SOME OLD FORMS OF LAW: AN HISTORICAL SKETCH.

By James Clephan.

Smeaton the engineer, to whom, in the last century, our forefathers were accustomed to resort for counsel, was reporting, in 1769 and 1771, on the state of Tyne Bridge, then on its last legs. In the autumn of the former year he had been called in by the Bishop of Durham, who had charge of one-third of the structure; and in the spring of 1771, the Corporation of Newcastle besought his attention to the remaining two-thirds. The Plantagenet viaduct had stood the shocks of time for upwards of five hundred years. "Originally very ill-built, and in general of too small stones, and not of the best kind," it had nevertheless kept its ancient place from the days of the builder of the Black Gate, sustaining the hourly pressure of the tide, the rage of inundations, the bumping of barges and of keels, the eager operations of war, the negligent inattentions of peace. The architect of the Eddystone found its ribs broken by collision of river craft—displaced here, driven down there. "The whole of the superstructure had more or less sensibly felt the effects of time." The venerable roadway had wrestled with many a flood since the fatal fire of 1248; and although never thrown, it tottered on its feet. How much longer it might bear up under its infirmities, he could not venture to foretell. "It is not easy to fix," said he, "the duration of a piece of stone-work, as we daily see instances of old buildings hanging together in a surprising manner."

"Those things which have long gone together," observes Lord Bacon, "are, as it were, confederate within themselves." Yet ancient edifices and institutions, "usages of primitive mould," time-honoured laws and customs, will sometimes pass away with seeming suddenness —vanish in the apparent promise of length of days—"come down (in popular parlance) with a run;" as did Tyne Bridge before the year was gone which had listened to Smeaton's last report.

One of the volumes of the late Cosmo Innes, Professor of History in the University of Edinburgh, is occupied by Lectures on Legal Antiquities, the fifth of which is devoted to Old Forms of Law:—

Compurgation—Ordeal of Hot Iron and of Water—Judicial Combat, etc.; once rooted as the rock, now consumed in the fire of time. "A pretty island, which," he remarks, "some of you may remember, opposite to Lord Mansfield's park above the bridge of Perth, was used by the monks of Scone as their place of judgment, *per ferrem et aquam;* and we had numerous other religious houses exercising the same jurisdiction. A time came, however, when men no longer thought it convenient that he who was accused of the theft of a cow should go free if twenty-four friends swore that they thought him incapable of stealing. The essoign by compurgators—*essonium compurgatorium*—went down. The trial by ordeal—walking over hot iron, floating on the river instead of sinking, and such-like appeals to a present interposition of Providence—also fell into discredit. The trial of right by wager of battle—judicial combat—remained longer. In the time of David the First, it was optional to the accused, or the defender, whether he would do battle or take purgation of leal men; and the laws of the judicial combat—*duellum*—were long carefully observed. It seems not to have revolted our forefathers to see the weak man obliged to fight the strong man, who wished to strip him of his inheritance. Yet this monstrous manner of settling a dispute about an estate in land or other weighty matter did at last offend common sense; and men looked round for other modes of civil and criminal judicature—other modes of getting at the truth."

Our local annals illustrate the historic pages of Professor Innes; and the *Archæologia Æliana* may fitly claim a paper on the subject—a chapter on Old Forms of Law.

The shores of our river heard an appeal to WAGER OF BATTLE in the century when Tyne Bridge perished in the flames; nor was judicial combat forbidden by the Statute Book until the century when our time-honoured viaduct was transformed into an Hydraulic Swing. From the grave narration of Matthew Paris, Chronicler of St. Albans, we learn that in the latter days of King John, the Prior of Tynemouth, "Dominus Radulphus Gubiun," was sore vexed by "Symon de Thynemue," who claimed, in perpetual right, two monastic corrodies (or keep from the monks for the maintenance of his servants), by gift of a certain Abbot of St. Albans. The question was by judicial settlement to be determined in duel; and the Prior, taking the road with a great pugilist, one William Pygun, presented himself before the

Hertfordshire monastery of which Tynemouth was a cell. The battle was waged; Simon prevailed; Ralph's champion was vanquished. ("Gesta Abbatum Monasterii Sancti Albani," edited by H. T. Riley, M.A., i., 272.—History of the Monastery of Tynemouth, by William Sidney Gibson, F.S.A., ii., 17.)

