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THE DEMISE OF THE LORD CHANCELLOR OF ENGLAND. PARALLEL IN THE HISTORY OF LORD WESTBURY AND LORD BACON.

It is proper, in the language of the London Jurist, upon "a great name passing into retirement," that the law journals should not entirely ignore the fact, or affect indifference to its occurrence. We do not regard either the wonderful rise, or the melancholy fall, of the late Lord Chancellor, WESTBURY, as the occasion of so much admiration or regret as many of our contemporaries seem to have done. But we do not desire, in any sense, to depreciate his eminent talents. From the time of his first call to the bar, it is most unquestionable that RICHARD BETHELL distinguished himself, alike in his sounding pretensions and by his successful performances, both of which were almost equally grandiloquent and imposing. He had been distinguished, at college, both by his love and his power of acquisition. He was early marked, in his career at the bar, as the uncompromising and self-confident advocate of the most radical reforms, both in the fundamental structure and in the administrative functions of the law. His first great measure of reform, which he continued to advocate during his whole public life, was the fusion of law and equity procedure; which led to the introduction of many of those equitable remedies, in connection with the trial and decisions of actions at law, in the superior courts in Westminster Hall, which have rendered the resort to courts of equity, in aid of proceedings at law, almost unnecessary in England at the present day.

As an advocate at the bar, Mr. BETHELL'S ability as a pleader, and his ingenuity in dealing with evidence, attracted universal admiration at a very early day. He is said to have had a very great command over facts, and in the statement of his client's case, and even in reading from the evidence in the cause, to have possessed the power of enchaining the attention, both of the court and jury, to an extent which was quite unusual, even among the most distinguished advocates of the English bar. He became, at length, the acknowledged leader of the equity bar; and, in due process of promotion, both Attorney-General and Lord Chancellor.

But before this, he is believed, by his persuasive and prudent advocacy of Lord Cranworth's bill for a Divorce Court, in 1857, to have materially contributed to the adoption of that important measure. His lordship has undeniably, in various modes, contributed to Law Amendment; upon the subject of Bankruptcy; the Title of Real Estates Acts; and upon many other leading topics. But his greatest efforts have been directed towards the general digest and consolidation of the common law, both customary and statutory. It is in regard to this general subject that his lordship's views have been most admired, and in regard to which they may be said finally, to have encountered the saddest discomfiture. Some rather unimportant minor reforms have been effected chiefly through the instrumentality of his lordship, during the few years of his public administration—such as the statute of limitations upon tradesmen's bills in actions in the County Courts, and the conferring of equity jurisdiction upon those courts in some matters of inferior concern. But, in regard to his lordship's great work, the Digest of the Laws of England, we suppose he must be regarded as having retired upon the very threshold of his undertaking. We perceive, by the journal of proceedings, that upon Monday, June 19, the Lord Chancellor presented in the House of Lords a bill for "completing the revision of the statute law, and expurgation of the Statute Book." The noble lord informed the House on this occasion (which he had repeated some score of times before), that the statutes of the realm were, at present, in forty-four quarto volumes; that former bills had carried the revision and expurgation down to and including the reign of James II., and the present bill, when adopted by Parliament, would complete that expurgation and revision, and would reduce the whole body of the living statutory law of England within the compass of ten volumes, which must certainly be regarded as a most invaluable contribution to the simplification and accessibility

of English statutory law. The next thing which his lordship then proposed was, to arrange the statute law in the form of a Digest under the most appropriate heads, forming a complete "analytical arrangement;" and "then to revise and expurgate the unwieldy and still increasing mass of the decided cases, REDUCING THEM TO SUCH AS CONSTITUTED THE BODY OF EXISTING AUTHORITIES, and which might in their turn be digested and arranged." We have chosen to take this last statement of what his lordship then proposed doing, from his own words, that there might be no ground for misapprehension in regard to his lordship's real purposes at that time. But as this was less than twenty days before the dissolution of Parliament, and his lordship's retirement from office under a resolution of the Commons of want of confidence, which constituted a virtual impeachment, in spite of all the resistance of a popular and influential ministry, it is safe to conclude that this great work of law reform is left where we find it on the 19th of June; not exactly *in medio*, but rather, *ab ovo, in primordio*.

