DEBATE

ON

THE INQUIRY

INTO

THE APPELLATE JURISDICTION

OF THE

HIGH COURT OF PARLIAMENT.

On the 28th February 1856.

The Earl of Derby:

Earl of Derby's Speech.

My Lords, I am quite aware that I should be open to the charge of the most unpardonable presumption, if it were to be supposed for a single moment that the motion which I am about to submit to your Lordships could, in the least degree, interfere with or prejudice that of which notice has been given for some future day by my noble and learned friend behind me (*a*), and still more so, if it could be imagined for a moment that, in bringing forward this question, I was seeking to take out of the hands of my noble and learned friend a subject upon which, I need not say, his authority must be immeasurably superior to mine; but upon which I hesitate not to say, with deference to other noble and learned Lords in this House, there

(*a*) Lord Lyndhurst. His Lordship had, on the 25th February 1856, given notice as follows:—"My Lords, I beg to give notice, That in the course of a few days I shall call your Lordships' attention (unless some other Peer should make a motion on the subject) to the state of the judicature of this House, with a view of applying a suitable remedy." (Cheers.)

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is no man who can speak with the same authority and with the same weight and influence as he can. But I really hope that the Committee for which I am about to move, if it be agreed to, as I imagine it will be, so far from superseding, will rather pave the way for and facilitate the motion which my noble and learned friend may make, and I think that he will move any resolutions which it may be expedient to move with greater advantage after the subject shall have been discussed, than he could do at this moment.

My Lords, as I understand that opposition is not likely to be made to this motion, beyond the addition of certain words proposed to be added by my noble friend the President of the Council, and which do not appear to be foreign to the subject matter of the inquiry, I shall not be under the necessity of troubling your Lordships at any great length; but I hope, in moving for this Committee, you will permit me, as shortly as I can, to lay before your Lordships some of the views which I entertain upon the necessity of dealing with this important question.

My Lords, with regard to the appellate jurisdiction of your Lordships' House, I imagine it to have been from the earliest time a jurisdiction inherent in the Great Council of the Realm, and that from the period when some of the elements gradually fell out of that Great Council, and held their deliberations in another place, and under other authority, the jurisdiction originally vested in the Great Council remained in that portion of the body which was at all times the most important, namely, in those who now constitute your Lordships' House. I am speaking now, of course, with regard to jurisdiction in matters of law. With regard to the jurisdiction in cases of equity, the origin of which dates from comparatively modern times, this House has invariably exercised that jurisdiction ever since the memorable discussion between Lord Coke

and Lord Chancellor Ellesmere, and from that time there has never been a doubt of the jurisdiction being inherent in this House.

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My Lords, I shall rather shock some of your Lordships by saying that, highly as I value this privilege, I do not consider its maintenance to be so absolutely essential, as some noble Lords may think, to the fitting discharge of the other functions of your Lordships. I consider it undoubtedly to be a very high privilege, and a most important privilege, and as regards the legal members of your Lordships' House, it undoubtedly does vest in them, as being such members, a very high and a very important and responsible jurisdiction; and even with regard to the House at large, I am not prepared to say, though substantially the authority is not practically vested in them, that the apparent semblance of that authority is not in itself a real source of power, of which I should be sorry to see your Lordships deprived. But of this I am quite certain, that if it were necessary to take this alternative between the maintenance of any privilege of your Lordships' House, however important or however valuable, and on the other hand, the better administration of justice, there is not one of your Lordships who would hesitate in regard to that alternative, and say, let justice be fairly and impartially administered, whatever privileges this House may be compelled to forego (*a*). But I am not prepared to think that it is necessary so to abandon those privileges; and in all the observations I shall have to make to your Lordships, I shall proceed upon the assumption that it is desirable to maintain the appellate jurisdiction in the House of Lords.

My Lords, I may be permitted, perhaps, before I go further, to remind your Lordships, that from the earliest times, not only the Peers of the Realm, but

(*a*) The jurisdiction is a duty cast on the Queen's highest Court of Justice. It may be also called a privilege.

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the Judges of the land and other high functionaries, were summoned by writs to assist in the discussions and in the deliberations of your Lordships (*a*). What part they took in those discussions and deliberations, whether that part was confined to those subjects which fell especially within their own province, or were specially delegated to them by the majority of the House; whether, with regard to the subjects into which they entered, they had the power of deliberation and discussion only, or the power of determining and voting, is, I believe, a matter of considerable uncertainty. But that that power was more restricted, at all events in later days, I think may be safely inferred, from the difference which I am informed subsists at the present day between writs issued to those of the Lords who are Peers of Parliament, and writs issued to the learned Judges, who still retain the privilege of having writs of summons to your Lordships' House; and it is a distinction which is very important. The Lords are called on to attend for the purpose of assisting, advising, and determining. The Judges are called upon to attend for the purpose of advising and assisting, but the important word "determining" is omitted in the writs which are issued to the Judges. Therefore, on looking to the form of the writs, I should rather infer that, in early times, the practice was the same as the practice of modern times, namely, that the Judges and other high officers were summoned to advise and assist, although they had not the power of voting and determining. It is sufficient for the present to say, that they have no power of determining.

Then, my Lords, how is the present tribunal practically constituted? Technically it is supposed that

(*a*) They were summoned to advise the Sovereign; "nobiscum super dictis negotiis tractaturi vestrumque consilium impensuri."—See Hale on the House of Lords.

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the cases are heard and decided in your Lordships' House, and it is owing to that fiction of law that a circumstance occurs, which certainly has not a creditable appearance, and which, perhaps, though trifling in itself, it is very desirable to avoid. I allude to the fiction that the whole House hears and judges the case, which renders necessary the presence of such a number of members of the House as, according to the rules of the House, are necessary to form a quorum, and, consequently, if one or two learned Lords alone sit, it is necessary that there should be an attendance of one or two others of your Lordships, in order to make up a House. It is perfectly notorious that none of those noble Lords ever think of interfering in the judgment of the House. The Lord Chancellor puts the question to those noble Lords; he moves the Lords to agree to such and such a judgment; but practically, it is notorious that those Peers take no part in the judgment; and it is not very extraordinary if, under such circumstances, they do not affect to give their attention to the proceedings and the pleadings in cases in which they can exercise no sort of judgment with regard to the decision to be pronounced. Whether there may be any other mode of dealing with this question, avoiding this evident impropriety in point of appearance, is a question upon which I may have to say a word or two before I sit down. Practically speaking, any of your Lordships who attend upon that occasion are rather like the lay figures which are introduced in a painter's studio for the purpose of adding to the completeness of the judicial *tableau*, and in this case certainly they do not perform the part of adding any grace or any force to the *tout ensemble* of the picture in which they appear (*a*).

(*a*) This happy ridicule has been unsuccessful. The "lay figures" still sit. (March 1857.) They are summoned in rotation

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My Lords, before we come to consider the question of the remedy to be devised, if any remedy is required, for the defects of the existing tribunal, I think it is necessary to consider what are the principal objections

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according to a scheme suggested by the late Lord Liverpool, in 1820, the Chancellor, Lord Eldon, concurring. The Peers at large evidently had not their attention directed to this arrangement. It was denounced by Lord Brougham in the first year of his Chancellorship as an outrage on "the general feeling of the community." (*Times*, 3rd Sept. 1831.) "Lay figures" vote on appeals and writs of error like law Peers, and if they chose could overrule the Lord Chancellor; his vote counting as but one in opposition to their two. The difference is that he is "a deliberating unit; they, two cyphers superadded to make up the quantum of judicial authority." So says Mr. Leahy. On the 11th March 1857 an appeal case between two railway companies stood in the paper. The Peers present were, the Lord Chancellor, Lord St. Leonards, Lord Wensleydale, and Lord Congleton. Says the *Times* (12th March 1857):—

"When this case was called on for hearing,

"The LORD CHANCELLOR intimated that his noble and learned friends Lord St. Leonards and Baron Wensleydale were shareholders in the London and North-western Railway Company, and he wished to know whether any objection on behalf of the parties would be made to those noble Lords hearing and deciding the cause.

"Mr. ROLT, on behalf of the appellants, said that so far as regarded his clients, he was sure no such objection would be made, —in fact, as there had been a variety of conflicting decisions in the case, he prayed that those noble and learned Lords would hear the case.

"The ATTORNEY-GENERAL said that if he were speaking for himself he should not have the slightest objection to the noble Lords referred to deciding the cause; but, after a recent decision in the Court of Common Pleas, he could not assent to that arrangement without the sanction of his clients.

"The LORD CHANCELLOR said that he trusted the Attorney-General would not object to Baron Wensleydale sitting as a sort of assessor.

"The ATTORNEY-GENERAL said he thought he might assent to that arrangement.

"Lord St. Leonards accordingly withdrew, and Baron Wensleydale remained upon the understanding that he was to give no judgment.

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which are raised against the practice as it stands at present. And in stating those to the best of my ability, it must not be at all understood that I concur in the validity of all the objections; on the contrary, I think several of them have been much exaggerated; several of them arise from a considerable amount of misconception; but I do not think we shall vary the case if we proceed to consider the main objections raised to the existing tribunal.

I apprehend those objections to be seven, some of which, however, run one into another. First, the small number of Judges; secondly, that the attendance of those Judges is not compulsory; thirdly, that not being compulsory, the number in attendance is uncertain; fourthly, that there is a great chance of a failure of justice from the consequence of no judgment being delivered; fifthly, that in certain cases there is an appeal from the same individual sitting in one capacity to the same individual sitting in another capacity; sixthly, that the tribunal sits for only half the year, and, consequently, during the remaining half there is, so far as this House is concerned, a denial of justice to the subject; and, seventhly, that in the case of Scotch appeals, there is an inadequate tribunal to decide upon them. Postponing the case of the Scotch appeals, I will proceed to consider those objections, not exactly in the order in which I have enumerated them.

"This was an appeal from the decision of the Lords Justices, affirming a decree of the Master of the Rolls pronounced in a suit for the specific performance of an agreement instituted by the appellants, as plaintiffs, against the respondents, as defendants. The Lords Justices having decided against the appellants, the present appeal was brought."

During the subsequent days of the argument the Lord Chancellor was obliged to sit alone, that is to say, with "lay figures," who break no solitude.

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First, however, with regard to the fact, that for one half the year the tribunal of the highest Court of Appeal is closed to the public. In the first place, this is an objection, if it be an objection, which is inseparable from the primary consideration of whether the jurisdiction should be vested in the House of Lords or not (*a*). If vested in the House of Lords, it follows, as of necessity, that that tribunal can only sit while the House of Lords is sitting, and can only in that way pretend to exercise its functions. I think, indeed, the noble and learned Lord whom I see near me once suggested that there might be a sort of permanent committee of the House of Lords to sit during the recess, but I do not think that that proposition met with any great favour on the part of your Lordships. Without at all undervaluing the principle that justice should be made accessible to every one, and be as rapid in its execution as is consistent with due deliberation and care, I am not sure that it is desirable, in matters of appeal, to give the greatest possible degree of facility. Still less am I satisfied that it is desirable in all cases to accelerate, as far as possible, that appeal. In the first place, the presumption must be in favour of the Court which has already given its decision upon the case. There are many cases in which a suitor, having the decision of the Court adverse to himself, and flattered by the representations of counsel or attorneys, in the heat of the moment and in the irritation of defeat, lodges an appeal with the House of Lords, when, if he had three or four months coolly to consider what had taken place, and what was likely to be the consequence of that appeal, it would, probably, save all parties from a very great and serious

(*a*) The proposal of Lord Cottenham in 1836, to establish a Court of Parliament throughout the legal year was not wholly without warrant and precedent.—*See* the Statute 14 Edw. 3. c. 5., and Blackstone's remarks, 3 Comm. c. 4.

expenditure, and relieve your Lordships from a considerable portion of your duties.

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Now, my Lords, I think there is more weight undoubtedly in the objection to an appeal from a Judge sitting in one capacity to the same Judge sitting in another capacity. My Lords, I certainly can imagine that a judicial mind, from long habit, may be so balanced and so equally poised as to be capable of listening impartially, and weighing impartially, the arguments urged upon the re-hearing, which may induce the same Judge to modify or alter, upon re-argument, the opinion he has formally expressed; but I must say that this is a position in which, neither with regard to the Judge himself nor with regard to the suitor, is it expedient that any man should be placed, because, if it does not really interfere with, it casts at least a suspicion upon the due administration of justice. My Lords, I apprehend that this can rarely occur in the case of appeals to your Lordships' House. My Lord Chancellor being in every case one of the Court of Appeal, his presence being all but indispensable, that is to say, the practice being that the Lord Chancellor always does preside, he has in certain cases, which are very few, an original jurisdiction. With regard to the other Law Lords of the House, they can have no original jurisdiction, at least those who attend upon appeals, and consequently the case of an appeal from a Judge to the same Judge must be a case of very rare occurrence. There is, however, one case, and I approach it with some difficulty, because I believe there is at this very moment an instance of the kind pending before your Lordships' House; that is a case in which your Lordships' House, as a tribunal, may be placed in a very painful position, and one which ought not to arise in the proper administration of justice. I take the case where the Lord Chancellor,

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upon an appeal from the Vice-Chancellor, had reversed the decision of the Vice-Chancellor. He sits to hear an appeal from his own decision. If he be assisted by only one noble and learned Lord, the result will be this, that, retaining the same opinion in this House which he expressed in the Court below, and there being a difference of opinion between the Lord Chancellor and the other noble and learned Lord who may sit with him, the Lord Chancellor will virtually confirm his own judgment, and, although there are two out of three, taking the Judge of the inferior Court into consideration, in favour of the original judgment, yet his judgment is by your Lordships' House reversed, and the judgment upon appeal given by the Lord Chancellor is confirmed, upon the principle that if the House is equally divided, the Court below has its judgment affirmed. I think that is a case in which there is a practical grievance to suitors, because the original judgment being given by a very eminent person, his authority and one of the highest authorities in this House being combined together, this single authority of the Lord Chancellor, upon an appeal in the first instance, and by neutralizing the vote of the noble and learned Lord in this House upon the ultimate appeal, will have the effect of giving to his single judgment the power of overruling the decisions of the two other learned persons before whom the case has been heard.

Again, my Lords, I may state that it has been mentioned as one of the objections to this tribunal, that there is a possibility of an equal division of the Court, and in that case there is a failure of justice, as it is said. My Lords, of course I need not say that where a Court, whether composed of more or fewer members, is equally divided, the result must be that the Court practically comes to no decision. But what is the result of its coming to no decision? If there be two against one,

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or five against three, in any Court of Appeal, the result, of course, is that the Court reverses the decision of the Court below; but if they be equally divided, whether they be two or whether they be four, the practical effect is this, that in a case, perhaps of great nicety and great difficulty, upon which conflicting opinions are held by men of the highest eminence, the balance is left in the hands of the inferior Court, and the inference is, not that it has judged wrongly, but the inference is that, in a case of great doubt and nicety, it has judged rightly, the presumption being in favour of the Court below where a doubt exists. Now, my Lords, it is rather remarkable that in a most valuable Act, for which the country is indebted to my noble and learned friend (*a*) whom I see near me, the Act for establishing the Judicial Committee of the Privy Council, it is laid down, not that the quorum shall be three, or five, or seven, but that the quorum shall be not less than four. An even number is taken for quorum in that case, whether it be with intention I know not, but certainly with the effect of introducing this very principle, namely, in case of the Judges in the Court of Appeal being equally divided, giving the balance in favour of the Court below, and presuming that the Court below has judged rightly.

Lord BROUGHAM: That is by Act of Parliament; the question must be re-argued in that case.

Earl of DERBY:

Then, my Lords, the remaining objections, besides those which I have enumerated, are the small number, the uncertainty of attendance, and the fact that the attendance is not compulsory. With regard to the two objections, of the uncertainty of the attendance and its not being compulsory, it is quite obvious that the remedy which has been suggested by the Govern-

(*a*) Lord Brougham.

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ment would not in the slightest degree meet the difficulties which exist,-because the admission of a certain number of legal Peers into this House, if admitted as Peers of Parliament, would not in the slightest degree diminish the uncertainty as regards numbers, nor, if they are admitted as Peers of Parliament, will their attendance be any more compulsory than the attendance of those Peers who now act.

But then it is said there is a small number of Judges; now, my Lords, I am not quite sure, however plausible this objection may be, that it is one which is founded in reason. Recollect who the Judges are, rather than how many. The Judges in this House consist, first and principally, of the Lord Chancellor, and the very fact of the Lord Chancellor having to preside in the judicial proceedings of this House, imposes upon every Government of Her Majesty the necessity of placing that political office of Lord High Chancellor in the hands of the most eminent man they can find at the Bar who also concurs with them in political opinions. My Lords, happily political opinions are so divided in this country, that I do not think that suitors in general would have any great cause to complain, either at this or at any other time, of the ultimate appeal from otherwise the highest judicial authorities being vested in the ablest men of one or other of the parties into which this country is divided. But, my Lords, what follows? Besides the Lord Chancellor of the day, there is, probably, a man equally learned, equally distinguished, who has been the Lord Chancellor under a preceding Government, and no person can hold an office as a Peer in this House, entitling him to sit and hear an appeal, who is not a man of high and distinguished eminence in the profession of the law. At the present moment we have fortunately at least five noble Lords of great

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eminence, three of whom have already held that high and distinguished office of Lord Chancellor, another, the noble and learned Lord at the table, the Lord Chief Justice, and another noble Lord (*a*), perhaps the highest authority of all, whose advanced age may well excuse him from undertaking the labour of sitting to hear appeals in this House. The noble and learned Lord at the table (*b*), is rarely able to attend appeals, in consequence of his absence in the necessary discharge of his duties elsewhere, but at the present moment you have at least the assistance in all cases of appeals of the noble and learned Lord on the woolsack, my noble and learned friend (*c*) near me, and my noble and learned friend (*d*) whom I see upon the bench immediately behind me. Would you increase the weight of the authority of that tribunal by adding to it any number of Peers? Would not you rather run some risk by attempting it? I do not say it may not be upon the whole desirable to do it, but is it not at all events necessary to consider very carefully whether, in adding to the number, you might not diminish the authority of the Judges? Now, supposing the noble and learned Lord upon the woolsack were to be sitting alone to decide an appeal from Sir William Page Wood, I will say, or any other of the eminent persons who sit in the Vice-Chancellors' Courts; or supposing, rather, that the Court above were equally divided, and that in the Court above two Judges were decidedly adverse to the judgment of the Court below, and that of the other two, one should be a distinguished Equity Judge, and the other, in a case involving a nice point in equity, should be a person conversant with common law only—not having been very eminent in the practice

(*a*) Lord Lyndhurst. (*b*) Lord Campbell.
(*c*) Lord St. Leonards. (*d*) Lord Brougham.