Judicial combat, surviving the Plantagenets and the Tudors, was under the consideration of Parliament in the period of the Stuarts. "An Act for Abolishing of Trial by Battle or Combat," had its first reading in the eighteenth year of James the First, February 28th, 1620–21; its second reading followed in due time; it was committed and recommitted; until, on the 28th of May, "Mr. Sollicitor reported the Bill for Battle. That the Committee thinketh it not fit it should proceed, but rests to be advised of." Three years afterwards, when the reign of James was far spent, there was a further Bill in progress, "to abolish battle in writs of right;" which, on the 29th of May, 1624, came to a like end.

The law's delay—delay in advent, delay in execution—is of old date. The reformer tried his hand in the time of King James, but legislation halted. In the next reign, society was quickened into action by the gloves that were thrown down in 1638, on behalf of Ralph Claxton and Richard Lilburn, before Mr. Justice Berkeley, when on circuit in the county palatine of Durham. Matthew Paris perpetuates the memory of the duel originating on the banks of the Tyne. John Rushworth of the Historical Collections hands down the story of the challenge on the Wear. Assistant-Clerk of the House of Commons, and oft-times Member for Berwick-upon-Tweed, the Barrister of Lincoln's Inn had vast and varied opportunities of acquiring information, and improved them all. Rushworth was familiar, moreover, as a Northumbrian, with the country from the Tyne to the Tweed, and kept our forefathers informed as to the passing events of the great world within which he lived and laboured. In the year 1659, "a messenger that brought a booke Mr. Rushworth presented to the towne," had 10s. from the Corporation of Newcastle; and a few years afterwards there was "paid Mr. John Rushworth, which is yearly given him for his intelligence and good offices done for this towne, £30." (Richardson's Reprints and Imprints.)

When, in 1638, the historic pen of this famous correspondent of the Common Council of Newcastle had been set free from the Scottish

crisis in which the Edinburgh matron whirled her memorable stool into the lists, he "returns to affairs in England," and, "to divert the reader, first mentions the trial of Claxton and Lilburn;" Ralph Claxton, namesake of Prior Gubiun, being demandant, and Richard Lilburn, father of John Lilburn, tenant. Each party had his champion in array. George Cheney for Claxton—William Peverley for Lilburn—"cast his gauntlet into Court with five small pence in it." The proceedings in the cause came under examination on Monday, the 6th of August, being the first day of the assize. Adjournment followed upon adjournment—Monday, Tuesday, Wednesday. Then from month to month. Some way or other, the matter must be settled, or got rid of. The question "concerning Claxton and Lilburn, their trial by battel," was brought before King Charles in Council. "His Majesty was made acquainted that there had bin several days appointed for determining by battel the question of right which had long depended between Claxton, demandant, and Lilburn, tenant, for certain lands [at Thickley] in the county palatine of Durham; and that by the late appointment the same was to be tried by the said parties' champions, the 22 December next. It was by His Majesty ordered that the Judges of that circuit, upon conference with their brethren, should be thereby prayed and required to take the same case into due and serious consideration, and [ascertain] if they could find any just way by law how the said combat might be put off, and the cause put into another way of trial; for His Majesty, out of his pious care of his subjects, would have it so, rather than to admit of a battel. But otherwise, since Lilburn had a judgment upon demurrer against Claxton, and also costs from the Board for his vexation, and since that Claxton had brought a new action, upon which Lilburn had waged battel, His Majesty would not deny the trial of laws, if it could not be legally prevented."

Such was the position taken by the King. "Afterwards, both parties brought their champions into the Court of Durham, having sand-bags and battoons, and so tendred themselves in that fighting posture. But the Court, upon the reading the record, found an error in it, committed by a mistake of the Clerk (some thought wilfully done), whereupon the Court would not let them join battel at that time." "Thus did the Court several times order to avoid battel by

deferring the matter, though champions on both sides were ever present in Court at all meetings to join battel."

The champions in array, eager to be at each other, bore the aspect in 1638 of a political portent. The affair, as Rushworth does not fail to observe, "proved an omen to what the next year produced, by a greater appearance of a battel, when the King's army was at the camp at Berwick, and the Scots on the other side of Tweed, yet both parties parted, also without a battel." The Scots quitting the Tweed in 1639, to come to the Tyne in 1640.

Rushworth subjoins "the opinion of the Judges in this cause of trial by a battel, upon a writ of right," viz.:—"The tenant waged battel, which was accepted; and at the day to be performed, Berkeley, Justice there, examined the champions of both parties whether they were not hired for mony? And they confessed they were. Which confession he caused to be recorded, and gave further day to be advised. And by the King's direction, all the Justices were required to deliver their opinions whether this was cause to de-arraign the battel by these champions? And by Bramstone, Chief-Justice, Davenport, Chief-Baron, Denham, Hutton, Jones, Cook, and other Justices, it was subscribed, that this exception, coming after the battel gaged, and champions allowed, and sureties given to peform it, ought not to be received."

