the Law of Nations, the vanquished were always subjected to the laws of the victorious." The conclusion is, that the treacherous betrayal of 1774, in handing back the whole Province of Quebec, including both the Canadas, to the tender mercies of barbarian French laws, and still persisting in their maintenance, is not only indefensible, but is one of the foulest legislative frauds that history has recorded.

But what now, in 1791, was Mr. PITT to do? What had been so recently abandoned, could he reclaim? What had been so recently established, could he throw down? He had a choice of evils; and though it may be easy for us, who have seen and felt the evil consequences resulting from the choice, to say that *it* was evil, it might be very honestly questioned, by others, whether the case, *at that time*, admitted of any thing better. I say, "at that time:" for consider. There had been war and revolution in the west; and France was heaving and writhing under democratic convulsion, portending a far more fearful revolution. All men could see the gathering storm, could hear the distant thunder.

> Black rising clouds the thickened ether choke,
> And spiry flames shoot through the rising smoke!
> With keen vibrations cut the sullen night,
> And streak the dreary sky with dreadful light!

That was a time, if ever there was a time, for England to concentrate all her powers. Was Canada to be abandoned? I have not read a word of the history of the transaction beyond the debates in the House of Commons, but this is my conjecture. However, right or wrong in this respect, I know enough of the character of Mr. PITT to be confident of this, that had he possessed the opportunities which have been presented to the Government since the conclusion of the war, the barbarity of Canadian law would not have been tolerated as it has been. A re-union is at length to be effected, and the all-important question is: Are we, or are we not, to have a re-establishment of British Laws? Another and a still more important question is: Are we, or are we not, to have a Constitution of Government, in any tolerable degree approaching to that of England? I fear the low-souled policy that now prevails.

"THE LAWS OF ENGLAND ARE THE BIRTHRIGHT OF THE PEOPLE THEREOF: and all the Kings and Queens who shall

ascend the throne of this realm, ought to administer the government of the same *according to the said laws.*"—12 and 13 W. III., c. 2. According to this charter of our country, are not its laws *our* birthright? What are the limits of "this realm?" Are we without its pale? Many of us are literally English,—there born and bred,—there taught in childhood, that the Laws of England were as much our RIGHT as was the Crown of England that of England's King. Have we done any thing to forfeit this our high prerogative? Yes! We have come to Lower Canada, a British Province; and here we learn, to our astonishment and indignation, that by an Act of the British Parliament,—sixty-five years old, and not yet repealed, not even intended to be repealed,—in all that relates to property and civil rights, we are British OUTLAWS—doomed, so long as we here continue, to be BARBARIAN *French!* We will not presume to question the *legal* right of the Parliament of England to treat us thus, or in any other manner they may think proper; but there is a higher Legislature than that of England; and there are Thrones and Dominions of a higher order: and we know and wish our Rulers to remember, that an Act of England's Parliament may be an Act of Treason at that Tribunal. Must we then, appealing in vain to our earthly Legislators, be compelled to protest against such treatment, and appeal to Heaven? Should we be thus compelled, let our Rulers know, that it will be to the eternal infamy of those by whom we have been betrayed—by whom we ought to have been protected. That they take the children's bread and cast it to dogs, is not our grievance. We call no men dogs for being foreigners, nor will we show a dog-like spirit in refusing to impart the blessings we possess. There is enough for all: there is a rich abundance! What we complain of is, that being children, we are compelled to submit to treatment NOT FIT FOR DOGS. This cannot last. By our brawny breasts and British hearts, this shall not last!

> Thy spirit, Independence! let me share—
> Lord of the Lion heart and Eagle eye!
> Thee will I follow with my bosom bare,
> Nor heed the storm that howls along the sky!

What sort of independence will we follow? Ay! that is the question—of which the solution (see the motto of this pamphlet) "depends upon the present decision of the Imperial Legislature." In plain terms then, WE DO NOT MEAN TO BE PALTERED WITH AND OUT-

LAWED AS WE HAVE BEEN. If it must be this, or a bold stroke for anti-British Independence—be it so. In that event, *we* will not court "conciliation;"—well knowing that Britons must not hope for "equal justice." If we must fight—pro Aris et Focis—for our Altars and our Hearths—as our fathers have often fought before us, those who thus compel us will have something different to deal with from a Franco-Canadian outbreak. Greek then meets Greek,—then comes the tug of war! Is this to be desired? Is it to be lightly chosen? By all that is great and solemn in eternity, I answer No. This is not what we wish. This—if we may have honourable treatment—is what, (believing it to be, next to slavery and insult, the greatest of earthly evils) rather than do, or suffer to be done, we will peril life and all. Then what is it that we want? Our prayer is that we may be no longer outlaws:—that, on the contrary, we may have in Canada, what our Laws inform us an Englishman has every where, "as much of English Law and Liberty as the nature of our situation will allow." All in one word;—for us as for our fellow-Britains, THE BRITISH CONSTITUTION. This is our claim, *and nothing less than this.* We prefer it as Britons born, ever true to Britain's Crown, ever proud of her Dominion; ready to share her every danger, praying to share her power and freedom.

I have much more to say to complete my engagement. It must form the subject of a second letter.

Your most obedient Servant,

CHARLES SCOTT.

Montreal, December, 1839.

P.S—The subjects remaining to be discussed are—the provisions of "a Bill for re-uniting the Provinces of Upper Canada and Lower Canada;" including a Review of the various measures proposed for making "permanent provisions for the future good government of the Provinces," &c., proving that such measures will not be "permanent;" and that the Government by such means to be established will not be "good:" that, on the contrary, the effect of such measures will be to perpetuate our "eternal squabbles," if not our intestine tumults,—*by certain Statesmen conceived to be the worthy because only practicable means for the perpetuation of our dependence.* Lastly: suggestions for a Colonial Constitution, breathing the true spirit of the Metropolitan:—such a Constitution as should prevent intestine broils, everlasting official interference, aristocratic domineering, and democratic revolution.