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of common law, not having presided in any court of common law—the effect of the judgment of that learned Judge, but learned only in the common law, might overrule the decision of two of the most eminent men of the greatest skill and practice in Chancery, who upon a division came to that result. My Lords, I think that would be an unsatisfactory tribunal. At the same time, I do not mean to say it may not be necessary to increase and enlarge the tribunal; and if you do increase and enlarge it, we have next to consider in what manner this may be done with the least disadvantage to your Lordships' House, and with the greatest chance of improving the tribunal itself.

Now, my Lords, various suggestions have from time to time been made. I take first that which has been suggested by Her Majesty's Government (though not exclusively by them) in the course of the argument, and which is grounded upon the defects of this House as a Court of Appeal, it being evidently intended that the defects of the Court of Appeal should be the main stay of the argument by which they support their proposition to introduce Peers for Life. Now, my Lords, who are the judicial persons who are to receive Peerages for Life to be? If they are men who at the present moment hold high situations, the duties of their various offices may distract them from an attendance upon your Lordships' House, and may prevent them from giving that assistance which you desire to receive. If they are men of less eminence, then you run the risk, in the first place, of not obtaining necessarily an increased attendance; you certainly will not have any compulsory attendance, the number of the Judges who will sit to hear appeals will be as uncertain as it is now; but you will have this, you will have the probability that the tribunal, at the same time that it is increased in number, will be weakened in authority,

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in consequence of the Court of Appeal consisting of a larger number of individuals, but those individuals of inferior weight and of inferior authority. I doubt, my Lords, whether that would have the effect of satisfying either the profession or the public, or tend (which is of more importance than anything besides) to the fitting administration of justice.

Then, my Lords, my noble friend (*a*) whom I see at the table has suggested that there should be certain offices which should carry with them Peerages for Life.

Lord CAMPBELL: During office.

Earl of DERBY: Such Peerages undoubtedly (as in the case of the Right Reverend Prelates opposite) would not be open to several of the objections which might be urged against non-hereditary Peerages in general; but, my Lords, I think they would be open to this objection, that there would be an exceedingly imperfect addition made to the tribunal of your Lordships' House, and more especially viewed as a Court of Appeal. We all of us know in the ordinary deliberations of this House, what is the value attaching to the authority of the noble and learned Lord the Lord Chief Justice; but we also know that upon many occasions, unfortunately for us, in consequence of his other avocations (and the same would be the case with the Chief Justice of the Common Pleas and the Chief Baron of the Exchequer), we have not the attendance and the assist-

(*a*) Lord Redesdale; who had proposed a system of official Peerages which his Lordship brought forward on the 27th June 1851, in the form of a proposal to address the Crown praying, that "For the advantage of the House and the suitors thereto, and for the honour of the legal profession, Her Majesty will be graciously pleased to sanction the erection of the offices of Lord Chancellor, Chief Justices of the Queen's Bench and Common Pleas, and Chief Baron of the Exchequer into Baronies, which shall entitle the holders of the said offices to writs of summons to Parliament by tenure of the said offices."—See Hans. 3rd Series, vol. 117, p. 1311.

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ance of the noble and learned Lord, and I believe at the present moment the noble and learned Lord never does sit to hear appeals.

Lord CAMPBELL: Rarely.

Earl of DERBY:

He is rarely enabled to sit, and, in point of practice, rarely does sit. Then, my Lords, assuming that it is necessary to increase the number of the tribunal, for the purpose of securing a more regular attendance of Judges, and at the same time of increasing the number who sit to hear appeals, we have the alternative of the creation of Peerages for Life generally, into the objections to which I will not now enter at large; we have also the alternative of official Peerages, as suggested by my noble and learned friend at the table; and also the suggestion of the possible addition of Judges upon the precedent introduced by my noble and learned friend behind me, in the Act establishing the Judicial Committee of the Privy Council.

Now, my Lords, upon what principle did that Judicial Committee of the Privy Council proceed? Upon the most sound and wise principle, namely, that with regard to questions affecting the Court of Prerogative, the Vice-Admiralty Courts abroad, appeals from the Colonies, appeals from India, in virtue of the power of the Crown to refer those matters to them as it might think fit, with regard also to the case of the extension of patents—the Judicial Committee of the Privy Council, in whom previously as a body had been vested the right of deciding and adjudging upon those appeals, had delegated to them, by the Act introduced by my noble and learned friend, the sole and exclusive consideration of those questions. That is, the Privy Council delegated to certain judicial and legal members of their own body, who were selected and named in the Act, the duty of examining into

those cases, of hearing them, and of reporting to the Queen in Council, from whom the order founded upon that report and judgment proceeded. Now, my Lords, remember that, in order to secure the attendance of a quorum of four members of the Judicial Commeitte of the Privy Council, my noble and learned friend thought it necessary to constitute as a component part of that body no less than ten or twelve distinctive high offices, and in addition to those—

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Lord CAMPBELL : All the Judges are included.

Lord BROUGHAM : Being Privy Councillors.

Earl of DERBY : Practically, I think, there are not above twelve or fourteen offices which are generally held by Privy Councillors ; and in addition to those twelve or fourteen officers, there are a number of persons selected by Her Majesty, being Privy Councillors, and also those persons are included who may, at any previous time, have held the offices which are mentioned.

Lord BROUGHAM : The President of the Council also.

Earl of DERBY :

Therefore, in order to obtain a quorum of four, that moderate number which was not in the case of the Judicial Committee of the Privy Council thought too small, it was deemed necessary to constitute a Court from whom the Judges might be selected, comprising at the very least, probably, from twenty to twenty-four individuals. Now, my Lords, my noble and learned friend opposite, who has talked of the creation of Peers for Life for the purpose of constituting an improvement in the Court of Appellate Jurisdiction of this House, surely does not dream, for the purpose of gaining four more Judges, of creating twenty or twenty-four more legal Peers, because the result will be that, in the first place, their attendance would not

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be compulsory, and in the next place, they would have the right to be present on every occasion, when they certainly might not be wanted. In the Judicial Committee, in order to obtain a quorum of four, my noble and learned friend thought it necessary to have a body of from twenty to twenty-four out of which to select those four.

Then how would you select them ? Observe, that the questions which come before the Judicial Committee of the Privy Council are questions which proceed from what, without any want of respect, I may call inferior courts—namely, Courts of Vice-Admiralty abroad, Courts in the Colonies, and Courts in India; but what cases have your Lordships to deal with in this high jurisdiction ? Not with appeals from inferior or subordinate courts; but you have, in every department, to hear and decide appeals from persons most eminent in those departments, and possessed of the highest authority in the courts below, from decisions of the Chief Justices, from decisions of the Master of the Rolls, from decisions of the Vice-Chancellors in Equity, from all those who have the highest authority, from all those who are themselves constituted as Judges in the Judicial Committee of the Privy Council over the inferior courts, you have to hear and decide appeals in this High Court of Parliament; and when I consider the very high authorities from which appeal is made, I think it is at all events a subject for mature consideration how far you should weaken, by the intrusion of numbers, the high and pre-eminent authority of those Judges who now hear and decide upon appeal from those high authorities which I have mentioned.

My Lords, it must not be supposed that at the present moment the noble and learned Lords who preside in the Court of Appeal here are without the means of

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obtaining assistance. On the contrary, they have the power in any case in which they may think fit of calling for the assistance and the advice of the learned Judges of the land. They have not, as I believe, the same power of calling for the assistance of the Judges in Equity.

Lord BROUGHAM : Not unless they are Privy Councillors.

Earl of DERBY :

In law cases, whether they are Privy Councillors or not, we have the power. The Judges in Equity, unless they are on the Privy Council, we have no such power of calling on. How has that arisen? I believe from accident and inadvertence. Till within a comparatively recent period, the twelve Judges exercised a mixed jurisdiction over law and equity. There were among them four who were Equity Judges, but when there came to be a more complete organization of the Courts of Equity, that equitable jurisdiction was taken away (*a*) from the Judges, and was transferred to the Courts of the Vice-Chancellors, for example, and the Vice-Chancellors not being included in the number of the Judges, and the Judges being deprived of their equitable jurisdiction, you have in name the assistance of the same persons; but those persons not performing the same functions, you have not practically the advice and assistance of the Judges in equity as well as in law. I shall be corrected if I have made any mistake upon this subject by those who are much more competent to speak on it than I am; but I apprehend that that is the case which undoubtedly exists, that we have the power, in cases of common law, of calling in the assistance of the Judges; but we have not the

(*a*) This apparently refers to the Court of Exchequer, which had an equitable jurisdiction till lately. See 5 Vict. c. 5. transferring it to the Court of Chancery.

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power in equity of calling for the assistance of the Vice-Chancellors, unless they also happen to be Privy Councillors. If your Lordships are of opinion that the Court of Appeal in this House requires strengthening, —if you are of opinion that it requires the addition of greater numbers in order to secure greater efficiency, upon which I venture to pronounce no opinion whatever —surely the obvious course of proceeding is to avail yourselves, more largely than you do at present, or can do, of the advice of those whom the Constitution and the practice of Parliament has already pointed to as your assistants and advisers, namely, the Judges in cases of common law, and the Vice-Chancellors in cases of equity.

Whether those persons so admitted should be admitted for the purpose of assisting and advising; whether the attendance of the whole of them should be required; or whether the Lord Chancellor should have the power of calling for the assistance, and advice, and co-operation, and insisting upon the attendance of some of them named for a specific purpose, is a question well worthy of the discussion and the consideration of the Committee. It is one upon which I do not presume myself to offer any opinion, nor will I venture to express an opinion whether, upon questions of law, it would be desirable or necessary, beyond giving their opinion, that they should also have the power of giving a vote and forming part of the Court. At present, my Lords, they are not only debarred, when they are summoned for the purpose of hearing a case, from giving an opinion upon it, but they are also debarred from the power of speaking; they are not allowed in the course of the hearing to put a single question to counsel, or to elicit any expression of opinion, or any explanation of a point which may appear doubtful. They can do it, no doubt, through the Lord Chancellor

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or one of the noble and learned Lords who are present, but they themselves sit there as mere assistants, to hear, and having heard, to advise and give an opinion, which opinion may be overruled, as it has been. They have no power of putting a single question; and, at the conclusion of the argument, they have no power of giving a vote.

Now, my Lords, in former times the attendance of the Judges, as you perfectly well know, was not a casual and accidental circumstance, but it was one of daily course, and was considered necessary; and we find Lord Somers (*a*), in the name of the House, strongly and vehemently rebuking the Judges for their neglect in giving their attendance upon the business of the House, which they were bound to give according to their office, and imposing upon them the obligation of attending from the sitting to the rising of this House, under the pain of the high displeasure of the House. That has long since ceased to be the case. It would be impracticable at the present moment, but I think it is a question well worthy of consideration, whether, when a difficult case is to be argued, in equity or in law, the Lord Chancellor and the other members of this House should not have the power of calling upon certain of the most eminent persons in that department, upon the same principle as the Judicial Committee of the Privy Council is constituted, to give their attendance and their aid, for the purpose of hearing and deciding upon the question. I imagine, my Lords, that that is within the power of your Lordships to effect by your own order. That they shall have the power also, if it is thought desirable, of determining and having a vote is, I apprehend, beyond your Lordships' power; and, if thought desirable, can only be effected by the interposition of an Act of Parliament.

(*a*) Macq. House of Lords, p. 39.

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One word, my Lords, with regard to Scotch appeals. I had a letter this morning from a most distinguished member of the Scotch bar, who is very desirous that this Committee should be appointed, and that he should have an opportunity of stating before it, if it be appointed, the circumstances of a case which has come before the tribunal in Scotland. He feels the great inconvenience which is experienced in consequence of the constitution of the Court of Appeal; but it is quite evident that neither the creation by Her Majesty's Government of new Peers, nor the creation of official Peers, if those official Peerages are conferred upon English Judges alone, can remedy the complaint of the Scotch Judges. And if your Lordships, upon consideration, should be of opinion that it is desirable to obtain, in matters affecting England and Scotland, the opinion, and advice, and assistance, and possibly even the vote of the Judges, in law or in equity, I think it follows as a matter of necessary consequence, that in cases of Scotch appeals you should at least have the power of summoning to your assistance, and placing beside you upon the bench, some of the most eminent of the Judges of the Scotch Courts, the Lord Justice General himself, the Lord Justice Clerk, and possibly the Lord Advocate, though the Lord Advocate not being a Judge, I speak with considerably more doubt of him; but you should have the presence of a distinguished Scotch lawyer who has sat upon the bench; I think that follows as a consequence, if you are so to alter this High Court of Appeal as to call in the assistance, with regard to English and Irish cases, of members of the English or Irish bar.

One word more, and I have done, thanking your Lordships for the patience with which you have listened to me upon a subject upon which I feel I have very little right to say anything; I mean with regard to

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the question of form, to which I referred at the commencement, which requires at the present moment the attendance of two or three members of your Lordships' House to perform the part of constituting a quorum. As I said before, that proceeds from the circumstance that, according to the fiction of this House, the case is heard in the House itself, and that the House itself requires a quorum of not less than three. That is not the case with respect to the Judicial Committee of the Privy Council. The whole Privy Council stands in a position analogous to that of this House, and they delegate to a Committee of their own body that which practically to all intents and purposes this House equally delegates to a Committee of its own body, but the mode of proceeding is different. In the one case you admit it to be the proceeding of a Committee—the Committee report, and the Queen in Council pronounces an order in compliance with the report. My Lords, if any difficulty arises from the form, why should you not consider these references as references not to the whole House, but as references to a Committee of the whole House, which does not require that quorum? Do away with the farce of the attendance of two perfectly useless members of the inquiry. Let the case be referred really to the learned members of this House, with the assistance, if you think fit, of the learned Judges, or the Vice-Chancellors, or any others, and let them sit as a Committee authorized by you to inquire and report upon the case. Let a report be presented each day, on the meeting of the House, by the Lord Chancellor, and at the meeting of the House let the Lord Chancellor presenting the report move the agreement of the House to the report of the Committee. My Lords, it appears to me that that mode of proceeding will keep in this House the full jurisdiction which is exercised by it at the present

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moment. The decision would be the act of the House, as the Order in Council is the act of the Sovereign. The one and the other would be founded upon the report of the Committee. We should not have occasion to recur to a fiction. We should, in reality, confirm the judgment of that Committee to whom we had delegated the investigation. And, my Lords, I do not suppose it will be for a moment imagined that, upon the bringing up of that report, there would be, upon the part of any member of the House, the slightest inclination to canvass or question it; but it would be a mere matter of form; and at the present moment, in fact, there is nothing in the resolution of the House, or in law, or in anything except the general understanding and practice of the House, which would debar any half-dozen members of your Lordships' House coming down and sitting upon appeals, and overruling the motion of my noble and learned friend the Lord Chancellor when he moved judgment. Your Lordships will recollect that such a point was raised in a very memorable instance (*a*), to which I will not further refer than by saying that it was one in which a bare majority of the Law Lords of this House reversed the decision of the Court below, and reversed it, overruling the all but unanimous decision of the Judges to whom the question was referred, with the single exception, I believe, of Mr. Baron Parke, now created by the title of Lord Wensleydale.

Lord CAMPBELL : And Mr. Justice Coltman.

Earl of DERBY :

Notwithstanding that, by the judgment of this House by the majority of one, a decision which had been come to below was overruled. I only advert to the case for the purpose of saying, that although under those circumstances, the opinion of the Judges was overruled, and notwithstanding the strong political

(*a*) The O'Connell case, 11 Cla. & Finn. 155.

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feeling which was generated by that case, it was distinctly and unanimously agreed to by the whole of the members of your Lordships' House. Unsatisfactory as that judgment was to many of them, it would have been far more unsatisfactory and dangerous if the lay members of your Lordships' House had presumed to interfere or express a judgment at variance with that which had been pronounced by those to whom it had delegated the duty of a full consideration of the case. I cannot, for my own part, therefore, see the slightest difficulty in dealing with this question in the way of having the cases heard before a Committee, that Committee reporting to your Lordships' House, and your Lordships' House concurring in, and sanctioning, and giving a judgment in pursuance of that report. That, of course, is rather a form than a substance. In point of practice the great question is,—Does the appellate jurisdiction of this House stand in need of alteration and improvement? Has the House discharged the duties of its high office as satisfactorily as it is possible to have them discharged by any alteration you can introduce? If not, if there are defects to be remedied, let us deliberately and dispassionately consider what those defects are. Let the Committee inquire, if you please, by discussion among themselves, or, if you please, by calling witnesses before them, what those defects are, and which of the various remedies which have been or may be suggested is the most applicable to meet those defects, and to make this House that which it ought to be, as it is the highest so the most perfect, the most impartial, and the most unobjectionable tribunal for dispensing the highest kind of justice, namely, that which is involved in an appeal from those who, with the exception of this House, are the highest judicial authorities of the country.

Earl of Derby's Speech.

My Lords, I beg leave to move, "For a Select Committee to inquire whether it is expedient to make any, and if so, what, provision for more effectually securing the efficient exercise of the functions of this House as a Court of Appellate Jurisdiction, and to report their opinion thereupon."

Earl Granville's Speech.

Earl GRANVILLE:

My Lords, I have listened with much pleasure to the singularly clear statement which the noble Earl has made with regard to the whole of this subject, and if that subject must be interesting to any one, it must be to your Lordships, who are so much interested in the question. There is one point in which I quite concur with the noble Lord. If it came to a question whether this House was to retain its appellate jurisdiction, the exercise of its functions being prejudicial to the administration of the justice of this country, though beneficial to the House, I concur with him in thinking that there should not be a moment's hesitation in abandoning that jurisdiction. At the same time, I think, I go still further than the noble Lord, in holding that those functions are a very important part of the functions of your Lordships, and go far to support the dignity and utility of the House, and to increase the respect in which it is held in the country. I think, therefore, it becomes us to take great pains to make it as perfect as it possibly can be made.