Still, however, though the money question broke down, there was no combat. By one means or other the issue was delayed. The last step was especially effectual. The matter was thrown into Parliament. A Bill was to be brought in to abolish the law.

Parliament was not sitting in 1638. It had been in abeyance from the Dissolution of March 10th, 1628. Not until April 13th, 1640, was there any more a meeting. Then came the Short Parliament, passing away at the end of three weeks. In the same year, November 3rd, 1640, was opened the Long Parliament; and on the 24th of February ensuing, "An Act to abolish all Trials by Battaile" had its first reading. Its second was on the 11th of March. The Bill was then committed to from thirty to forty members, of whom Sir Henry Anderson, Burgess for Newcastle, was one. "To meet on Monday next, in the afternoon, at two o'clock, in the Inner Star Chamber." When Monday came, Lords and Commons were in conference "on the Earl of Strafford's trial."

Little or nothing was then or afterwards heard of trial by battle. In the summer time, order was made (July 23rd, 1641), "that the petition of Richard Lilburne, Gentleman, this day preferred to this House, shall be referred to the consideration of the Committee for the Bill for abolishing of trial by battaille, to be considered of *when the Committee shall be revived.*"

The substance of the petition may be read in Rushworth, "setting forth how often he had joyned issue for tryal by battel for lands in value of above £200 per annum, and had brought down his champions several times to the assizes at Durham; but were from time to time put off from a tryal by combat by the Judges, who still found some error in the record, that the tryal could not proceed."

Lilburn's plaint was "to be considered of when the Committee shall be revived." But that opportunity does not seem ever to have arisen. The Committee had no new life. The country was entering in earnest on the conflict glanced at in the Collections, and the Bill slept at its second reading. Legislation stood over for well-nigh a couple of centuries. In the reign of George the Third, six hundred years after the overthrow of the champion of the Prior of Tynemouth, Westminster Hall was startled by the spectacle of wager of battle. At the Warwickshire assizes, a trial on a charge of murder of a young woman had ended in a verdict of acquittal. The accused was brought up, on the 17th of November, 1817, on the appeal of a brother of the deceased, as next of kin. "Not guilty," was his reply; "and this I am ready to defend with my body;" at the same time throwing a glove or gauntlet on the floor. "No one smiled. The Judges looked embarrassed." (Crabb Robinson's Diary, ii., 68.) The appellant was about to pick up the glove, in acceptance of the challenge, when he was held back. As in 1638, the matter was considered and considered, until, after repeated adjournments, it was decided, in the month of April, 1818, that wager of battle, if obsolete, was still law; whereupon the Attorney-General gave notice, on the eve of the Dissolution, of a Bill for repeal, to be introduced in the new Parliament—the last Parliament of George the Third. This Bill was introduced on the 9th of February, 1819, when, said Sir Samuel Shepherd, the appeal in cases of murder would be seen to be a most violent outrage upon law and justice; and for the simplest, yet most satisfactory of reasons, namely, that when a party

had been once tried and acquitted, he never should undergo the ordeal of a second trial for the same offence.

Parliament was with the Bill; it went forward from stage to stage; and on the 22nd of June, the Royal Assent was given to 59 George III., cap. 46:—"An Act to abolish Appeal of Murder, Treason, Felony, or other Offences, and Wager of Battel, or joining Issue and Trial by Battel in Writs of Right." Thus was brought to an end, at last, that law of wager of battle which took Prior Ralph from Tynemouth to St. Albans, when as yet Tyne Bridge was unconsumed and the Town Wall of the Edwards unbegun.

By the side of this legal antiquity, now purged from the Statute Book, flourished from generation to generation the not less remarkable law by which a prisoner at the bar, STANDING MUTE, was liable to PRESSURE TO DEATH. Refusing to plead on his arraignment, he must either have his silence or his life crushed out of him. Two cases are on record in the county of Durham, in each of which the law exacted its full and final penalty.

The register of St. Nicholas', one of the parishes of the cathedral city, makes a note of the earliest death:—"Buried, August 7, 1578, Thomas Rowland, pressed to death in the Pallace Greene." The second occurred in the latter days of August, 1597, when Anthony Arrowsmith "stood mute;" accepted his fate in the Market Place; and was buried at St. Mary-le-Bow.