Lord Chancellor WESTBURY came to the possession of the seals under great expectations, both from friends and foes. He was known to be an able, confident, and energetic reformer; one who would not scruple to wield the pruning-knife to any extent, among the most sacred relics of the past, if they only stood in the way of his lordship's cherished reforms. His lordship, as we have before stated (*ante vol. 3, N. S., pp. 74-79*), entered upon his career of reform and expurgation, which his lordship is fond of designating as "weeding" the garden of the law, very likely from some association connected with the Temple, or Gray's Inn, or some other of the sacred localities about Westminster Hall and the Parliament House; but sure it is, his lordship entered upon this career of expurgation and "weeding" of the law, with great assurance, and with almost equal expectation on his own part and that of his friends; albeit some of his lordship's associates, of a different school, might have received his schemes—or dreams—of reform, with something less of confident conviction and hopeful expectation. But on all hands, we believe, it came to be the general opinion that his lordship was destined to live in history, and to live more for what he did, than for what he abstained from doing.

We think, in all soberness, that too much praise cannot be accorded Lord WESTBURY, for his laborious efforts to reduce the body of English statute law to something like an intelligible form, and to bring it within reasonable compass; a small portion

of which has been, and we trust the whole will be adopted by the requisite confirmatory Act of Parliament. But in regard to the remainder of his lordship's proposed undertaking, which seems to be nothing less than the preparation of an entire code for the realm, we have always felt ourselves incapable of soaring to the sublime comprehension of his lordship's wisdom. The whole scheme is either too vast for our comprehension, or else it is too absurd and hopeless for any but a novice or a monomaniac to seriously undertake. We have said, in our former article, all we desire to say in regard to the apparent hopelessness of the proposed undertaking, until the experiment shall assume somewhat more promising proportions. We do not desire to be suspected of any willingness to exult over fallen greatness, or to attempt to run riot among the ruins of the most hopeful, or of the wildest, and the vainest schemes. His lordship's undertaking, as was true, to a certain extent, of his whole character, was eminently American, where nothing is fairly considered to be beyond the scope of human ingenuity. And in regard to a state which had been founded within the memory of many now living, and whose jurisprudence might all be comprised within the lids of a decent-sized octavo volume, the scheme was hopeful enough. And with men who are incapable of apprehending the existence of any degree of wisdom, human or divine, superior to their own, such an experiment might possibly be regarded not only as hopeful, but even desirable, with those vast empires of the European continent, whose codes have been the growth of twenty centuries, and comprise the wisdom and experience of all the civilized ages of the world's history. And such men feel no distrust in undertaking such vast and sublime reforms. Their faith and zeal know no bounds. It is for this reason that they will often be found succeeding in such daring undertakings, when all others, from want of faith, if for no other cause, would be almost sure to falter, and finally to fail. It is for this reason, among others, that we had hoped the learned Chancellor might be spared to accomplish his undertaking, in his own way; feeling assured, that unless he did succeed, the task might justly be regarded as hopeless; and if he did accomplish his undertaking, in such a manner as to effect the desired simplification of the laws of England, why then all would rejoice. But we must now wait for another bold enough to undertake this so long-deferred work; a work which we fear is not within the compass of any but divine wisdom to accomplish, and that through the slow process of ages.

It is rather wonderful that the only two Lord Chancellors of England, who should have felt themselves competent to undertake the production of a Digest of the entire body of the statute and common law of England, BACON and WESTBURY, should have been separated by a period of nearly two centuries and a half, and should both have retired from office under a cloud; and in some respects, under circumstances so similar. It is recorded of Lord BACON, that he abandoned the hope of digesting the laws of his country, long before the final period of his official labors. But we have already alluded to my Lord WESTBURY'S assurances of prosecuting that vast work, uttered in his place, from the woolsack, less than twenty days before his retirement, and while he had the prospect of a long official life. And in his lordship's final address to the House of Lords on the 5th of July, the great source of thankfulness seems to have been, that his tenure of office had given him the opportunity to propose and to pass measures which he predicted would be of great benefit to the country—and with which he hoped his name would be associated; and his great regret seems to have been, "that a great measure which he had at heart—a digest of the whole law—he had been unable to inaugurate"—but that scheme, "already prepared," he bequeathed to his successor.