The noble Earl stated, I think, seven objections, and I think he stated with great fairness all the objections which have been raised against the principle of the appellate jurisdiction of this House. I do not intend to follow the noble Earl by going over as he did some of the answers which might be made to those objections, still less do I intend to follow the noble Earl in his discussion of the different plans which might be

suggested for the improvement of this tribunal. I refrain from doing so for several reasons, but more especially because I am most anxious that Her Majesty's Government at least, if not the opposite side of the House, should go into that Committee perfectly unembarrassed, and wholly free to judge what really is the best remedy, and not with an endeavour to bolster up their own remedy. I think, therefore, I shall exercise a sound discretion in abstaining from following the noble Lord, though upon some points I certainly do not agree with him, and I should have had some remarks to make upon his statement. I will, therefore, confine myself to a very few brief observations with respect to the almost formal amendment which I have taken the liberty of giving notice I should move upon this occasion.

Earl Granville's Speech.

Your Lordships, perhaps, will remember that I took the liberty the other day, I hope in terms not offensive to your Lordships, of stating the circumstances of embarrassment in which the Crown and the House were placed by a recent decision of this House (*a*). I stated then, as I was authorized to do, that time would be given by Lord Wensleydale for a fair consideration of this important subject. I pledged myself, on the part of Her Majesty's Government, that they would look at the question carefully, without any personal or party feeling, and expressed a hope that we should be met in the same way by all sides of the House. The noble Earl followed, and bore witness to the spirit with which he intended to pursue the inquiry; observing that he, for one, and I believe he spoke for the rest of your Lordships, should feel it to be a painful thing to appear to be, even for a moment, in collision with the Crown on any subject. My Lords, the noble Lord then made some suggestions, and said

(*a*) The decision as to Life Peerages,—see the Report published by order of the House.

Earl Granville's Speech.

that he should give notice of a motion similar to that which he has just now made. To that I rejoined, that, without pledging myself, I thought, upon the understanding which has been so often come to in this House, and always adhered to, that no delay should take place, except that which is necessary for the examination of the subject,—that if Her Majesty's Government were satisfied with the terms of the reference, we should be inclined to agree to the proposal. The noble Lord gave the pledge which has been alluded to, and that very evening he gave the words of the motion. Upon looking at the words of that motion, it certainly struck some of Her Majesty's Government, that though not perhaps probable, yet it was possible that the Committee might consider themselves excluded from a consideration of this constitutional question (*a*), as bearing upon the appellate jurisdiction of the House, unless some additional words were put in. I am anxious that no additional words which I suggest should be such as to raise any angry discussion upon the present question before we go into Committee. I think that the less we have this subject debated before going into that Committee, the more likely we are to attend to the business of the Committee in an unprejudicial manner; but I thought it necessary to put in those words to save my right, or that of any other member of the Committee, to make any proposal which should not only tend to perfect the jurisdiction of this House, but should also meet the difficulty (*b*) which has arisen as between the Crown and the House. It will be evident to your Lordships that when two estates of the Realm (*c*) dis-

(*a*) The question of Life Peerages.

(*b*) The difficulty as to Life Peerages.

(*c*) In the late discussion on Life Peerages, the House of Lords was constantly characterised as one of the "Estates of the Realm," and the Crown as another Estate. The House, however, is more than an Estate, being composed of two elements, the spiritual and

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agree, the most natural way to get rid of the difficulty would be by calling in the third estate, and, by an agreement between all the three, to put an end to what must be an anomaly, and which in some degree reflects upon the Constitution. My Lords, the noble and learned Lord opposite very much deprecated the introduction of any Bill for this purpose. He did not state his reasons, but I have no doubt he considered that it was undesirable, that we ourselves should provoke discussion which might be necessary in another place, with regard to the constitution and functions of this House. I am sorry to say, that the subject has already been introduced into the other House, not by any person anxious for strengthening the appellate jurisdiction, still less by any democratic opponent of the House of Lords, or any of our institutions, but by a representative party in that House. My Lords, I do not wish to reflect for a moment upon what may have passed merely in the heat of debate, more particularly as I feel that it is entirely opposed to the tone of my noble friend opposite, that this subject should be used as a weapon of offence in party warfare. But I do so far feel with the noble and learned Lord opposite, that I think if the Government were to introduce a Bill, however well framed that Bill might be, without any consideration of the feelings of your Lordships, such a course would tend to widen rather than to heal the breach which exists. And I cannot conceive of any better opportunity being given for a judicious course on this question, than that which is afforded by the present motion of

the temporal Lords. Her Gracious Majesty is not an "Estate," but stands on higher ground; above the three Estates, the Nobility, Clergy, and Commonalty. The legislative power does not reside in the three Estates, but in the Crown and the three Estates. This was the feudal polity, not confined to England; it was the same in Scotland. In France, says Montesquieu, "there are three kinds of Estates, the Church, the Sword, and the Gown; each having a sovereign contempt for the two others."

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the noble Earl, by which some of the most distinguished members of this House, whom I have no doubt he would desire to nominate upon this Committee, will be able round the table to discuss all the bearings of what may be proposed. I frankly admit, as I have told your Lordships, that this is my object in proposing the addition of these words. The words themselves, I think, cannot be objected to, because whatever course that Committee may adopt, whether it adopts the course which the noble Earl so strongly argued for to-night of calling up assistance or not, I do not quite understand whether those assistants are to give advice which may be overruled by members of your Lordships' House, or whether they are to assist in other ways than by their advice, but in any case that will, to a certain degree, affect the character of this House. In the same way as regards the proposition which he has attributed to me, but certainly without the slightest foundation, that I am likely to propose the creation of some sixteen or twenty Law Peers in this House, I think, if I were to propose any such plan as that, it would be well worth considering whether it would affect the character of the House or not, and the same may be said with regard to the proposition of the noble Lord the Chairman of your Lordships' Committees. It is almost impossible to go into this question without in some degree considering the effect which will be produced upon the House itself. Respecting that very point which was strongly put in his able speech the other night, as to the absurdity of a lay Peer sitting here on alternate days, and taking no part in the judicial procedure, I think the passing of a formal resolution, by which such a Peer should be precluded from taking part in any such proceedings might be a subject of consideration as regards the whole character of your Lordships' House. My Lords, those are the reasons why I have ventured to

introduce these words, as I am not aware that any objection will be made to them. The words I move are merely to add after the word "jurisdiction," "and further, how any such provision would affect the general character of this House."

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Lord CAMPBELL:

Lord Campbell's Speech.

My Lords, I apprehend that the proposal of my noble friend the Lord President will meet with no objection whatever, but that this motion will be carried *nemine dissentiente;* and that being so, I should not have troubled your Lordships with any observations were it not that I am about to leave London for the circuit to-morrow morning, and that the Committee may, probably, make its report before I can have an opportunity of attending it. For that reason, I beg your Lordships' indulgence while I very briefly throw out the result of some very anxious meditations upon this subject.

I entirely agree that it is of the greatest importance, not only to the dignity and usefulness of your Lordships' House, but to the public welfare, that the judicial jurisdiction should be retained. It has been looked upon for ages with veneration, and no supreme Court of Appeal can now be constructed which would be a substitute for this House.

My Lords, as a lawyer, I was educated with the most profound respect for the appellate jurisdiction of this House. During many years I was employed in appeals at your Lordships' bar, and I must say, that whether the decision was with me or against me, I was satisfied with the exercise of that judicial jurisdiction, and I believe so were the public.

After I had the honour of becoming a member of this House, for nine years I constantly attended the hearing of every writ of error, and every appeal which was argued at the bar. When my noble

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and learned friend (*a*) who sits opposite and the deceased Lord Cottenham alternately held the Great Seal, there were four Lords (*b*) who constantly attended, and, unless I am very much deceived, the decisions of your Lordships during that time were respectfully received in England, in Ireland, and in Scotland.

For some reason which I cannot explain, a change has taken place, as I am told, in public opinion. How that has arisen I cannot say. I have the most sincere respect for my noble and learned friends who now preside in deciding cases which come before your Lordships. There was one point certainly I did complain of, both in public and in private, that when two noble and learned Lords sat to hear an appeal, and there happened to be a difference of opinion between them, the case was decided merely by an accident (*c*) affirming the appeal. I believe it would have been much better if a re-argument had taken place before *all* the Law Lords, and then their decision would have been more satisfactory (*d*).

Whatever the reason may be, there does seem to be a loud call now for some alteration in the exercise of your Lordships' jurisdiction as a Court of Appeal and the question is, what that alteration shall be.

I will most cautiously abstain from again entering into the question of Peerages for Life. If an Act of Parliament is passed for the purpose, these creations may be introduced, but by an Act of Parliament alone can they be made so as to give the holders of them a right to sit and vote in this House. But I doubt

(*a*) Lord Lyndhurst.

(*b*) Lord Lyndhurst, Lord Brougham, Lord Cottenham, and Lord Campbell.

(*c*) When the Lords are equally divided, the judgment below is affirmed. Hence some have said that the result is, after all, but a negation; the incident of an "accident."

(*d*) In Beattie *v.* Johnstone, Session 1843, this was done. 10 Cla. & Finn. 83. It is the rule.

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very much whether making Peers for Life would at all answer the purpose of strengthening the appellate jurisdiction of this House. That subject has been very ably handled by the noble Earl opposite, and I will not repeat his observations, only saying that I very much agree with them.

You cannot have the Chiefs who are presiding in the Superior Courts in Westminster Hall, because they are necessarily occupied in their own Courts. I myself last session of Parliament sat here four days on an appeal from a Court of Equity, having been very much pressed to do so by my noble and learned friend upon the woolsack; but the circumstance caused considerable inconvenience, and I do say, that it is wholly incompatible with the duties of the Chief of either of the Courts in Westminster Hall to give any effectual assistance in the discharge of your Lordships' duties as Judges of Appeal.

Then, my Lords, with regard to attaching Peerages to office; that is open to this clear objection, that the moment the Judge retired from his office he would lose his seat in this House; and at a time when he might be supposed to be still capable of rendering you assistance, he is absolutely disqualified, because he holds the office no longer to which his Peerage was attached.

With regard to calling up to the House Puisne Judges who have retired from the bench, much aid cannot be permanently expected from that source, because they must be considerably advanced in life, and it can be very seldom that you can have any effectual assistance from such individuals.

The next thing to consider is the suggestion to which my noble and learned friend (*a*) opposite, (who has paid great attention to this subject, and whose opinion is entitled to more weight, I may venture to say, than that of any member of this House,) has referred;

(*a*) Lord Lyndhurst.

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namely, summoning the Equity Judges, if they should be made Privy Councillors. Unless they are made Privy Councillors, they can have no summons; and if they are made Privy Councillors, and merely came in as assistants, I still doubt whether the objections to the appellate jurisdiction would be removed.

A great inconvenience, as has been pointed out by the noble Earl, arises when the learned Judges who advise the House give unanimous or nearly unanimous opinions on one side, and your Lordships decide upon the other. I remember a case in which the Judges were unanimous; that was the celebrated case respecting the validity of a marriage in Ireland solemnized by a Presbyterian minister (*a*). My noble and learned friend (*b*) and myself, and one other noble and learned Lord (*c*), felt it our duty to give an opinion against that of all the Judges, and it was because there was an equality, three to three, that, according to the rule, the judgment was affirmed. That being so, I think that you would not gain anything material by calling in the Equity Judges under the writ of assistance.

My noble and learned friend proposed another plan, which was to refer all appeals to the Judicial Committee of the Privy Council. That tribunal will make his name illustrious, but I think he was rather too fond of his own child when he proposed that your Lordships' should substitute the Judicial Committee of the Privy Council in the place of this House, and be governed by its decisions. It would have been substantially, though not nominally, parting with your appellate jurisdiction altogether, and in a very objectionable manner, because the Privy Council, and consequently, the members of the Judicial Committee, hold their offices during the pleasure of the Crown. To give your appellate jurisdiction to persons who only hold their office during the pleasure

(*a*) Queen *v.* Millis, 10 Cla. & Finn. 534.
(*b*) Lord Brougham. (*c*) Lord Denman.

of the Crown, instead of retaining it in your own hands, I think would not be a satisfactory course to pursue.

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Then comes the proposal which the noble Earl has thrown out, and which, although it will require the most mature consideration, I must say, seems to me to be the least objectionable, and that is, that your Lordships should have a Judicial Committee of this House. My Lords, this is according to ancient precedent. The King's ordinary Council constituted the Judicial Committee of this House; and it appears from our ancient annals that that Judicial Committee had referred to them any questions of law which came before your Lordships' House—that they were considered as a Committee of your Lordships' House; and after that Committee had pronounced its opinion and reported it, then it was that this House formally gave their judgment, adopting that which had been recommended by the Committee.

Your Lordships are aware that you appoint Committees composed not entirely of Peers. I find a great number of instances of Bills committed by the House of Lords to the Judges; to several Lords and the Judges; and to several Lords and the Attorney and Solicitor General. So that you have abundant precedent for forming a Judicial Committee, and then that Committee would consider how the cause is to be decided. The question would be argued judicially before that Committee, and the Committee would make its report, and your Lordships, unless you saw strong reason to the contrary, would formally by a final judgment confirm the decision of the Committee.

My humble opinion at present is, that that Committee should consist of all the Law Lords who are members of this House, the Lord President, and the Chairman of our Committees, and also of a certain number of the Judges of Law and Equity in Scotland and Ireland; and then you would make a selection from

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that body of a proper tribunal for each case, according to the nature of the question. This is the practice in the Judicial Committee of the Privy Council.

The Committee would not sit in this House, but in some adjoining room with all the accompaniments of of a Court of Justice. I venture to suggest that in this manner a satisfactory conclusion would be arrived at, which I do not see is by any other means so likely to be attained.

I will give your Lordships one instance in which this tribunal, which I now propose to revive, actually sat and adjudicated as a Committee, and having adjudicated, its judgment was adopted as the judgment of this House. That was in a case which occurred in the reign of Richard the Second, between the Prior of Montacute and Lord Richar Seymour;—on a writ of error from the Court of King's Bench. It was not a single instance, contrary to the law, but it was in pursuance of the practice from the remotest times, and it was a most constitutional privilege of this House. This writ of error from the Court of King's Bench came before this House; it was referred to the Judicial Committee, that is to say, the King's Ordinary Council; it was argued before them, and decided in favour of the appellant, and judgment was given accordingly to reverse the judgment in the Court of King's Bench. The judgment of this House recited the reference to the Judicial Committee; it recited that they had decided in favour of the appellant; and then there is the judgment of the House confirming the decision of the Committee, and ordering that the judgment of the Court of King's Bench be reversed, and that the appellant shall be restored to all his rights. Therefore this, my Lords, is a clear precedent for the course which I now propose. (*a*)

(*a*) Nearly 500 years ago (1384) a Parliament was holden at Westminster, where, as according to the well-established usage, *still*

The question, I admit, is one of very great difficulty, but I feel that it may be overcome. The subject will require, however, great consideration; and in the Committee I earnestly press upon your Lordships

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adhered to, RECEIVERS and TRIERS of PETITIONS were appointed by the Crown. The Receivers were the Assistants. The Triers were the Selecti Judices; in fact, the "Council" referred to by Lord Campbell and described by Lord Hale. The Triers did not sit in the chamber of Parliament, because there were in ancient times no *night* sittings, and the public or political business of the country went on at the same time with the examination of private causes. The Triers therefore sat by necessity apart—those for domestic petitions in the Painted Chamber, and those for foreign relations in the Chamber Markolph. Another reason was, the parliaments, though frequent, were short, and dispatch was necessary. But if such a constitution were rendered again effective, the sittings of the Court might be still as now in the House of Lords.—The following extract from the Rolls of Parliament shows the appointment in the 8 Ric. 2. (3 Rolls, p. 184.)

RECEIVOURS des PETITIONS D'ENGLETERRE, IRELAND, GALES, et ESCOCE.

Sire Johan de Waltham.
Sire Richard Ravenser.
Sire Thomas Newenham.
Sire John Searle, Clerc del Parliament.
Et ceux qui veullent liverer lour billes les baillent avaunt p. entre cy & Samady proschein venant au soir.

RECEIVOURS des PETITIONS de GASCOIGNE & d'autres Terres & Pays de par dela la Meer, & des Isles.

Sire Piers de Barton.
Sire Johan Bouland.
Sire Robert Faryngton.
Sire Robert Muskham.

TRIOURS des PETITIONS D'ENGLETERRE, IRELANDE, GALES, & ESCOCE.

Le Roi de Castill & de Leon, Duk de Lancastre,
L'Ercevesq de Çanterbirs.
L'Evesque de Londres.
L'Evesq de Wyncestr'.
L'Evesq de Ely.
L'Evesq de Salesbirs.
L'Abbe de Seint Austyn de Canterbirs.
L'Abbe de Waltham.
Le Count de Kent, Mareschall d'Engleterre.
Le Count d'Arundell.
Le Count de Warr'.

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to examine witnesses upon the subject. You will, of course, hear the Attorney and Solicitor General of the present Government, and the Attorney and Solicitor General of the late Government, men of

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Le Count de Northumbr'.
Le Sr. de Nevill.
Monsr. Richard le Scrop.
Monsr. Guy de Brien.
Monsr. Robert Tresilian.
Mons. Robert Bealknap.
Mons. Johan Holt.

Touz ensemble, ou vi. des Prelatz & Srs. avant ditz au meyns: appellez a eux Chanceller, Tresorer, Seneschall, & Chamberleyn, & auxint les Sergeantz nre Sr le Roy quant il busoignera. Et tendront lour place en la Chambre de Chamberleyn, pres de la Chambre de Peint.

TRIOURS des PETITIONS de GASCOIGNE & d'autres Terres & Pays de dela la Meer & des Isles.

L'Evesq de Nichole.
L'Evesq de Norwicz.
L'Evesq de Seint Davy.
L'Evesq d'Excestre.
L'Evesq de Hereford.
L'Abbe de Westm'.
L'Abbe de Glastyngbirs.
Le Count de Cantbrugg.
Le Count de Bukyngham, Conestable d'Engleterre.
Le Count de Staff.
Le Count de Salesbirs.
Le Sr Fitz Wauter.
Le Priour del Hospital Seint Johan Jer'lm en Englcterre.
Monsr. Johan de Cobham de Kent.
Monsr. William Skipurith.
Monsr. Roger Fulthorp.
Monsr. Davyd Hannemere.
Monsr. William Burgh.

Touz ensemble, or vi. des Prelatz et Srs avaunt ditz; appellez a eux Chanceller, Tresorer, Senechal, Chamberleyn, & les Sergeantz le Roi quant il busoignera. Et tendront lour place en la Chambre Markolph.