The process of pressure is minutely pictured in Stow's "Survey of London." Elaborate was the ingenuity with which the prisoner was to be tortured into speech or out of life. His limbs were severally drawn out with cords to the four corners of a framework; weights of iron, stone, or lead were placed over the body; three morsels of barley bread to be given on the second day, without drink; some "drink of the kennel" on the next day, with bread; and so forward, until death, or a broken resolution, came to the sufferer's relief.

Harrison, too, in his "Description of the Iland of Britaine" (comprised in the Chronicles of Holinshed), bestows a few lines on the apparatus, when treating of the various punishments of offenders in Tudor days. "Such fellons as stand mute, and speake not at their arraignment," the reverend historian states, "are pressed to death by huge weights laid upon a boord that lieth over their brest, and a sharpe

stone under their backe; and those commonlie hold their peace thereby to save their goods unto their wives and children, which, if they were condemned, should be confiscate to the Prince."

Crowded on the Wear would be Palace Green and Market Place, to witness the progress and issue of the conflicts between the prisoners and the law in the reign of Queen Elizabeth. Surtees enables us to call up in imagination the pleasant home, with field and orchard and garden, which Arrowsmith nerved himself to hand down in his family. Under the head of Coatham Mundeville, the historian of the Palatinate recites the inquisition of 40 Elizabeth, January 17, 1597-98:—"Anthony Arrowsmith, Gentleman, died seised of a chief messuage, cottage, garden, orchard, and thirty acres of arable, ten of meadow, and forty of pasture, by 10s. rent to the Bishop's bailiff of Cotham."

Then comes a foot-note:—"In the margin of the inquest is written, 'Prest to death;' the meaning of which I believe certainly to be, that he stood mute on his trial, and underwent what was termed *peine forte et dure*. This act of dreadful endurance saved the estate to his son."

The doom of Rowland and of Arrowsmith continued to hang over the heads of prisoners down through the times of the Tudors and the Stuarts to the accession of George the Third. The persuasive machinery lingered at the Old Bailey to the latter years of the eighteenth century. Peter Conoway, "standing mute" in 1770, was shown the apparatus for pressing him to death; whereupon his purpose gave way. He pleaded; was convicted; and died at Tyburn.

The framework on which mute prisoners were stretched crosswise with cords, had now, probably, made its last appearance in England. It was a spectre of the past—an anachronism. Parliament took in hand a revision of the Statute Book, and the ancient process was adjudged to have lived out its term. A Bill was brought in for its abolition; and on the 16th of April, 1772, the Royal Assent was given to 12 George III., cap. 20, "An Act for the more effectual proceeding against prisoners standing mute on their arraignment for felony or piracy;" the new law making provision that they should be dealt with as if convicted by verdict or confession; and the second and last clause enacting that the new statute "should extend to His Majesty's Colonies and Plantations in America." For the old English law of "pressure to death" had been carried into operation beyond the Atlantic. ("The Century," illustrated Monthly Magazine, New York,

July, 1882.) (See also, as to "standing mute," Sir Walter Scott's "Advertisement" preliminary to his "Pirate.")

The law was now a dead-letter; yet, casting its shadows before, it lingered among the traditions of the eighteenth century, and in the dawn of the nineteenth had not disappeared. At the Easter Assizes of 1801, in Shrewsbury, a prisoner charged with sheep-stealing stood mute. The Act of 1772 notwithstanding, the accused was a perplexity. He was remanded to prison, and lay there until the autumn, when he was again arraigned. Persisting in silence, a jury was impanelled to make inquiry; and finding that he was mute only with a view of evading trial, he was put to the bar, found guilty of the offence imputed to him, and left by the Judge for execution. After conviction he implored for mercy, declaring that he had been induced to feign dumbness as a means of escaping punishment. ("Annual Register," 1801.)

In the next reign, Sir Robert Peel was applying himself to the consolidation of the Criminal Law, and in 1827 brought in, among other measures, "An Act for further improving the Administration of Justice," its first clause incorporating the statute of 1772:—"And be it enacted, that if any person, being arraigned upon or charged with any indictment or information for treason, felony, piracy, or misdemeanor, shall stand mute of malice, or will not answer directly to the indictment or information, in any such case it shall be lawful for the Court, if it shall so think fit, to order the proper officer to enter a plea of not guilty on behalf of such person; and the plea so entered shall have the same force and effect as if such person had actually pleaded the same." (7 and 8 George IV., cap. 28.)