The Chancellor did not preside in these committees—because he was on the woolsack—as one of the Assistants of the House, and the chief of them. But the Triers, when difficulties arose, could send for him and for the other Chief Officers of State. The petitions were not always of a judicial character; consequently the Chancellor's presence was not always necessary. But if a question

great eminence, who have often practised at your Lordships' bar, and who are well acquainted with the exercise of that jurisdiction. I would strongly recommend that you should call before you my friend

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of law had to be resolved, the Triers were prepared to meet the occasion. Therefore we are to suppose that when the Prior of Montacute's writ of error came, the Triers fortified themselves. If the reader, therefore, will refer to the Rolls of Parliament (*a*) he will find in Norman French the pleadings and proceedings of which the following is an abridged translation :—

The Prior of Montacute presented the following petition :—To our Sovereign Lord the King, and the Lords in this present Parliament, the Prior and Convent of Montacute humbly shew, That whereas the Lord Richard Seymour brought a writ of *scire facias* against the said Prior, returnable in the King's Bench, to have execution of the manor of Tyntenhall, by reason of a fine levied thereof, between one Richard Lovell and certain other persons, which manor formed a large part of the substance of the said Priory, &c.; to which writ the said Prior made appearance in Court, &c., and thereupon judgment against the Prior, &c., upon which the said Prior and Convent supplicate their very gracious Lordships to examine the matter, &c. For otherwise the said Priory would be ruined and annihilated for ever. Which petition was read in Parliament, and the record and process brought in before the Peers of the realm, Justices and others; and the matter being diligently debated and examined, it was ordered that the enrolment of the record should be amended, so as to admit certain pleas of the Prior; and afterwards such enrolment having been reformed, the Prior and Convent presented another petition, addressed—"To our very redoubted Lord the King, and his noble Lords in this Parliament," alleging divers errors, and *praying that it might be ordered in that Parliament that certain members* ("genz") *of the Kings Council might be assigned, before whom the said record might be carried; and that they should have full power and authority, by virtue of such order, to hear the assignment of errors, and to summon the said Richard Seymour to be before them, by a certain day to be by them appointed, to hear the assignment of the said errors, and righteous judgment* (*b*) *thereupon to give.* And this petition being read in Parliament (*c*), it was agreed by the assent of Parliament that the Prior should have a writ of *scire facias*, returnable the next Parliament, to summon the said Richard

(*a*) Rolls of Parliament, vol. iii. p. 172. 186. See Macq. House of Lords, 677.

(*b*) The original is "Droiturel juggement eut rendre."

(*c*) Parliament here means the House of Lords.

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Mr. Macqueen, the author of an excellent book upon this very jurisdiction, who is familiar with all the law upon the subject, and who I am sure will give you the most valuable assistance. And, my Lords, I do in

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Seymour to be in the next Parliament, there to hear the errors by the said Prior alleged, and such besides to do and receive as by the law of the land should be judged in that behalf; and it was ordered that the record and process should be in the next Parliament, &c. Accordingly in the Parliament holden at Westminster, 8 Richard II., 1384, the Prior of Montacute moved his case for judgment. The result is thus stated :—" Liquet manifestè Cur. in Parliamento quod erraverunt. Ideo, ob errores illos, consideratum est quod judicium pdcm. tanquam erroneum, revocetur, cassetur, et penitus adnulletur, et quod pdcus. prior plenarium habeat restitutionem manerii, &c."

This case proves that it was usual to devolve on the Council the examination of such procedings. It shows that this was the understanding of the nation at the time; and that the Council, under the authority of a reference from the House, might not only investigate, but determine, writs of error in Parliament. The case, on the other hand, affords evidence that the Council was not supposed to possess inherent jurisdiction of its own; for its authority to deal with the Prior's case was to be derivative. It may be asked, how it happens that the Prior's prayer for a reference is not in words complied with by the Lords? The terms of the original order are : '*Etoit agardez par assent du Parlement*' that the Prior should have a writ of *scire facias* returnable the next Parliament. Here is certainly no reference *per expressum* to the Council; but it is to be observed that, a very few days before, the general assignment of *Triers* had been made; and therefore to make a special reference to them in each case was perhaps deemed unnecessary—or, if made, it was not recorded, or, if recorded, it has not been preserved. The Lords apparently gave assent to the Prior's petition simply by awarding a writ of *scire facias,* returnable the next Parliament. For it was in the Court of Parliament (though not in the Chamber of Parliament), that the errors were to be tried. And hence the final judgment of reversal is pronounced by the *Court in Parliament,* that is to say, by the House of Lords, which, in a judicial sense, always meant, and still means, the Parliament.

The remarks of Lord Campbell, in a note to the fourth edition of his " Lives of the Chancellors," vol. i. page 26, should be studied by those who have had a hand in the changes lately wrought on the Great Seal, as well by those who have to reflect on the present plight of our highest Court of Judicature. " Recent events, (says his Lordship, writing in September 1856), have been unfortunate

justice to my own native country insist upon it, that the Lord Advocate may be heard, and that the Lord Justice General, a most eminent Judge, and whose opinion deserves the highest possible respect, may also

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for the office of Chancellor as connected with the Appellate Jurisdiction of the House of Lords. Some change in the tribunal became necessary. A sudden belief arose in the public mind that the jurisdiction was usurped. *Instead of recurring to expedients which might have been rendered effective by their own authority,* the Lords preferred a scheme for which the sanction of the two Houses, as well as of the Crown, was necessary. The Bill for this purpose being thrown out by the Commons, in what a state is the Lord Chancellor for the time being now left!"

Lord Campbell adheres to the project of a Judicial Committee, following the advice of his illustrious predecessor, Lord Hale (see Hale on the House of Lords). This suggestion means something in the nature of a revival of the Court of Triers, who (if they did not originate with) enjoyed, at least, the sanction of our English Justinian, the earliest record we have of their appointment being early in the reign of Edw. I. The "RESPONSES by the COUNCIL" of that period show that the Council and the Triers were the same individuals. We have said that these Triers are still continued. The Journals at the opening of every Parliament show this. But it is probable that not above one or two of these Rois Fainéants are aware of their own existence as such. The Crown has gone on appointing them, and the faithful clerks have persevered in recording them, without a hint given to the nominees, although they are vested with authority of a very high nature—almost the highest; and not only in this country, but in "Gascony and Aquitaine!"

In 1677 a Committee was appointed to consider how far it would be expedient to revive the Court of Triers. No result ensued.

On the 11 Nov. 1852, the following appointments took place (doubtless, we must suppose,) by Her Majesty's command:—

Les RECEVOURS des PETITIONS de la GRANDE BRETAGNE et D'IRELAND.

Messire John Jervis, Chevalier et Chef Justicer de Banc Commune.

Messire William Henry Maule, Chevalier et Justicer.

Messire William Russell, Ecuyer.

Et ceux qui veulent delivre leurs Petitions les baillent dedans Six Jours procheinment ensuivant.

Les RECEVOURS des PETITIONS de GASCOIGNE et des autres Terres et Pays de par la Mer et des Isles.

Messire Frederick Pollock, Chevalier et Chef Baron de l'Exchequer de la Reyne.

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be consulted. Certainly, there have been times when Scotland has had great reason to complain. Generally, those who have presided here have been well acquainted with the Scotch law, as they now are, but there have

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Messire James Parke, Chevalier et Justicer.
Messire James William Farrer, Ecuyer.
Et ceux qui veulent delivre leurs Petitions les baillent dedans Six Jours procheinment ensuivant.

Les TRIOURS des PETITIONS de la GRANDE BRETAGNE et D'IRELAND.

Le Duc de Rutland.
Le Marquis de Bath.
Le Marquis de Ailesbury.
Le Count de Derby.
Le Count de Cardigan.
Le Count de Hardwicke.
Le Count de Malmesbury.
Le Count de Wilton.
Le Count Vane.
Le Count Cawdor.
Le Viscount Hawarden.
Le Viscount Combermere.
Le Baron Saltoun.
Le Baron Redesdale.
Le Baron Ardrossan.
Le Baron Colchester.
Le Baron Penshurst.
Le Baron Lyndhurst.
Le Baron Wynford.
Le Baron Abinger.
Le Baron Raglan.

Touts eux ensemble, ou Quatre des Seigneurs avant-ditz, appellant aux eux les Sergeants de la Reyne, quant sera besoigne, tiendront leur Place en la Chambre du Tresorier.

Les TRIOURS des PETITIONS de GASCOIGNE et des autres Terres et Pays de par la Mer et des Isles.

Le Duc de Manchester.
Le Duc de Northumberland.
Le Marquis de Winchester.
Le Count de Westmorland.
Le Count de Sandwich.
Le Count de Jersey.
Le Count de Desart.
Le Count Nelson.
Le Count de Stradbroke.
Le Viscount de Stratford de Redcliffe.
Le Baron Colville de Culross.
Le Baron Polwarth.
Le Baron Tyrone.
Le Baron Sheffield.
Le Baron Glenlyon.
Le Baron Brougham et Vaux.
Le Baron Bateman.

Touts eux ensemble, ou Quatre des Seigneurs avant-ditz, appellant aux eux les Sergeants de la Reyne, quant sera besoigne, tiendrout leur Place en la Chambre du Chambellan.

With this commendable attention to forms, it were to be wished that greater care had been bestowed upon substance. Throughout the Plantagenet reigns, as well as previously, things went on satisfactorily. But Henry VII. set up the Star Chamber. His son and Elizabeth made light of Parliaments. In her reign an appeal from the Channel Islands was received by the Privy Council,—the first instance of the exercise of independent appellate jurisdiction

been instances in which Scottish appeals have been referred to those who were entirely ignorant of Scottish law. I do not see the noble Earl (*a*) here who has contended for Scottish privileges, but I myself should

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by that body, which Lord Coke calls a Board and not a Court; and which Lord Hale (who treats systematically of all the existing Jurisdictions) does not mention at all; except as being subservient to the House of Lords. Then was the time for the Lords to remonstrate and make a stand, for all foreign appeals lay to *them* by the ancient Constitution (Macqueen's H. of Lds. p. 683.) But they were silent, and thus gradually the Privy Council, from being ancillary, became a rival jurisdiction, and it has been constantly dilating ever since. In the reign of Charles II. ecclesiastical and maritime appeals went to it against the opinion of Lord Shaftesbury, who correctly laid it down that the Court of Parliament, where "His Majesty was highest in His Royal Estate," was the universal superintendent of all inferior tribunals.

Considerably reduced or shaken by these encroachments from without, the Lords suffered perhaps more from their own neglects and mistakes within.

Thus, *first*, they dispensed with their Assistants, the learned Judges, except on grave occasions. This was, perhaps, their greatest error—an error, however, for which the Chancellor or the Government of the day, rather than the House itself, was blameable.

Secondly, they made an order (9th June 1660) that the Judges should not be allowed to speak till they were spoken to; an order entirely without precedent and without authority, especially when we remember whose Court the House is, whose servants the Judges are, and under whose mandate they come there, not to hold their peace, but to give good counsel and assistance *to the Crown.* In the Second Report on the Dignity of the Peerage (note 1. p. 449), it is stated that the order of 9 June 1660, "made on the Restoration of Charles II., and *probably reviving old standing orders of the House* destroyed or lost during the confusion which had preceded, marks the character in which those persons were summoned." The character in which those persons were summoned appears from the writ addressed to them, and the services they performed are shown by the Rolls of Parliament. There is no indication that we can find of any previous order resembling that of 1660; but that order is still enforced; so that a Judge in the House of Lords cannot ask a learned Counsel what book he is citing in argument. The question must be put through the mouth of a Peer.

Thirdly, a fiction, or rather fond fantasy, was devised in the last century, that Peers inherited law by descent, or acquired law by

(*a*) Earl of Eglinton.

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have been ready almost to raise the standard of rebellion when I have read of the manner in which the judicial business has sometimes been transacted. My Lords, I do trust that there is no danger, however, that such times

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patent. The satire of Swift did not prevent the great Lord Chancellor Hardwicke from saying, that if he went wrong in Penn *v.* Baltimore, (1 Ves. Sen. 446.,) his errors would be corrected by a Senate equal to that of Rome itself. In every case that went from Chancery, in his time, to the House of Lords, he was himself the Roman Senate, and affirmed in judicial solitude his own excellent decisions. Yet after this was Blackstone ready to take up the wondrous tale of Peers " bound upon their conscience and honour (equal to other men's oaths) to be skilled in the laws of their country."

The *fourth* neglect, or mistake, was the practice which had crept in during Lord Eldon's time, of dispensing with the Chancellor's attendance, and getting the judicial work done by deputy speakers not members of the House; or, as in Lord Gifford's case, taking one of the Judges and calling him up with a Peerage for the avowed purpose of relieving the Chancellor from the performance of his cardinal duty.

When Sir John Leach and Chief Baron Alexander sat alternately as " Deputy Speakers," to hear appeals in the last year of Lord Eldon's Chancellorship, three "lay figures" (we use Lord Derby's expressive metaphor, *suprà,* p. 583) were associated with them. At the close of an argument, the "Speakers" (not being able to speak) made a sign; in an adjoining room they gave atterance to their opinions, and then returning to the woolsack, resumed their taciturnity. A "lay figure" (who had not heard, perhaps, a word of the argument, and who had not taken the trouble to go with the deputy speaker into the place where that learned person had explained himself) rose and gravely moved that the judgment complained of be "reversed." This mode of satisfying the suitors, and enlightening the inferior tribunals, did not last long; but it lasted long enough to bring reproach on the highest tribunal of the country.

The Chancellor's first duty is to attend the House of Peers; the head of the law sat on the woolsack long before the Chancery was a " Court," and long before the legal College of Lincoln's Inn was founded by Henry de Lacy (*a*).

Fifthly, a certain remissness,—in leaving too much to the Government of the day;—for although Peers are not necessarily profound

(*a*) Per Lord St. Leonards: "I hope I shall never see this House, in its Appellate Jurisdiction, act in any other way than under the Presidency of the Lord Chancellor for the time being." Evid. before the Comm. p. 178.

will again occur, but that we shall have a Judicial Committee from which we shall select proper Judges for every case as it may occur, and that in this manner our jurisdi ction will remain and be usefully exercised.

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jurists, yet are they all interested in the satisfactory administration of judicial business in the House. They ought to see to this, and not abandon it entirely to professional persons. We believe that Lord Derby has the distinction of being the first member of this illustrious body, who, neither being a lawyer nor a member of the Government, felt it his duty to bring forward resolutions affecting the appellate jurisdiction; and he did so on the ground that the Peerage generally had a deep concern in what Lord Brougham calls the "flower of their prorogative." See Life Peerage Debate, p. 422.

If the Lords would but "collect their scattered elements of strength, and revert to their pristine institutions" (*a*), all would be right. Lord Lyndhurst told them, on the 23d June 1851, (see Hansard,) that "the best way to proceed was in the manner that most corresponded with the ancient constitution of the House." This, he would have shown, had he brought on the motion which he promised (*suprà*, p. 579), but that motion was intercepted by the more rapid proceedings of Lord Derby.

All agree that to create a proper court of ultimate appeal is difficult; but in this country the difficulty has been aggravated by trying to keep up *two* courts of ultimate appeal, exercising rival and clashing authority. The effort should be to secure *one* good supreme tribunal, having a large stock of Judges, not all sitting constantly together, but liable to be called upon to do duty as their respective qualifications fit them for the varying exigencies of each case, keeping in view a principle excellently put in a late number of a distinguished publication (*Edinburgh Review*, July 1856), that a "supreme court of appeal should possess an amount of judicial authority and legal weight, exceeding the combined strength of the courts, whose judgment it has to review." The Reviewer (who has evidently thought long and deeply on this subject,) further says that there should be "some members sitting constantly in the Court of Appeal to maintain the uniformity of its practice, and occasionally to take a broader view of the questions brought under the cognizance of such a tribunal. The combination of such minds with some of the Judges engaged in the daily business of other Courts, is extremely important. The Exchequer Chamber therefore is objectionable." By recurring to the original constitution of the House, by summoning the Equity Judges, (*see* the opinion of Sir F. Kelly, *infrà*, p. 665), by recalling the ordinary Council—the Judicial Committee,—by re-uniting them with the body from whom they have been unskilfully and unhappily

(*a*) See "Letter to Lord Lyndhurst, on the House of Peers in its Judicial Character, as it was, and as it is," 1856.

Lord St. Leonards' Speech.

Lord St. Leonards:

My Lords, it is a great satisfaction to be able to rise to speak on this question, and to feel assured that it is in no respect a party question; but, at the

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severed for two centuries, by placing them all again under the same roof, (as recommended by Lord Campbell on the 11th April 1842), and by some other improvements corresponding with the expansion of the empire,—"a constellation of lawyers" (Lord Hale's expression) might be secured to the House of Lords, fitted for the dispensing of every kind of law, and competent to discharge any amount of business. If the Chiefs of the Common Law Courts were relieved from the Circuit, and from Jury trials, they might be constantly in the House, except during Term time. This would be a prodigious acquisition; and it would involve no change; for the Writ of assistance declares that all other things are to be cast aside in obedience to its Summons.

Things rational do not die by disuse. Even a sinful absurdity, Trial by Battle, unseen for three centures, required an Act of Parliament to extinguished it. The contrary doctrine is dangerous where much stands on antiquity. (See Twiss's Life of Lord Eldon, vol. 2, p. 336; Hansard 18 June 1819).

The union of the legal with the legislative power weighs, and has always weighed, in the popular apprehension, giving the Court of Parliament an authority quite peculiar, and differing from that of other tribunals—the difference being one of kind as well as of degree. As to Colonial and Foreign appeals, we doubt whether it would not be an advantage to have them heard in a Tribunal more in the public eye than the Privy Council. Our dependencies should look for justice to the Imperial Parliament.

And here we cite the remarks of Sir John Romilly before the Committee:—"It appears desirable that the Appellate Tribunal should not consist exclusively of Lawyers. It should continue to be the House of Lords in its essence, and not merely in form." The Vice-Chancellor Stuart, in the same spirit, deprecates "any change that would prevent the interference of the Lay Peers;" his Honor, in another place, commending "the number of checks which the present system provides." This cannot refer to the "lay figures," for they are no checks, but proclaim incompetency. Such men as Lord Derby, Lord Ellenborough, Lord Grey, the Duke of Somerset, Lord Stanhope, Lord Redesdale, Lord Granville, the Duke of Argyll, Lord Eversley, and many others, would undoubtedly be of service on appeals, particularly on foreign ones, because errors seen by them in their judicial character would be put by them, as Members of the Legislature, in a train for rectification. Of old, the law was administered where it was made. This was what gave the Court of Parliament a jurisdiction and an attraction distinguishing it from all other Tribunals.

same time, I think noble Lords on both sides of the House ought to be aware that this question cannot be approached so as to dispose of it in a short or perfunctory manner. The time has arrived for an ex-

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About the year 1778, four Peers having delivered their opinions against the twelve Judges on a legal question, Dr. Johnson said:— "Sir, there is no ground for censure. The Peers are Judges themselves; and supposing them really to be of a different opinion, they must, from duty, be in opposition to the Judges." In Lady Radnor's case, (Cruise's Dig. vol. 1. p. 516), by yielding to the pressure of conveyancers, the Peers not only did great injustice to her Ladyship, but decided in opposition to the general principles of Equity as understood in the Court of Chancery; in effect uprooting the ancient Right of Dower, which the Legislature will be asked ere long to re-establish, (see Edinburgh Review, of January 1857, p. 192). When subtleties become too sublimated, then it is that the Lay element may prove a corrective. Justice is better than law—yet is it often sacrificed at the shrine of technicalities. The presence of the Peerage lends dignity to the tribunal. But this supposes that the Peers attend to what is going on. They did so in former times, and exercised over the lawyers a wholesome supervision.

The Appellate Jurisdiction of the Queen in Council has been contrasted with the Appellate Jurisdiction of the House of Lords. The fact is that the principal defects of the Privy Council, as a Court of Appeal, have been corrected by Lord Chancellor Brougham's Act of 1833; but it was long before this tribunal attained to the high reputation it now enjoys. As late as in 1840, Lord Cottenham complained of its want of a head to keep order in its proceedings, its uncertain component parts, the difficulty of getting them together, and its irregular precarious sittings. And Lord John Russell declared in the House of Commons on the 5th August 1840, that "he thought this was a discreditable, if not a disgraceful state of one of the great Courts of this empire." Yet this is the identical Court which has recently received the unqualified commendation of the most eminent members of the bar. The change is mainly due to the care which has been taken by the successive Lords President, by Mr. Reeve the discerning Registrar of the Privy Council, and by the members of the Committee itself,—that no cause should be heard without the attendance of the Judges best qualified by experience, station, and ability to decide it. Still Lord Campbell's objection (*suprà*, p. 612) holds good; and one of Lord Cottenham's complaints is unsatisfied. The Judicial Committee has no chief. The Lord President is not a legal functionary. The members sit at a table, and are less like a Court than any other judicial body in the world.

But to return to the House of Lords. That fabric has traditions to stand upon. The objections which have begotten clamour are

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amination of it. The noble Earl who leads the House on the part of the Government seems to have imagined that a very short time will be occupied, and that we on this side of the House are pledged that there shall

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removeable without organic change, and with but little legislative aid. The two Courts should be reunited. There must be again what Lord Hale calls "a Court as it were within a Court." And it must sit, like other Courts, throughout the legal year, and daily, as it did in the Norman and Plantagenet times.

By an Act 14 Ed. 3. c. 5., a Court formed of a Committee of the House was established, consisting of one Prelate, two Earls, and two Barons, who were to be chosen at every new Parliament. This tribunal, though long out of use, had a wise design, that of obviating the inconveniences which arose from the want of a Supreme Court of Appeal during the recesses of Parliament. There is, therefore, ample warrant for the House sitting judicially after ceasing to sit legislatively.

The Statute suggests that upon certain matters the Courts below did not adventure to decide. The Rolls of Parliament abound in entries showing that where the Judges desired to have a resolution of their doubts, or relief from a too heavy responsibility, they adjourned questions from Westminster Hall to the Court of Parliament, "propter difficultatem;" for it was supposed that here were lawyers who had the deepest erudition, the most varied experience, and the widest circumspection.

The necessity for a "Constellation of Lawyers" in the House arose mainly from *this*, that its decisions settled the law, and bound itself as well as subordinate tribunals. A judgment by the Lords on an appeal or writ of error is conclusive upon all except the legislative power, which, no doubt, may alter it; but how? By altering the *law*, which the House itself cannot do. The theory of the Constitution seems to be that the ultimate appellate jurisdiction is infallible. It cannot err. The well-known case of *Reeve* v. *Long* (Salk. 227; 2 Cruise's Dig. 336) seems in point. There the reversal by the Lords was against the opinion of all the Judges. A general Act was passed (10 & 11 Will. 3. c. 16), altering the law laid down by the House, but not touching the decision. The principle on which the Act proceeded would appear to have been, that what the Court of last resort decides, however inconvenient or unjust, is *law*, and is to be set right only by Parliament. Hence, even where the law Lords differ in opinion,—where they are equally divided in giving judgment,—and where, consequently, as some may irreverently imagine, the soundness of their final determination may be questioned, it will nevertheless be as good law as if the Peers had all cordially concurred in voting it. Thus, in *The Queen* v. *Millis*, 10 Cla. & Fin. 534, Lord Lyndhurst, Lord Cottenham, and Lord Abinger were of one mind; Lord Brougham, Lord Den-

be no delay. I am certain that there will be no unnecessary delay on this side of the House; but it would be a delusion if your Lordships believed that this great question can be forced through the Com-

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man, and Lord Campbell of another. The decision was said to have been but a *negation*, proceeding upon the ancient rule of the law, Semper præsumitur pro negante. But the Court of Exchequer, in *Catherwood* v. *Caslon*, 13 Mee. & Wel. 261, treated this as a light mode of dealing with a judgment of the House of Lords. They looked to the result, and there they found that the House, *as a House*, had given a *judgment;* and then they said, by the mouth of the learned Baron Parke, "that authority binds us." The contrary doctrine, Lord Campbell holds, would endanger titles (*a*). It will be found that the House itself has never revoked what it has once deliberately laid down on an appeal or writ of error. Lord St. Leonards, indeed, is of opinion that although it cannot "reverse its own decisions, it has the power of correcting an error in Law in future cases" (*b*). But, with great deference to his Lordship, let us suppose that the Lords were now, in 1857, to entertain misgivings respecting the principle on which they decided the great *Bridgewater* case, in August 1853 (*c*)—is there any power short of a statute that could alter the law of that celebrated adjudication? And is not the House itself as much bound to conformity as the other Courts of the country? In the recent case of *Cochrane* v. *Baillie*, Lord St. Leonards said (12 March 1857), with reference to a judgment on a Scotch appeal, "That simple naked point was decided *by this House, and is now the law of the land*" (*d*).

The House without the concurrence of the other branches of the Legislature certainly cannot alter "the Law of the Land." This was what Lord Mansfield meant when he said "the absurdity of Lord Lincoln's case is shocking. However it is now Law," and must be followed.—(Douglas' Rep. 695.)

These considerations seem strong in favour of those who wish to protect the House from all possible miscarriages, whether in principle or practice, in substance or appearance.

Decisions below are never cited to the House as *authorities*, because it is bound by no decisions but its own. The Lords, therefore, are careful how they notice cases from other Courts, least they shake or appear to confirm them.

(*a*) See 3 H. of L. Cas. 391, where Lord Campbell said: "My opinion is, that this House cannot decide something as law to-day, and decide differently the same thing as law to-morrow; because that would be to leave the inferior tribunals and the rights of the Queen's subjects in a state of uncertainty."

(*b*) 1 Macq. Reports p. 791.

(*c*) *Egerton* v. *Lord Brownlow*, 4 H. of L. Cas. 1.

(*d*) 2 Macq. Reports p. 541.

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mittee without occupying a very considerable time. I entirely agree that witnesses must be examined, and for the reason I will tell your Lordships. Witnesses must be examined because, however reverently the

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The admirers of "single-seated justice" (if the phrase be English, or has meaning,) will learn with surprise, that when the French Court of Cassation sits, in full conclave, forty-nine Judges are present; that is to say, three Courts, each of sixteen Judges, unite (with a President at their head) to form the Supreme reviewing tribunal of the Empire. And yet it appears that a decision by this formidable combination, pronounced en audience solennelle (toutes les Chambres réunies), does not fix the law (*a*), so as to make it absolutely binding, the French Jurists caring little, or comparatively little, for precedent, and going, or professing to go, all upon principle. See *infrà*, p. 679.

Much was said in the Committee as to the number of Judges necessary, or proper, to constitute a tribunal of ultimate appeal. Very valuable opinions on this point were delivered by witnesses entitled to the greatest attention. (See *infrà*, p. 655.)

In a late case at Lincoln's Inn (19 July 1856), the Court being composed of only two Judges, Lord Justice Knight Bruce gave his sentiments as follows:—"The Lord Justice Turner has, with the Vice-Chancellor, come to a conclusion at which I have been unable to arrive. Finding that my Brother's conclusion *renders my opinion immaterial*, I wish the parties not to be delayed on my account. Accordingly, without my concurrence, as without my dissent, the appeal must be dismissed." The course taken by Lord Justice Knight Bruce, though ingenious and well intended, (under difficulties created by the Legislature,) raises the question discussed, *infrà*, p. 665, 666. Mr. Roundell Palmer holds that "in Courts subject to appeal, the reasons which influence the minds of the different Judges should appear, in order that they may be considered and reviewed."

The people of Scotland have felt and evinced a feeling characteristically "fervid" on the subject of their appeals (*b*). They all, however, admit that the Court of last resort must be in the metropolis of the Empire. Lord Cockburn, in his Memorials, owns that Scotland itself is too narrow; while the profound Sir Islay Campbell acknowledges the benefits which the adjudications of this House have conferred upon Scotch jurisprudence.

(*a*) This was mentioned by Lord Brougham in the Committee. *See* the Evidence before the Comm., p. 16, *sed vide* the remarks of M. de la Chere, *infrà*, p. 683.

(*b*) "Suppose (says Lord Chancellor Brougham) a decision of the thirteen Judges of Scotland appealed against. It was to be adjudicated upon by a single individual, who was, perhaps, as ignorant of the law of Scotland as of the law of Japan."—*Times* 3 Sept. 1831.

appellate jurisdiction of this House has been treated up to a recent period, at this moment, and for a short time before the period at which I am addressing your Lordships, it is impossible to deny that certain chan-

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Those benefits are sometimes as conspicuous in affirmances as in reversals. This is shown by Lord Brougham's judgment in the famous Warrender case; a judgment which verifies the remark of Mr. Hume that in matters of reasoning the arguments, when just, can never be too refined.

If it be probable that the assistance of a Scotch Judge would be of use, it is certain that the exclusive devolution upon him of Scotch business would be mischievous, and the bare imagination would be as bad as the reality. This would make it necessary to secure strong colleagues.

One source of dissatisfaction for the last forty years has been a subordinate tribunal in the House called the Appeal Committee, which is appointed to consider and report on matters of practice. No one can tell when this little court will convene, or, with certainty, who may compose it. Lord Cranworth since his appointment to the Great Seal has always sat in it. Lord St. Leonards never once came near it. The matters generally before it are indeed unworthy of such high cognizance; yet, to do them properly is a work of time and of labour and care.

A petition presented to the Appeal Committee on the first day of a session may not be disposed of till the last, when the object has, perhaps, become impracticable, or is no longer desired by the parties.

The Appeal Committee expires with the session; and if a petition has received no decision, the application, if persisted in, must be renewed by a fresh petition (involving fresh fees) in the ensuing session.

No Counsel attend the Appeal Committee—nor is the business generally of such a kind that Counsel could much assist in it.

Sometimes the Committee gives no decision itself, but, when perplexed, reports that the matter should go back to the House, —or, what is worse, that it should be argued along with the merits at the Bar. Parties are, therefore, obliged to be prepared, perhaps, at great expense, with an array of counsel and a pile of printed papers on the merits, although it may turn out, after ten minutes talk at the Bar, that the merits cannot be gone into.

The business before the Appeal Committee is occasionally important *to the parties;* but the bulk of it is mere routine, with which the Officers of the House could deal better than a Committee of Lords, who ought to assemble only upon matters of some weight or doubt; and even then, the Officers of the House ought first to examine and decide. If the parties acquiesced, there would be an end of the affair. In the event of dissent, the Officers should prepare a statement of the point, with the precedents and authorities, so as that the Appeal Committee could make resolutions with satis-

Lord St. Leonards' Speech. nels of public information and of public censure have been directed against the appellate jurisdiction of your Lordships. Nothing can be a fairer subject of discussion among all persons than the question of

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faction to themselves, and with a constant eye to *uniformity of decision*, so invaluable in the practice of Tribunals.

The Appeal Committee originated with Lord Eldon, who, persecuted for arrears at Lincoln's Inn, grudged every moment spent upon the woolsack, or on the judicial business of the House. He thought to get some relief, however small, from the Appeal Committee. The same motive led to the appointment of Lord Gifford as Deputy Speaker, in 1824 and to the more curious nomination of the Dummies in 1827 (ante, p. 622). Thus, for the convenience of one man, (a good man certainly, let us even say a great man,) a Tribunal, the most illustrious in the world, and coeval with the monarchy, was made for a time, we are constrained to say, a little ridiculous (*a*).

A singular notion is entertained that the Committees of the House of Lords have no power to swear witnesses, and this because the Committees of the other House have no such power. But the House of Lords is the Court of Parliament; the Commons are only a representative assembly (*b*). The Lords' Committees are an effluence of themselves. The House cannot look judicially at testimony not coming before it through the medium of an oath. The old Court of Triers examined witnesses. That they put them upon oath, cannot be doubted. The power of swearing is incident to the judicial office, and comes from the Crown.

But then it is said that a Committee on a Legislative Bill is not a Judicial Committee. Why not? When the House takes evidence on a Legislative Bill, the evidence is on oath, and the pro-

(*a*) From 1806 to 1828, the first Lord Redesdale sat regularly in the House of Peers, advising on judicial business. In learning, some have thought that he was equal to Lord Eldon. He had powers of exposition too, and excelled as a legal writer. The laborious inquiry into the Peerage was carried on under his superintendance; but he could not have written the Reports; for these are contradictory and often inaccurate. It is singular that the Scotch lawyers, in acknowledging their obligations to Lord Eldon, (Mr. Moir, for example, in his able pamphlet,) forgot Lord Redesdale, who assisted Lord Eldon in every one of the great Scotch cases. These two legal luminaries somehow contrived always to agree in their judgments,—even in *Innes* v. *Jackson*, where Lord Eldon's decree was reversed. 1 Bligh's Rep. 173.

(*b*) It may however be a very fit thing that the House of Commons and their Committees should have power to put witnesses on oath. The member for Midhurst (Mr. Warren) has given notice of a motion on the subject, undoubtedly one of great importance, regard being had to the magnitude of the interests disposed of on testimony given by witnesses unsworn and sitting at their ease on a level with the Judges.

the appellate jurisdiction of this House, the manner in which it should be constituted, and the way in which Appeals should be conducted; but it ought to be approached with the greatest respect and deference, not

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ceeding judicial. The House does not change its character with the function it performs. It is still the Court of Parliament.

If this be so, why are scores of railway and other witnesses sworn before the House, while causes are being heard? Why is the amenity of the Court ruffled by crowds of eager and burly persons pressing upon the Bar while learned counsel are speaking, or while the Lords are, perhaps, engaged in the very act of delivering their judgments?

On the 13th March 1857, Lord Campbell gave notice (*a*):—

"That with the view of expediting and generally improving the proceedings of Select Committees, he should move a standing order to the effect, that the oath to witnesses should be administered not necessarily at the bar of the House, but when deemed fit, before the Select Committees. At present the greatest inconvenience resulted from its being necessary that witnesses should be sworn at the bar of the House. Judicial business was sometimes interrupted in consequence of a crowd of witnesses being collected at the bar; and the expedient was occasionally resorted to of hearing them unsworn before Select Committees, and swearing them afterwards if it were thought necessary." To this the Lord Chancellor replied, by observing that he "did not see his way quite so clearly as his noble and learned friend to the assumption that their Lordships could delegate to other persons the power of administering an oath. It might be matter for consideration whether an Act of Parliament would not be necessary. As at present advised, he should feel a difficulty in drawing an indictment against a person who had taken a false oath before a Select Committee of their Lordships' House exercising a delegated power to administer oaths."

When a Commission is issued by a Court of Justice to a person not having a judicial character—an English Barrister or Scotch Advocate for example—he examines the witnesses upon oath under a delegated authority. This authority may be either per expressum or by implication. In either case the Commissioner executes his function on the principle that the evidence he is to report must have that sanction which the Court itself, if examining the witnesses, would impose. He is to consider himself, therefore, pro hâc vice, as the Court.

When, again, a Commission is issued by a Court of justice to a person who *has* a judicial character, but no antecedent jurisdiction over the subject matter, he also administers the oath under a dele-

(*a*) *Times*, 14 March 1857.

Lord St. Leonards' Speech. only to individuals but to this House, the Court of appeal that has so long existed as an appellate jurisdiction, and has so long ruled the rights of all classes with respect to their property. My Lords, I shall be

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gated authority; because, although his office is judicial, he is not entitled to swear the general public.

An oath, however false, will not amount to perjury if the person administering it, although a Judge, is exercising an assumed or volunteer authority; Hawk. P. C. b. 1. c. 69. s. 4; 2 Russ. by Greaves, 599.

If the House of Lords were to grant a commission to two Judges of the Court of Queen's Bench, say in a Peerage case, those learned persons having no antecedent jurisdiction, would administer the oath, not by their own, but by a derivative authority; yet the witnesses, if they swore falsely, would be subject to the pains of perjury, just as much as if they had given evidence at the trial of a cause before the Chief Justice of England and a Jury.

In the Lovat Peerage case, the House of Lords granted a commission to two Judges of the Court of Session to examine witnesses in Scotland. The Petition for this Commission, 24 April 1826, stated that it was in pursuance of "former precedents." The Commission was issued with the assent of persons not very likely to be wrong in their law—Lord Eldon and Lord Redesdale. The power given was "to examine witnesses upon oath." Many persons accordingly were so examined under that Commission. The oath administered was in pursuance of the Commission. The power to administer it came from the House of Lords; the Scotch Judges having no antecedent jurisdiction over the subject matter, and no right to swear persons except upon questions brought before them secundum cursus curiæ.