Times change, and laws with them. It is chronicled in Holinshed that on a Sunday in September, 1538, "one Gratnell, hangman of London, and two others, were hanged at the wrestling-place by Clearken well," in the presence of twenty thousand persons, "for robbing a booth in Bartholomew faire." The Sabbath day had been chosen, that the citizens might come together in greatest numbers to witness the scene; and they assembled in tens of thousands. Great, also, would be the concourse on the Wear, in the same century, when Rowland and Arrowsmith, braving the ancient ordeal, were "pressed to death." Yet now, after a flight of three hundred years, not only is robbery no longer, as in the days of Henry VIII., a capital offence,

and the process of pressure banished from the administration of criminal justice, but public assemblies at executions have been suppressed by an Act of 1868 (31 and 32 Vict., cap. 24), "to provide for carrying out capital punishments within prisons."

The Statute Book, in common with other publications, has its successive editions, with enlargements and amendments. When "standing mute," and its capital penalty, came under consideration in the reign of George the III., other laws, lingering in decay, had also legislative attention. Of the number were the Tudor enactments dealing with the difficulties of gipsy life :—22 Henry VIII., cap. 91, 1530; 1 and 2 Philip and Mary, cap. 4, 1554; and 5 Elizabeth, cap. 20, 1562. Under these successive provisions there took place in the year 1592, between the two instances of "pressure to death" at Durham, an execution of five unhappy wanderers on the Wear, whose fate found parochial record for our instruction. In his *Chronicon Mirabile*, published in 1841, Sir Cuthbert Sharp quotes the circumstance from the register of St. Nicholas' in Durham :—"Simson, Arington, Fetherstone, Fenwicke, and Loncaster, hanged, August 8, 1592, being Egyptians;" and Surtees infers from their names "that all of them were probably natives of the northern counties, and gipsies only by association."

"EGYPTIANS" was the term commonly applied to the roving community in the time of Elizabeth. Her most illustrious subject puts it into the mouth of Othello in connection with the magic handkerchief :—

> That handkerchief
> Did an Egyptian to my mother give :
> She was a charmer, and almost read
> The thoughts of people.

So, also, to an Egyptian soothsayer Marc Antony addresses himself for a forecast of the future :—

> Say to me,
> Whose fortunes shall rise higher, Cæsar's or mine?

In populous city or in secluded hamlet, human nature is essentially the same. Curiosity and credulity are a common heritage; and "Egyptians," humouring "the thoughts of people," have had their reward. Some four centuries ago, our island had a teeming visitation of the people "so calling themselves," who, "using no craft nor feat of merchandise," practised "great, subtil, and crafty means to deceive

the people, bearing them in hand that they by palmistry could tell men's and women's fortunes," thus "deceiving the people of their money," and also "committing many heinous felonies and robberies." (22 Henry VIII., cap. 9, 1530.) The Act of Elizabeth, prolonging the statutes of her predecessors, enacted, further, that it should be death for "Egyptians," or others counterfeiting themselves like to them, to remain a month in the realm, unless they betook themselves to some lawful service or employment; under which law the five convicts of 1592 were hanged at Durham. The "Prologue" of Sir Cuthbert Sharp's "Parish Registers" has a line allusive to their doom:—

> The bold Mosstrooper feels the felon's pain,
> And swart Egyptians die for sordid gain.

The Act of Elizabeth, although reported for judgment in the Parliament of 1768, was respited. It was not repealed until the Parliament of 1780; when, as "a law of excessive severity," it was in 1783 brought to an end from and after the 1st of August, and the gipsy tribe fell under the ordinary rule of justice.

The movement for an amelioration of the Criminal Code was at this period setting in. By 30 George III., cap. 48, 1790, the statute was abolished whereby women convicted of high or petty treason were sentenced to be drawn upon a hurdle to the place of execution, and there burnt with fire till they were dead, (a penalty which had long been commuted, by reformation of feeling and opinion, into the consuming of the body after strangulation). In the following year, the whipping of female vagrants was prohibited by statute. And now, whipping-post and pillory, ducking-stool and stocks, and scold's bridle or branks, banished from our thoroughfares, must be sought for in museums. Horace Walpole, wending his way to the Tower of London on the morning of the 16th of August, 1746, "passed under the new heads at Temple Bar," where ingenious speculators were "making a trade of letting of spying-glasses at a halfpenny a look!" But Time has not only swept away the ghastly spectacle—the spirit of the age that gave it birth is gone, and Temple Bar itself is a thing of history. Our Norman Keep, once put to the same grim uses, survives as the home of the Society of Antiquaries in Newcastle; and in the *Archæologia Æliana*, which "this worm-eaten hold of raggéd stone" enshrines, the present paper may find an appropriate resting-place.