But it may happen that a Commission is issued to a person or persons not only vested with a judicial office, but vested also with an antecedent jurisdiction over the subject matter. Thus, upon references made by the Court of Chancery to the Master, the Master examined all the witnesses upon oath, not under any authority imparted to him by the reference, but ex proprio vigore by virtue of his office, an office in its nature judicial, and giving him an exclusive authority to execute the reference.

This comes near the case of the House making a reference to members of its own body, who have in them not only the judicial character but the antecedent jurisdiction.

If these suggestions are well founded, they go to establish the power of a Committee of Peers to put witnesses on their oaths with reference to matters as to which those Peers possess independently an original or inherent jurisdiction.

By virtue of a Commission from the House, in the Lovat case, witnesses were examined upon oath in a remote corner of Inver-

very anxious that the leading counsel who have practised and are now practising at the bar of your Lordships' House should be heard as witnesses, and examined before that Committee. Let us hear from

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ness-shire; and it is presumed no one will doubt that, if those witnesses had prevaricated, they might have been indicted for perjury, unless we suppose that Lord Chancellor Eldon and his profound coadjutor Lord Redesdale miscarried in the advice which they gave to the House.

Then where is the difference between an appointment of a Commission and a Reference to a Committee? There *is* a difference, and a considerable one too; but it is all in favour of the Committee, who inquire, indeed, by direction from the House, (of which they are a part), but who swear witnesses by their own authority, or by a power more easily communicated to them than to strangers, a power to be exercised, not in the Provinces, but in the Palace of Justice, and almost within hearing and sight of the woolsack and the throne.

The question has been made a little difficult by the course taken for some time under an impression that Peers could not carry with them their judicial faculty and their jurisdiction out of one chamber of Parliament into another. And this but shows the danger of tolerating new practices without due consideration of their effects. The Lords, we believe have, the remedy in their own hands, if they would but use it.

The theory and working of the feudal Parliaments stood with the reason of mankind; but, owing to the long intermissions of their sittings during the Tudor and Stuart reigns, the original practice came to be forgotten; for the rolls and journals were not printed in those days: and when Lord Chancellor Clarendon returned from Bruges with his Master and the Great Seal in 1660, there was no one to tell the old and rational method of proceeding. Hence the deviations.

The House, however, rests securely on its ancient basis; and we may say of it what Andrew Fairservice well said of the Glasgow Cathedral:—"It's a brave Kirk—nane o' yere whigmaleeries and curliewurlies and opensteek hems about it,—a' solid, weel-jointed masonwark, that will stand as lang as the warld, keep hands and gunpoother aff it."

[The substance of the preceding Note has been put together very much at the suggestion of Sir John Lefevre, who most kindly placed materials at the disposal of the writer, with a view to the inquiry of last Session. Passing strange, it seemed that Sir John Lefevre was not examined before the Committee; and, perhaps, more inexplicable still, that Mr. Reeve, the experienced regulator of the Judicial Committee, was not asked a question].

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their lips, who are certainly competent to speak upon the subject, what are the objections to the jurisdiction as it is now exercised, and we shall then be better able to judge whether any and what remedy can be applied to those evils which they will point out.

Her Majesty's Solicitor General spoke in another place (I speak only from what I have seen, and I dare say the expressions were exaggerated), with his authority as a member of the Government and a leading member of the bar, of the manner in which appeals to this House were conducted, which must infallibly lead most men to doubt the propriety of this House retaining its jurisdiction; or, if it does not, cast censure upon the persons who undertake the duty of advising your Lordships in that respect. Now, I am about to read a few words to your Lordships from a publication which contains a report of all the cases in all the Courts, and which is usually exceedingly well conducted, and with great propriety; but, taking up this question of Life Peerage, they make this observation within the last week or ten days, as to the manner in which the judicial business of the House is conducted: "That an accession of strength is required in this quarter no one, we should have thought, would doubt; and we cannot assent to Lord Lyndhurst's assertion that the House of Lords as a Court of Appeal is sufficiently strong. It is unsatisfactory to the counsel who practise before it; to the suitors whom they represent; and to the public at large. The administration of justice should not only be unsuspected, but should be above suspicion. It is a serious evil to have the highest tribunal of appellate jurisdiction in this country—the last resort of wearied and almost exhausted suitors—exposed to obloquy and contempt, not only from the lay portion of the community, but even from lawyers, with the Solicitor General at their head." I rejoice, therefore, that this Committee has

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been appointed, if it went no further than to ascertain what are the grounds upon which these arguments are brought forward.

My Lords, I have practised at the bar of this House probably to as great an extent as almost any other man has done, and I have seen the administration of justice, and have been affected, as counsel, by the administration of justice in this House, for a very long period before I left the Bar. I will take upon myself to assert that, although more learned men may have assisted your Lordships in coming to a decision, there never has been a period at any time in which the causes have been heard with more attention by those who have assisted your Lordships with their advice—there never has been a period in which more attention has been given to the hearing of the cases; in which more attention has been bestowed upon the decision of the cases; or in which more elaborate reasons have been given for those decisions than at the present period. Let us, therefore, know, let the House know, and let the country know what are the grounds of the charges which are thus brought, not simply against the jurisdiction itself, but evidently against the exercise of the jurisdiction. The words which I have read to your Lordships, if they bear any meaning, rather point to the latter than to the former. What is the meaning of saying that the administration of justice should be unsuspected? The administration of justice in this House is unsuspected. There is not a man in England who suspects the administration of justice in this House. There are persons who may differ from the opinions expressed by the noble and learned Lords who assist you. They may be unequal to the task; there may be more learned persons in existence; but that would not justify any such observations as I have called to your Lordships' attention. It appears to me, therefore, a matter of the highest

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necessity that a Committee should be appointed, in order to see whether the public discontent, as far as it can be said to exist, is or is not well founded.

I have a right to say, speaking for myself only, that in the discussion of the question of Life Peerages I was wholly unactuated by any desire to resist all alteration of the jurisdiction of the House as a Court of Appeal. It has been said that those who have opposed Life Peerages have evinced a determination to maintain the jurisdiction of this House as it now stands, altogether untouched. Now, I have, for the last twenty-five years, taken every possible opportunity in the other House of Parliament, and wherever I have had the power of calling the attention of the Government and the public from time to time to the, nature of the jurisdiction of this House, and requiring, as far as I could, that there should be an alteration in the manner in which it should be exercised, never for a moment thinking that the jurisdiction should be taken from the House; all I desired was that it should be improved, that is, that the exercise of it should be improved; but I am sure if your Lordships desire to strike from under you one of the main pillars upon which the House rests, you will denude yourselves of the appellate jurisdiction. Depend upon it, the greater portion of that weight and authority with the public would cease, and you would not be the House you now are, but your hereditary quality would be affected and diminished by your being deprived of that which, while it is an ornament to the House, can never be so unless it is useful to the country.

My Lords, in the year 1830, after I became Solicitor General, I stated to the other House of Parliament what the measures were which that Government to which I had been attached intended to bring forward I particularly touched upon the Court of Appeal, and I advised the creation of what I called an Equity

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Court of Exchequer. During the whole of my life at the Bar, I have objected to what my noble and learned friend has alluded to, an appeal from a man to the same man. I recollect perfectly well making use of this observation, that a man in appealing from Philip drunk to Philip sober had some chance, but after the Lord Chancellor, sitting in his own Court, has upon careful consideration decided a case as he thinks right, to bring the same matter before him, sitting alone in this House, and ask him to reverse his decision, never can be a wise course to follow. I have no doubt he is desirous of doing what is right, but I take the liberty of observing that, although I have no doubt of his good intention, yet it never can be carried into effect, because the learned Judge thinks he is right, and he maintains his opinion, having been satisfied in the Court below of the facts and the law of the particular case. Now, my Lords, that state of things does not now exist, nor has it existed for a considerable period, because there never has been a period for a considerable time in which the Lord Chancellor has sat here without being able to have other assistance; and no Lord Chancellor would sit and hear an appeal by himself without calling for assistance if he could obtain it (*a*).

The Lord Chief Justice refers to a case in which lately he was kind enough to come and assist at the hearing of an appeal. It was an appeal from a decision of my own in the Court of Chancery, and which involved many important questions of law and equity, a very fair subject for appeal. My noble and learned friend on the woolsack thought we had better have a

(*a*) Lord Hardwicke when Chancellor was the sole Law Lord in the House. He could have called in the Judges; but he rarely, if ever, did. How often did Lord Eldon summon them? Mr. Leahy, writing about 1827, says:—"I believe that on an average the Judges do not sit in the House of Lords two days in a whole Session of Parliament." Lord St. Leonards himself, when Chancellor, sat a good deal alone; and on Scotch causes too. *See* his Lordship's own remarks, *infrà*, p. 647.

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Common Law Judge. Of course I acquiesced. There was my noble and learned friend near me, my noble and learned friend on the woolsack, and my noble and learned friend the Chief Justice, and myself. The cause was heard, therefore, besides the Judge, from whom the appeal came, by three other Judges. Elaborate opinions were delivered. My noble and learned friend stated his opinions. I stated my opinion, but being from a decision of my own, I thought I was bound to give to the subject the most deliberate opinion in my power. I think my noble and learned friend on the woolsack did the same, and the result was that the judgment was affirmed unanimously. I wished to explain this to your Lordships, for the purpose of showing that as justice is now administered in this House, the abuse which has been complained of, of appealing from a man to the same man, does not exist. I admit it to be an abuse, but it does not take place, and therefore the practice of this House is not open to that objection.

There has been great misunderstanding, as it appears to me, in regard to what has taken place in this House upon the hearing of appeals. I believe there has been considerable dissatisfaction expressed, that where two noble and learned Lords have been sitting together and have differed, the decree below has been affirmed upon the opinion of one only, and it is believed, I rather think, that that has gone to a considerable extent. There never was a much greater mistake. During the three sessions in which I have sat as a Law Lord along with my noble and learned friend on the woolsack, we have heard together, I think, up to the beginning of this session, 81 cases; in 71 of those cases the Law Lords were agreed, and they were, therefore, either affirmed or reversed, according to the unanimous opinion of the three who heard the case, because my noble and learned friend above me scarcely ever misses an attendance, unless he happens to be

abroad or has engagements of a pressing nature. Usually there are three Law Lords present. Now, in point of fact, I have had the misfortune to differ from my noble and learned friend on the woolsack, I think, altogether in ten cases, so that there are 71 cases in which we have agreed, and ten cases in which we have disagreed.

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Now, let us see what the effect of that is, as giving rise to any complaint on the part of the suitors. One case was the great Bridgewater case, and therefore we may put that upon one side. My noble and learned friend was opposed to all the four Law Lords, including the late Lord Truro, but that throws no reflection upon my noble and learned friend's opinion at all. No one ever thought so or said so, because he had the great authority of the Judges agreeing with his opinion. But the four other Law Lords, according to the best opinion they could form, agreed in an opinion contrary to that of the Judges, and therefore against my noble and learned friend; but, as I have said, without the slightest idea on the part of any man, that that derogated from the respect and deference which is due to my noble and learned friend. Putting that case upon one side, there would be nine cases in which we have differed. In one of those cases, my noble and learned friend above me agreed with me, and the consequence was, I think, that the case was affirmed upon the opinion of two against my noble and learned friend. There could be no objection to that, of course, because we sit here for the express purpose of giving our opinions. There were four other cases in which I unfortunately differed, both from my noble and learned friend on the woolsack, and my noble and learned friend near me. Those four cases were decided according to the opinions of the majority. There was a majority against me, and my opinion was overruled There was no harm accruing to the suitors, therefore

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you cannot have a better tribunal than three, if you have competent men, because it ensures a certain majority, which having four does not, and therefore if the men are competent, which the public and your Lordships' House and the profession must best determine, and if they are careful and really execute the duty they undertake conscientiously, as they are bound to do, and have to answer to God and man for doing, you cannot have a better tribunal. So far as I have stated to your Lordships, you will see that no harm could be done, and no man could complain.

Then there are four cases of disagreement. My noble and learned friend on the woolsack and myself sat alone upon four cases, in which we differed; the result of which was, that my noble and learned friend affirmed two—two were affirmed according to his opinion, and two were affirmed according to my opinion. Now there is nothing singular in that. It is impossible that two men should sit together who are honestly discharging their duties, and competent to consider the very complicated cases of fact, and the difficult cases of law, which come before your Lordships' House, without ocasionally differing. The opinion of each must be, of course, supported, if they desire to stand well before the profession to which they have the honour to belong, by elaborate judgments, showing, whether they are right or wrong, why they hold a certain opinion. It is not simply coming and saying, I disagree to this or to that, but after communication with each other, each retains his opinion, and gives elaborate reasons for it. Now, my Lords, it has been supposed that there is no decision if two Law Lords sitting together should differ. That is not so. There is an absolute decision; for first of all, the question is put, that the decision below shall be reversed. Then it is put that it shall be affirmed, and in point of fact, the decree below is affirmed, and that

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upon an actual decision of the House. The decision of the House is that it shall be affirmed. Now, though I do not at all approve of a tribunal composed of two persons only, yet it is not open to the great objection which is supposed. The Chancellor has sat here alone. When I myself had the honour to occupy his seat, I sat here for a considerable period without any assistance, and had to decide cases without any assistance, but I never heard of there being any disapprobation expressed. My noble and learned friend on the woolsack has had to sit by himself without the slightest assistance. Supposing, on the contrary, any other Law Lord to be sitting with him, and to differ from him, if he was for affirming the decree, he would affirm it just as he would if he sat by himself. But only observe how much more his opinion is entitled to deference and attention, when he knows that another Law Lord differs from him in opinion, and is ready to state his opinion, and to give his reasons for that opinion, than if he sat alone and wholly unassisted. The House must not suppose that when my noble and learned friend and I differ upon any occasion, we come down to this House to give adverse opinions without consultation. When I find myself in the unfortunate predicament of differing from my noble and learned friend, I communicate to him what my opinion is. I state the grounds of it, but, at all events, I put him in possession of the grounds upon which I entertain a different opinion, and then examining them with attention, and addressing himself as a lawyer to the subject, he comes to a conclusion upon it. Remember, my Lords, that his opinions are reported, and sent forth into the profession, and the profession will hereafter talk of him as a great lawyer, or a lawyer not of great eminence, according to the soundness of his decisions. For now and hereafter it is a matter in which they pledge their reputation, whenever they

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pronounce an elaborate opinion in this House, and to differ is inevitable. It would be very desirable, and nobody would desire it more than I, that the Lord Chancellor for the time being, should, if I may so express it, rule and govern the decision of your Lordships' House in appeals; but it is impossible that it should be so, if other noble Lords disagree with him, unless they merely follow his leading. That would not be satisfactory, and there would then, indeed, be an outcry. And a man who could command the opinions of others, and induce them to follow him, must have such a knowledge of law, and such a commanding intellect, as belongs to none of us. The truth is, my Lords, that this is not an age of great men; but the truth also is, that taking men in any condition of life, in any profession, with equal opportunities, there is not that great superiority in one man over another; that is, a certain number of men directing their attention to the same subjects will come so nearly to each other in these days, that it is scarcely possible for any man to step out of the ranks and take the lead; almost all of those around him are of the same calibre, and whatever he may think of himself, his compeers are too much on an equality with him, in point of intellect and attainments, for him to take a commanding position.

When we look at the nature of this jurisdiction, I would impress upon your Lordships that the whole evil of the differences of opinion which have arisen between my noble and learned friend and myself, without detracting from his authority, if it be so considered, as Lord Chancellor, has amounted simply to this, that two cases have been affirmed upon my judgment, which, if heard by my noble and learned friend by himself, he would have reversed. Whether they were rightly affirmed by me or not, it would be great presumption in me to say, but there was nothing singular in that; and there has never been any dif-

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ference of opinion without elaborate reasons being given on one side and the other, as well as consultation, and the utmost possible attention is always given to any case upon any judgment in this House.

My Lords, when fault is found with the jurisdiction of two Judges, let us see what has been done, and what the opinions have been or are at this moment of Her Majesty's Government, and what have been the views of preceding Whig Governments. The Court of Appeal in Chancery was established by the Whig Government. And how did they constitute that Court of Appeal from the decisions of the Vice-Chancellors and the Master of the Rolls? Why, they constituted it of three. It might be the Lord Chancellor and the two Lords Justices, but the Bill expressly authorizes the Lord Chancellor to sit alone, and it authorizes the Lord Justices to sit alone. And what is the result? That in 99 cases in 100, the Lords Justices do sit alone; but they are constituted by Act of Parliament. But in creating that jurisdiction, the Government of the day created it so as to give the power to two Judges only. At present there are two (and two more learned persons and more admirable Judges could not occupy that bench), and if, as it frequently happens, they disagree, the one being for the affirmance, and the other intimating that he does not quite agree or does not take the same view, it is not necessary for him to say anything upon the subject. Now, the Act of Parliament itself, to which I have referred, giving the jurisdiction to the two, expressly states that if they differ, the affirmance shall be on the vote of the one who is the qualified leader, and it is right that it should be so. As the decision of the Court below was come to by a court of competent jurisdiction, in the Court which is created in order to dispense justice in the case of an appeal from the other Court, it must be shown that the decision was wrong. Now, if the

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appeal is to two of those Judges (and they are of equal authority, as we are), and one thinks the decision wrong, while the other thinks it right, why, then there is the decision of the Court below, and the decision of one of two co-equal Judges in favour of the decision of the Court below, being at the same time aware that his learned brother is of a different opinion, and having, as it were, tried his own opinion upon the touchstone of the others. My Lords, that therefore shows not only what has been done, but what is now the opinion of Her Majesty's Government. At this moment there is a Bill introduced into the other House by a portion of Her Majesty's Government, namely by the Solicitor-General for Ireland, for the transfer of the business of the Encumbered Estates' Court to the Court of Chancery, and a new Court of Appeal is, by that Bill, proposed to be created; but I cannot at all see the necessity for such a tribunal. Having been Lord Chancellor of Ireland for five years, my opinion may possibly be considered of some authority on the subject. Having sat there for five years, and having been intimately acquainted with the business and the nature of its difficulties, I never found any trouble in disposing of all the business, in hearing everything upon the paper, including the appeals from the Master of the Rolls, without any human being ever thinking of a new Judge being required to sit with the Lord Chancellor. But this Bill, as introduced, actually authorizes the creation of a new Court of Appeal, consisting of the Lord Chancellor, an Ex-Chancellor, if one can be got, and if not, a Common Law Judge, to be taken from his Court, knowing nothing of equity; and if one of those two persons cannot be obtained, then the Government are to appoint a barrister of fifteen years' standing. Then the appeal will go to a Court constituted in a most objectionable manner, because the Ex-Chancellor or the Judge of the Com-

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mon Law Court, constituting that Appeal Court, is to act only during pleasure; and I must say, that I thought it was a matter that was entirely settled in England, that no men were to sit as Judges, deciding upon men's properties, who sat only during the pleasure of the Crown.

Now, my Lords, if that Court were to be so constituted, it would consist of two persons, the Lord Chancellor and the new Judge. That new Judge would be appointed during good behaviour, and so far right, in the first place; but then the authority of the Lord Chancellor would be detracted from in a most fearful manner. I never heard that there was any objection raised to the Lord Chancellor of Ireland sitting to hear appeals. I feel perfectly satisfied that no such objection was made whilst I was in Ireland and I have not the slightest reason to believe that any objection has been made to the present Lord Chancellor. But to put another Judge alongside of him, would be to create the very embarrassment under which we have been labouring; it would introduce that very difficulty that I referred to, to have another Judge of inferior power placed alongside of him; for if that Judge should be for affirming the decision of the Court below, he might sit alongside of the Lord Chancellor and overrule him. Your Lordships see, therefore, that what seems to have struck the public mind in regard to this power being confided to and exercised by two persons, does not seem to have pressed very heavily upon either former Whig Governments or the present Government; for there is an Act of Parliament, providing an exactly similar tribunal to that of your Lordships' House, and there is a Bill before the other House for the express purpose of unnecessarily, as it appears to me, creating the very counterpart of that which is now objected to.

My Lords, my attention has been directed to the

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subject of the constitution of appellate tribunals, and very seriously directed to it at different periods for twenty-five years; and, perhaps, I may be allowed to recount in a few words the occasions upon which I have brought it forward, in order to show that at different periods of my own professional life I have desired that the appellate tribunal of this House should be as perfect as possible. In the year 1830, I brought the question before the House of Commons, and in the year 1835, when Lord Melbourne put the Great Seal in Commission, I wrote a public letter, in which I particularly pressed upon him the necessity that existed for a change in cases of appeal to this House, and that it could no longer be delayed. Then, in 1841, in the other House of Parliament, I moved resolutions in regard to the hearing of appeals, and the jurisdiction in appeals, in which I proposed to alter the appellate jurisdiction of this House. I brought in a Bill founded on those resolutions. They were read twice; and I brought in a Bill which was also read a second time. I proposed at that time what I thought would be, or probably might be accepted as an improvement, namely, that the Lord Chancellor should have constant assistance, and that it should be in the nature of two persons to be appointed by the Crown, and to be called Lords Assistants, and that they should sit with the Lord Chancellor in this House. If they were Peers, of course they would have voices in the decision; but if they were not Peers (and they were not necessarily according to that plan, to be Peers), they should still be at liberty to speak and to declare their opinions in the House; but to have no voices if not Peers. I will not vindicate that at all, though I think I could state good reasons why it might be adopted; but this I will state, that it is one of the greatest problems that ever came before this House, what shall be the

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alteration made, bearing in mind that you have to preserve your own right, as regards the actual voting, and on the other hand, that you want legal assistance and constant legal assistance, because that great benefit may be derived from a Court of Appeal is undoubted. Men want to know what the law is, and if different persons are administering the law at different periods in the ultimate Court of Appeal, you never can have those fixed rules laid down which assist mankind, and prevent, by the certaintyof the rules, hundreds and thousands of vexatious suits. This is what the subject has a right to expect at your hands. If anybody has a plan matured, he has an opportunity to present it now. But what are the difficulties that surround it? I could suggest half-a-dozen; but I could not suggest the best plan of obviating them, and I do not know anybody else that could; but that is no reason that we should not try. But let me assure the noble Earl that if there are different proposals, we are bound to hear all of them; for if this matter is hurried,—if you come to a decision upon it, and set some scheme to work, and it breaks down, which it will, unless something is adopted after very great deliberation,—you may rely upon it that the evil which you inflict upon the House and upon the country will be very great; but that is no reason, I entirely admit, that you should not avail yourself of the opportunity of examining different learned persons to know if the House has fallen in the estimation of the public, where the evil lies, and what it is. Then we shall see whether we can decide upon the matter directly; but depend upon it that the remedy has not yet been hit upon by any human being; for I have examined every one of those suggested. After the Bill to which I have referred was read a second time, I had occasion in the year 1849, to publish a work containing an examination of the legal decisions of this House for a

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very considerable period, and in the introduction to that book I stated this question. I stated there all that had ever been offered with a view of improving the appellate jurisdiction, and referred to all the different steps that had been taken with the view and hope that something might be done, and I am entitled to say that for the last quarter of a century no man has been more anxious than I have been myself to improve the jurisdiction of this House. I have given it the most constant attention, and the most anxious deliberation; I have been in the habit of sitting here four days in the week, and I have given to the cases an amount of consideration and of time which has not been surpassed by any member of your Lordships' House, when this House has been sitting on appeals, and I have not been able to attend to the ordinary business of the House, because I have devoted my whole time to the legal business of the House. It is, therefore, with great regret and some surprise, that I find the jurisdiction of this House spoken slightingly of by those who have had recourse to it. My Lords, I will only detain you by saying that I have great respect for the suggestion of the noble Earl and my noble and learned friend, but I am bound honestly to say that I am quite sure that the proposal of referring to a Select Committee of this House this most important subject will never be found to answer. I can assure your Lordships that there are very grievous complaints that in the Judicial Committee of the Privy Council a report is required to be drawn out and presented to Her Majesty, and there has been a considerable movement, and there is now a considerable desire, that the law in that respect should be altered, and that they should be allowed to give directly their judgments, as this House does; and it would be to strip the House at once of its highest privilege if that practice were altered. The House has exer-

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cised, for many years, this jurisdiction, and that very circumstance gives weight to your Lordships' decisions. I am perfectly satisfied that the plan proposed cannot answer, and, therefore, it will not be in my power to support the motion of my noble friend; but I will attend the Committee with every desire that a man can have to improve the jurisdiction of this House, if it be possible; and it must be a very wise person indeed to point out what with safety may be adopted. But there is one consideration which gives me very great reason to hope, and it is this—the unanimity of feeling which prevails on both sides of the House, and that noble Lords, in the consideration of this question, are wholly unprejudiced by party feeling or rivalry. If we meet, we shall meet upon common ground as mutual well-wishers to the Constitution, using our best endeavours to make it as excellent in working as it is in theory, and that the real interests of the country may be promoted by the inquiry.

Lord Brougham's Speech.

Lord BROUGHAM:

My opinion upon this question, an opinion entertained for many years, has received very great confirmation by what has passed on the present occasion; and I hardly think I can state the difficulties in as strong terms as the short controversy that has taken place to-night entitles me to state them; nor do I think that I shall be considered in the least degree to differ from my noble and learned friends, in the views which they have taken, if I wholly abstain from now entering into it. If I purposely abstain from going into any one of the topics which have been so ably handled by my noble and learned friends who have preceded me, it is not at all from underrating the great value of their suggestions, and it is much less from underrating the paramount

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importance of the subject; but it is simply because I consider that it would be inconvenient to anticipate the inquiries of the Committee, and to state at present what my impression is, either of the nature of the defects of the present Court of Appeal, or still more the nature of the remedy to be applied.

My Lords, it is from no short consideration of this question that I come to the conclusion, either of its importance or of its difficulties. I have been for upwards of twenty-five years a member of this Court of Appeal, sitting as a Judge of Appeals, and I was at the bar the same number of years, and consequently I may well say, as my noble and learned friend who spoke last said, that my attention is not now for the first time directed to this question. I hope and trust that no sensitive feeling will at all relax the disposition of your Lordships, or the determination, I may say, to enter fully and speedily into the inquiry by all the means by which that investigation may be most successfully and fruitfully conducted, by the examination of documents, of decisions, of former proceedings of a legislative nature, and of living witnesses of skill and experience in Courts of Appeal, witnesses of all descriptions, both at the bar and on the bench, and if you will, witnesses from the other parts of the United Kingdom, from Scotland as well as from Ireland. I have no doubt whatever that your Lordships will strenuously, and I trust successfully, pursue this inquiry, and that this inquiry may lead to a profitable result is my prayer, and my hope, I may add, rather than my expectation; but I trust that the Committee will be able to suggest some considerable improvement at least in the Court of Appeal; I will not say in the constitution of the Court of Appeal, but in the working of it. I confidently expect that that will be the case. I have more doubts as to the

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possibility of improving its structure. I will not stop for an instant to state the grounds whereupon those doubts rest, but I have many doubts of the possibility of greatly improving the structure of the Court.

My Lords, my noble and learned friend the Lord Chief Justice, was a little mistaken in the account which he gave of my Bill of 1834 (*a*). It was not for transferring all the jurisdiction of this House to the Judicial Committee of the Privy Council. It was a mere optional power, a power given to this House to use the Judicial Committee as ancillary to its own judicial functions, to give a power to the House of Lords to send cases to that tribunal which had answered most perfectly during the time that it had been in existence, and which has only been confirmed by longer experience; to give this House the power of using that jurisdiction as a beneficial and convenient instrument for the purpose of assisting it in its own decisions, but not by any means to transfer to that Court that which ought to be confined for ever to this Court. And I will fairly state to your Lordships that my principal reason for not proceeding further with that Bill, was that I was afraid that even that optional power given might tend in the end to trench upon the judicial functions of the House.

My Lords, I entirely agree with my noble friend the noble Earl who so ably and clearly introduced this question, in holding, as I believe all your Lordships hold, that if we were to be reduced to the dilemma, and put, as it were, to our election, either to abandon our judicial functions, or to see the administration of justice in this High Court of Error and of Appeal made evil for its purposes, hurtful to the

(*a*) *See* Lord Brougham's Bill of 1834, to amend the Appellate Jurisdiction of House, Macq. H. of L., Appx. No. 12.

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subject, and no longer beneficial to the people of this country, then I should have no hesitation whatever in electing with my noble friend who stated the possible alternative (and I hope an alternative which we shall never live to see exist), rather to abandon those judicial functions, important as they are to this House, and in all respects important to the Constitution of the country, than not provide a fit remedy for the defects existing in our judicial capacity. But I hope and trust that to that alternative we shall never be driven. I think it will require not much improvement in our course of proceeding, and, if an improvement in the structure of the Court should be found impossible, I trust that we shall retain, I will not say regain, for I deny that we have lost it, but retain the respect and affection of the people for this House in its judicial character.

Lord Chancellor's Speech.

LORD CHANCELLOR:

My Lords, I really had not intended to say one word, for I feel that if there be any defect in the course that this debate has taken, it is, perhaps, that some of your Lordships have apparently rather committed yourselves to opinions that will have to be considered in Committee. I was anxious to express no opinion whatsoever which should preclude me from entering in a perfectly unbiassed manner upon the consideration of the question in Committee; but I have thought that it was due to my own position, and due to my noble and learned friends who are in the habit of sitting with me, to make one or two observations upon what has been said to be the lost character in the estimation of the country of the judicial proceedings of this House. I do not believe that to be the fact. See what the complaints made are. It is said, that one noble Lord hears a case opened, another

hears it answered, and a third is present to hear the judgment. But these are only objections to the forms of your Lordships' proceedings, and not at all to the substance.

The notion that noble Lords come in and hear a portion of the discussion, and then give their judgment without having heard the whole, must be entertained by persons utterly unacquainted with what is going on here. Nothing of the sort ever takes place. I do not say that in the course of a long argument, a noble and learned Lord does not go away for a few minutes; but if he does, he does not lose the thread of the argument, and to treat that as any peculiarity of this House is to betray a total ignorance of what goes on in all other Courts. It is just the same as happens in the Court of Queen's Bench; and I think in the Judicial Committee of the Privy Council I have seen the same thing happen. One member may walk out for a minute, and when he comes back again he is immediately put in full possession of what has passed during his absence.

I quite concur with all that has been said by both my noble and learned friends who last addressed the House, for I am afraid that we are instituting an inquiry into a problem which it will be extremely difficult to solve. We shall not fail to do the best we can, and as far as I am concerned, and I believe I may say the same of every one of your Lordships who may happen to be members of the Committee, we will look at the question dispassionately, and with the sole object of coming to that conclusion which will be best calculated to promote the public interests.

NOMINATION OF THE COMMITTEE ON THE APPELLATE JURISDICTION.

The Earl of DERBY at the close of the debate said, that in the list of the Committee which he proposed the name of the Lord Chief Justice would not appear at present, because the noble and learned Lord had announced that he was about to go on circuit. If, however, on his return the inquiry should not be concluded, their Lordships would, no doubt, be desirous to have the assistance of the noble and learned Lord during the remainder of its sittings.

The LORD CHANCELLOR then read aloud the names of the following Peers to form the Committee on the Appellate Jurisdiction, namely,—

Ld. Chancellor.
Ld. President.
D. Somerset.
M. Lansdowne.
E. Derby.
E. Stanhope.
E. Carnarvon.
E. Grey.
E. Ellenborough.
V. Gordon (Earl of Aberdeen).
L. Sundridge.
L. Redesdale.
L. Lyndhurst.
L. Brougham and Vaux.
L. Abinger.
L. Glenelg (a).
L. Elgin.
L. St. Leonards.

This Committee sat for many days during the Session 1856. Their proceedings were watched with great attention. They examined very eminent witnesses—some of them forensic—some judicial.

The following Extracts show the principal points of inquiry, so far as these relate to the general constitution and permanent character of the House as a Court of ultimate appeal. Matters having only a temporary, local, or personal interest, are omitted; though they excited, at the time, a lively curiosity.

(a) Lord Glenelg declined acting.

EXTRACTS FROM THE OPINIONS DELIVERED BEFORE THE COMMITTEE.

1.—The Proper Number of Judges in a Court of Last Resort.

Sir FITZ-ROY KELLY :

I think there are very great advantages in a single Judge ; but it must be in a Court of original jurisdiction. If you could be sure of always having one of the greatest men that any age can produce, one Judge might be fit to preside in a Court of final appeal ; but that cannot be.

Q. Did not a single Judge form a satisfactory tribunal for 150 years ?

A. I do not think it was so, even in the time of Lord Eldon. No such Judge in general can exist.

Q. Supposing a Judge to sit without the peculiar habits which Lord Eldon had of delay, has not such a Court, consisting of one, an advantage in respect of unity in decision and despatch of business ?

A. It has ; but I do not think that those advantages would counterbalance the disadvantages of the want of confidence on the part of the public in the decisions of any Supreme Court of Appeal, consisting of a single judge.

Q. Supposing the tribunal to consist of one person, and he a sound lawyer and a well-educated Judge, with all the advantage of previous discussions, decisions, and printed judgments, in which all the cases are cited ; do not you think that it is very probable that the public would be more satisfied with his decisions than with a diversity of opinions, even though the Court should come to the same conclusion ?

A. I think not. But if the appeal were from himself what would be done? because that must be considered if there were only one Judge.

Q. Do not you think a judicial mind is very capable of revising even its own decisions in the case of such a man as the Lord Chancellor usually is?

A. I do; but the public would never be satisfied with it; it may be so sometimes, but it is not so always, and justice ought always to be well administered. In my opinion, the tribunal should consist of the five best men in England, to decide the particular cause before the House, and those five, or the majority of them, should decide. Judging from experience, five is the number which would constitute the most effective tribunal which can exist in this country.

Q. Would you make it absolutely essential that there should be five?

A. Five should be the minimum.

Sir Richard Bethell:

I think it would be perfectly competent in this country, with the great sources which you have from whence to draw your supply, always to have in the House of Lords five men of the greatest attainments, the greatest intellect, and the greatest experience in the law. I should prefer five to any other number.

Q. Is it not the fact that judgments in former times, of the highest authority, were practically given by a single Judge?

A. If there be a single Judge who, by the common consent of mankind, embodies the highest qualities of a Judge, then the decisions of that individual, being uniform, certain, definite, and clear, would be of the highest possible value; precisely as if you had an arbitrary government, with absolute authority vested in a man of the highest possible moral and intellectual perfections, one would desire to live under that government rather than any other. But it is so difficult to obtain such a man, and still more a succession of such men, that it is impossible, particularly in the case of a tribunal which has causes brought before it from all quarters of the globe, involving all possible questions, to suppose that one individual will at all times be equal to the satisfactory determination of such a vast and multitudinous assemblage of subjects; therefore it is that we desire a greater number of minds than one, in order that some may supply what is wanting in the others.

The Right Hon. JOSEPH NAPIER:

I think an Appellate Tribunal of five would make as excellent a tribunal as could be.

ROUNDELL PALMER, Esq.:

I think, taking into account the probability, and almost the certainty that there would be other noble Lords capable of assisting, three in addition to the Lord Chancellor would be sufficient; but at the same time I am bound to say I am sensible to the force of the reasons of those who would hardly be satisfied with three; I mean the object of having those who are conversant with more than one branch of the laws administered in the House. The Lord Chancellor, we know, from experience, may be either a common lawyer, or an equity lawyer; it would be necessary to have at least two equity lawyers, I think, whom you could always reckon on to assist the House; on the other hand, especially if the attendance of the Judges is to be less frequent than heretofore, it might be important to have two common lawyers.

The DEAN OF FACULTY:

I think the best number for such a Court, after the best consideration I have been able to give the subject, is five.

RICHARD MALINS, Esq.:

I object to every Appeal Court consisting of less than three Judges.

JOHN ROLT, Esq.:

Q. Would you prefer a Court of three to a Court of five?

A. I should.

2.—Attendance should be a Duty.

Sir RICHARD BETHELL:

I object very much to the constitution of the House of Lords, because the law Lords may be called gratuitous members of the tribunal; they are not bound to attend; they frequently do attend, but sometimes do not attend.

Sir FITZ-ROY KELLY:

Where it depends, as it unfortunately does here, upon the mere volition of the individual Lords, whether they will

attend or not,—that is really the great vice of the present tribunal. I cannot but think, speaking with all the respect which I unfeignedly feel for this Judicial Tribunal of the House of Lords, its days are numbered, unless some great change takes place in its constitution.

ROUNDELL PALMER, Esq.:

I think, like those who have preceded me upon the main point, that it would be more satisfactory, in every way, if there were a more permanent and constant judicial element in your Lordships' House; if the attendance were not accidental and voluntary to the extent to which it is; and also if the number of law Lords were not so liable to be reduced by accident, as it is.

JOHN ROLT, Esq.:

The only matter which has occurred to me to require regulation, if it were practicable, is, that there should be in some way or another a duty imposed upon the law Lords, who have during the whole of my practice administered your Lordships' jurisdiction, to attend, so as to ensure that attendance as a duty, and that it should not be a mere voluntary attendance, which they would not consider themselves under any special obligation to fulfil.

3.—The Sittings should be throughout the Legal Year.

Sir RICHARD BETHELL:

I think it most desirable on every ground that the House of Lords should be open as a final Court of Appeal during the regular portion of the year devoted to judicial business; and I speak of that for another reason. Repeatedly, by decisions in the Court of Chancery, things have been fixed as law, which never would have remained law if there had been a possibility of coming promptly to the House of Lords. That I may make that intelligible to your Lordship, who has been good enough to put the question, I may say that a most important point of law may come on to be discussed upon a motion for an injunction in the month of August: that injunction is granted. There is no possibility of having that question determined by the Court

of ultimate appeal until probably the following February. If you choose to retain the functions of a great Appellate Tribunal, you must open your doors to the suitors of the country in the same manner in which the doors of the ordinary tribunals are open.

ROUNDELL PALMER, Esq. :

I assume that it would be in your Lordships' power, if you thought fit, or it might be placed in your power by enactment, to appoint a Judicial Committee to act for the House during the prorogation whenever it might be thought expedient. Certainly, a delay for three months out of the whole time while the Court of Chancery is sitting is a delay tending to create other delays, and upon the whole, in my opinion, as well as that of others, it must tend to the production of substantial inconvenience and injury to suitors. I agree with what has been said upon the subject of injunctions.

The Right Hon. Sir JOHN ROMILLY, M.R. :

Q. You assume, as an indisputable fact, that the new tribunal, whatever it be, should sit during the whole legal year ; you think that is essential ?

A. I think that is essential.

The DEAN OF FACULTY :

Q. I meant to ask more particularly whether you would think it desirable to protract the legal Session beyond the legislative Session ?

A. Certainly.

4.—The Judicial Committee should be re-united with the House of Lords.

Sir RICHARD BETHELL :

Q. I understood you to express an opinion, that it was desirable that the House of Lords, as the Court of Appellate Jurisdiction, should absorb the functions at present exercised by the Judicial Committee of the Privy Council ?

A. I think so. It is, in theory, a great objection that there should be two co-ordinate final Courts of Appeal. With respect to the Judicial Committee of the Privy Council, there is this great inconvenience, that no one can tell now

at what time it will sit. It sits at odd times. Sometimes we have three or four days of the vacation taken up by sittings of the Privy Council ; so that it is a Court which really has no regular time of assembling. You cannot tell of whom it will be composed, or when it will sit. These, I think, are great objections to a final Court of Appeal ; and it is partly to prevent such things that I should humbly suggest that the Privy Council (which, though it has been a most satisfactory tribunal, yet is, as it were, a thing of yesterday,) should merge in a tribunal, the sittings of which, and the composition of which, would then become perfectly certain and well known, so that there should be one tribunal for the whole empire.

Q. With regard to the constitution of the Judicial Committee of the Privy Council, so far as it partakes of those elements of uncertainty to which you have just referred, it is open to the same objections as the House of Lords ?

A. Very much so. A suitor comes to your brass gates, and before they open, he knows not by whom his cause will be heard, whether by one Lord, or by two, or by three.

Q. The Judicial Committee of the Privy Council, the Committee understand you to say, is open to the same objection ?

A. Yes ; from the uncertainty of knowing who will be there, or when it will sit.

The Right Hon. Sir JOHN ROMILLY :

It is to be observed that if this Judicial Tribunal were properly constituted, all the appeals ought to come to it, and you ought to have no intermediate appeal.

Q. And you would sweep away the Court of the Lords Justices, and the Judicial Committee of the Privy Council ?

A. Yes.

Q. And you would make the Appellate Tribunal of the House of Lords one great Court of Appeal, sitting through the year ?

A. Yes.

RICHARD MALINS, Esq. :

I am inclined to think the whole judicial business of the Privy Council might be transferred to the House of Lords.

JOHN ROLT, Esq. :

Q. Should you desire to to see the jurisdiction of the

Judicial Committee of the Privy Council transferred to the House of Lords?

A. I should be very glad to see it transferred to the House of Lords.

Q. Would there be any objection on the part of any of the dependencies of the British Empire to have all causes decided by a House of the Legislature?

A. I should think none.

5.—Flexibility of the Tribunal.

Sir FITZ-ROY KELLY:

It is of the essence of a perfect tribunal which has jurisdiction over causes of a constantly varying character, and involving different systems of law, that there should be the power of shifting and changing the constituent members of the Court. In cases of common law, they generally summon one or two Chief Justices, or ex-Judges, being Privy Councillors; in cases of equity, they summon the Lords Justices or the Vice-Chancellors; in cases of Indian law, they have a very able and eminent man, Sir Edward Ryan, who is familiar with Indian customs and Indian law; and again, upon appeals from the Ecclesiastical Courts, they summon the Judge of the Prerogative Court, or of the Admiralty Court; so that the Tribunal always consists of the best men in England to determine the particular cause which is to be heard and decided.

The LORD ADVOCATE:

The remedy is to constitute a Court of Appeal, that, by daily and constant practice in the different systems of law which prevail in Her Majesty's dominions, shall become so welded and moulded together, that each member of it shall communicate to the others the general principles of his system; while, at the same time, each is there to prevent any material error in regard to details of practice, or to the more special questions which may arise.

6.—Whether the Lay Element should Operate.

The Right Hon. Sir JOHN ROMILLY:

I consider that the lay element in an Appellate Tribunal is a beneficial one, as it has a tendency to obviate what I

consider the greatest defect of an Appellate Tribunal, namely, the breaking up of great principles into small and minute details, and which, undoubtedly, the Judicial Tribunal of the House of Lords has generally endeavoured to avoid.

Q. Would you submit the lay Lords to any previous examination before they were appointed on the Appellate Tribunal?

A. Certainly not.

The VICE-CHANCELLOR Sir JOHN STUART:

Any change in the constitution of the jurisdiction which would prevent the interference of the lay Lords would be a great blow to the dignity of the Peerage, and to the interests of the public.

Q. Do not you think that if there were the slightest suspicion of any partiality or impropriety on the part of any law Lord, in the transaction of the judicial business of the House of Lords, the next day you would see every Peer in the House present in his place?

A. I have not a doubt of it.

7.—Whether there should be a Scotch Lawyer in the House?

Right Hon. The LORD JUSTICE GENERAL OF SCOTLAND:

I think that the Court ought to contain within itself the skill and the strength to deal with the judgments of all the Courts which it reviews.

The LORD ADVOCATE:

I suggest that one of the members of the Court of Appeal should be a Scotch lawyer of eminence; and it seems to me, if he sat, not only in Scotch appeals, but in English appeals, and in appeals from the Colonies, he might be of the greatest service.

Q. When you say a Scotch lawyer of eminence, do you mean one who had filled a judicial station in Scotland?

A. It might be right to select persons from that position, but not necessarily so.

Q. You do not consider that the decisions of the Court would be supposed to be decisions of the Scotch Judge alone?

A. No; that objection has been made; but I cannot help thinking that if the Scotch Judge sat upon English and Colonial cases, and formed part of the great appellate system, that would never come to pass: he would have a respect for the opinion of his brother Lords; and the Scotch character of the man would be merged in the catholic character of the Tribunal.

Roundell Palmer, Esq.:

I think there would be a great advantage in having a Judge acquainted with the laws of Scotland; upon that point I would take the liberty of observing, that it would be well for your Lordships to consider whether that state of things which has existed now for many years in the House as to the laws of Scotland, is one upon the permanency of which you can reckon.

My impression is, that if the Judge were entirely withdrawn from the actual administration of the law in Scotland, and selected on account of his generally acknowledged eminence in Scotland, he would contribute very useful knowledge upon points which ought not to be drawn into dispute in the House, and be a great security to the House against surprises upon Scotch law. My observation would lead me to believe that those members of the Judicial Committee who do not sit there as representing a particular branch of law, always exercise an independent judgment, and contribute an independent judgment to the ultimate decision. In Indian cases, in which I have had considerable practice, Sir Edward Ryan attends there with great advantage to the public, and contributes his special knowledge of the administration of Indian law: but I should say that the more leading part in the hearing of those cases has often appeared to be taken by Mr. Pemberton Leigh, or by Lord Justice Turner, or by Lord Justice Knight Bruce, and it would be contrary to all the conclusions I should draw, for me to suppose that in case of a difference Sir Edward Ryan's opinion would necessarily prevail.

The Dean of Faculty:

In the view of a re-constitution (if I may say so) of the Court of Appeal, the remedy which occurs to me, and which is most generally approved of, is, that provision should be made that one of the Judges should be a Scotch lawyer.

The Right Hon. Sir JOHN ROMILLY:

I asked Lord Corehouse whether it would not have been better if there had been a Scotch lawyer in the Court of Appeal: he said, no; he was of opinion that it would have been worse. I remember distinctly his stating to me his view, that the effect produced by the Appellate Jurisdiction of the House of Lords had been most beneficial with respect to the administration of the law in Scotland. And I remember Mr. Adam, the late Accountant-general (whom several of your Lordships will also remember), expressing a similar opinion to that, when I mentioned to him the conversation I had had with Lord Corehouse.

The Right Hon. LORD JUSTICE CLERK OF SCOTLAND:

I always believed the suitors to be exceedingly unfavourable to any such notion as that of a Scotch Judge being placed upon the Court of Appeal. The present feeling, as far as my knowledge goes of the Faculty of Advocates, is quite new. I never heard the subject broached, during the eleven years I was Dean of Faculty; and I can speak from my positive knowledge that Lord Corehouse, Lord Moncrieff, Lord Murray, and others, who were seniors to me, thought that it was quite an essential feature of the Court of Appeal that there should be no Scotch lawyers, but that it should be composed entirely of English Judges. There are a great many benefits I think resulting from that.

JAMES ANDERSON, Esq.:

My opinion is, that, practically, the introduction of a Scotch Judge is not desirable.

R. MALCOLM KERR, Esq. (Scotch Advocate and English Barrister):

The people of Scotland do not, I think, desire to see in the Court of Appeal, either a local Scotch Judge, or even a Scotch Judge who has ceased to exercise judicial functions in Scotland.

8.—Of Summoning the Judges as Assistants.

Sir Fitz-Roy Kelly :

With respect to the summoning of the Judges, I would not presume to advise the House of Lords to part with the privilege of summoning the Judges. I would discontinue the practice of summoning them in most of the cases ; that is, I would have a Tribunal of five, consisting of law Lords who generally are familiar and well acquainted in every respect with Common Law, and have had long practice in the Common Law, and who, with such others of the Common Law Judges as might be summoned, being Privy Councillors, would constitute the Tribunal of five, which would be amply sufficient for all ordinary cases. But, undoubtedly, there may be cases of such extraordinary difficulty, or such extreme importance, or cases in which, from something which may have taken place in the progress of the cause through the inferior Courts, it may be necessary to have the opinions of all the Judges of England. I gave an instance yesterday,—the case of the Queen *v.* Millis. I do not say if a case were to arise like the case of O'Connell, if I had the honour of a seat in the House of Lords, I should not suggest the summoning of all the Judges of England, because the public attention would be directed to it, and surmises might be made, however unfounded, which would be prevented by the attendance of the whole of the Judges ; therefore, though, as a matter of general practice, I would cease to summon the Judges, I would retain the privilege of summoning them, and summon them upon particular occasions.

Q. Would you extend that power of summoning the Judges to the Judges in Equity ?

A. Certainly ; I can hardly admit that the privilege does not exist at present ; at all events, it exists if they are Privy Councillors. It certainly would be exceedingly desirable that the House of Lords should have the power of summoning all, whatever may be their position or their rank, who can effectually assist the Tribunal which it is ultimately determined to create.

John Rolt, Esq. :

The other matter which would require regulation, in my humble judgment, relates to the mode of taking the opinions

of the Judges. It appears to me that if the exact question in the cause is asked, and you have the opinions of the Judges one way,—the House coming to a contrary conclusion,—it tends to shake the confidence of the public in the Judges.

9.—Whether, in giving Judgment, Dissents should be Concealed.

ROUNDELL PALMER, Esq. :

Q. Would you have judgment delivered as the joint opinion of the Court, without reference to the opinion of the one who differed?

A. I think it would be desirable that it should be delivered as the opinion of the House, adopted by the House, and sanctioned by the House, without any reference to the opinion of the one who differed. Your Lordships will allow me to state my reason for that. In the Courts below, which are subject to appeal, it is of the greatest importance that the reasons which influence the minds of the different Judges should appear; and if they differ, it is of still more importance, in order that they may be considered and reviewed; but when you come to the Court of last resort, it is of more importance, I apprehend, that the authority of the judgments of that Court should be maintained in the eyes of the suitors and the public, than that the precise reasons which have actuated the Judges should appear. It is useful that those reasons which the House has adopted as its reasons should be known; but I do not think it can be necessary that it should be known that an individual, however learned and eminent, has dissented from those reasons.

The Right Hon. Sir JOHN ROMILLY :

My own opinion is, that the dignity of the Appellate Tribunal is best upheld by there being no difference of opinion apparent in it; and that it would be better that they should discuss the matter among themselves, and that the decision should be given as the decision of the whole body.

Sir RICHARD BETHELL :

Q. The judgment should be that of the majority, without the mention of any difference of opinion?

A. Yes.

Right Hon. The LORD ST. LEONARDS:

I would not sit upon any Appeal or other Court if I were not at liberty to express the opinion which I entertained; and I am clearly of opinion that the law never can flourish as a science, unless the Judge is permitted to do so.

The DEAN OF FACULTY:

Q. Supposing the Judges of the Court of Appeal are divided, ought the dissentient Judges to express an opinion?

A. I think so; I think it would be most desirable that in that case the dissent should be expressed; because if it were not, the suitors would suspect that there was a dissent in every case; they would always suspect the existence of a division of opinion.

Right Hon. The LORD JUSTICE GENERAL OF SCOTLAND:

Q. Should you think it desirable that the reasons for either reversal or affirmance of the decree of the Court below should be assigned, and if assigned, should each member assign his reasons separately?

A. I think that is a question upon which there may be room for difference of opinion: my own opinion is, that there ought to be no fixed rule upon that subject.

JOHN ROLT, Esq.:

Q. Do you attach much importance to the judgment in an appeal being given as the judgment of the Court, without there being an expression of any difference of opinion on the part of those who may dissent from it?

A. I have not considered that question; I should prefer hearing the opinions of all the members of the Court.

[In Grey *v.* Pearson the Vice-Chancellor Turner dismissed the plaintiff's bill. Lord Chancellor Cranworth reversed or varied this decision. When the appeal to the House of Lords was about to be opened (March 12, 1857), the Lord Chancellor observed that it was doubtful whether Lord St. Leonards would be present. The learned Counsel for the appellant (Mr. John Walker, Q.C.,) begged leave to request that the case might be put off until Lord St. Leonards could attend.

The cause was consequently adjourned. It was afterwards argued before the Lord Chancellor, Lord St.

Leonards, and Lord Wensleydale. On the 16th March 1857, the House pronounced its judgment, which is thus reported in the *Times* of the 17th:—

"The Lord Chancellor retained the opinion he expressed in the Court below

"Lord St. Leonards delivered a long and elaborate judgment in which he entirely differed from the opinion of the Lord Chancellor, and relied upon the decision of Lord Hardwicke in Brownsword *v.* Edwards (*a*). In his opinion the appeal ought to be allowed.

"Baron Wensleydale concurred with the Lord Chancellor in his opinion that the appeal ought to be dismissed.

"Appeal dismissed accordingly."

No one is here to blame. It is the system. The same thing might have happened if Lord Hardwicke, Lord Mansfield, and Lord Chancellor Thurlow could have come together to review a decree by the latter, reversing one of Sir Pepper Arden's.]

10.—Sir Richard Bethell's Scheme for a Court of Ultimate Appeal.

1. The House of Lords to exercise its Appellate Jurisdiction through the medium of a Judicial Committee composed of Peers.

2. The jurisdiction and functions of the Judicial Committee of the Privy Council to be vested in the Judicial Committee of the Lords, so that there may be (in the House of Lords) one single uniform Appellate Tribunal for the whole Empire.

3. This great Court of the House of Lords to be open during five days in every week throughout the year, except the usual vacations as observed by the Court of Chancery.

4. The Court, when sitting, always to be constituted of the Lord Chancellor, as President, and four other Members, *i.e.*, of the Committee. Five to be the quorum.

5. Peers who have filled the office of Lord Chancellor to be *ex officio* Members of the Committee; and if any one of such Peers will engage regularly to attend the sittings of the Committee, he is to be a permanent Member, and entitled to a salary of £ , in addition to his retiring pension.

6. Official Peerages to be conferred on such a number of eminent lawyers as may be necessary to make the Com-

(*a*) 2 Ves. Sen. 243.

mittee consist of four permanent Members, in addition to and besides the Lord Chancellor and any ex-Lord Chancellor, *not being a permanent Member,* who may think proper to attend. One of the permanent Members to be taken from the Scotch Bar or Bench.

7. The Committee to have power to summon all or any of the Judges of the Courts of Law and Equity, the Testamentary and Admiralty Courts in England, and Court of Session in Scotland, to sit as assessors of the Committee.

8 Each permanent Member of the Committee, not being the Lord Chancellor or an ex-Lord Chancellor, to receive a salary of 5,000*l.* per annum, from which any retiring pension is to be deducted.

9. Every official Peer to have the full privileges of a Peer of Parliament during his office (or life).

10. Any petition or application to the Crown which, according to present practice, may be referred by Her Majesty to the Judicial Committee of the Privy Council, may be referred by Her, in like manner, to the Judicial Committee of the House of Lords.

11. The practice and rules of procedure of the House of Lords as an Appellate Tribunal to be revised and simplified; and all applications now made to the Standing Committee on Appeals to be heard and determined by a Committee of three Members of the Judicial Committee, who shall meet for that purpose once in every week during the sittings of the Committee.