There is something affecting, almost, in the appeal of both these men to posterity, to vindicate their fame from the imputations of the present generations, by which they seem to have regarded themselves as persecuted. On the 19th of December, 1625, some years after his conviction of bribery and corruption in office, and after he had received, in full, the pardon of his royal master, and been restored to all his dignities and honors, BACON, in the last of his earthly offices to come in force, his last testament to the living and to after ages, thus writes: "For my name and memory, I leave it to men's charitable speeches, and to foreign nations, and the next ages." And my Lord WESTBURY, in his valedictory before the House of Lords, said: "With regard to the opinion which the House of Commons has pronounced, I do not presume to say a word. I am bound to accept the decision. I may, however, express the hope, *that after an interval of time calmer thoughts will prevail, and a more favorable view be taken, of my conduct.*"

The offences charged upon these two distinguished Chancellors were not dissimilar in character. The one in accepting bribes from suitors, sometimes from both sides, but never allowing him-

self to be influenced by them; the other in bribing officers to resign, by promising them a retiring pension, that he might fill their places by the appointment of his children and dependants to fat places and rich livings. In both it was, on their own construction, but the excess of a commendable prudence in providing for himself and especially for those of his own household; like many other virtues, in excess it becomes a crime. We fear there is more of this species of wise forecast by men in high offices on both sides of the Atlantic, than would be regarded as entirely creditable to the incumbents, if it was fully known. It speaks well for the independence of the English Commons, that such a vote of censure could have been carried, by so clear a majority, against the ministry and other powerful friends, and upon a question where so many treacherous and unscrupulous men would have been so willing to yield upon the slightest ground of apology; which, in regard to a living and influential man, is always so readily afforded. We do not presume to say it might not have been as readily obtained in the American Congress, under similar circumstances. We hope it might have been. We dare not say it would have been. The public experience in this country of the appointment of committees to inquire into public abuses, has not been such as to encourage the repetition of such experiments, with much hope of reaching the guilty, in time to effect their expulsion from office. Lord WESTBURY seems to suppose, if one may judge from the language of his retiring speech, that he will still be allowed to hold a position of power and influence in the House of Lords, in common with the other law lords, ST. LEONARDS, CHELMSFORD, WENSLEYDALE, and others. But judging from the experience of his great prototype, who never entered the House of Lords after his full pardon, and from the common experience of disgraced Englishmen, we should conjecture his lordship would never be able to command the same respectful attention there which he has before done, and which he would naturally find indispensable to his success there, or even to hopeful labor. We conjecture his lordship will die under the cloud which now obscures his horizon.

The parallel between BACON and WESTBURY might be still further continued, but it would scarcely repay the labor. We cannot refrain from repeating Lord CAMPBELL's account of BACON's Digest of the Law: "In performance of his promise to the king, he actually began the stupendous undertaking of framing a Digest of the Laws of England; but finding it was a work of assistance, and that which he could not master by his own fancy and

pen, he soon laid it aside." This is taken by LORD CAMPBELL from BACON'S Preface to the Holy War.

We trust Lord WESTBURY may not fall into such abject humiliation as did his great prototype. But all would desire to see him sensible of his great offence, and truly penitent for it.

And now, to sum up the character of this most distinguished, most disgraced Lord Chancellor of England except perhaps his greater and baser prototype, Lord BACON, to what does it come?

It is not surely to mere inanity and vain show. Far from it. WESTBURY, as a judge, possessed all the vices and few, or none, of the virtues demanded by his high station. He yielded to the temptations of his position; and, instead of leaving his policies and his politics behind him when he ascended the bench, whether in the Court of Chancery, in the Judicial Committee of the Privy Council, or in the House of Lords, as the august tribunal of last resort and final appeal, as did ELDON and even BACON, he, the most timeserving and shortsighted of all England's great Chancellors, not only dragged all his animosities and all his partialities into the place of judgment, but it is greatly to be feared, upon the most charitable construction, that it must be said of one of the ablest and most brilliant of modern public men, that he not only prostituted place to the advancement of private ends and personal advantages both for himself and his friends, but that he even carried his private griefs and petty prepossessions into the most sacred and urgent occasions of official power.

His first great fault, as a judge, seems to have been, that he was incapable of sinking the advocatę under the ermine; that instead of ceasing to be partial and partisan, when he assumed to hold the even balance of justice, whether between man and man in the private relations and interests of life, or on the broader theatre of public debate and contention, where questions affecting the interests of nations and the well-being of successive generations came to be debated and determined; in every place where decency and, above all, propriety and justice, demanded that the judge should forget himself and all his former alliances and associations, and soar at once into the sublime elevation of the pure atmosphere of absolute truth, and there stand fixed and immovable, as the mountain of holiness; as the Atlas of profane, or the Ararat of sacred history; instead of this noble self-sacrifice in the temple of justice, this greatest of advocates, this most successful of politicians, became less than the least of all his predecessors, as a judge, because he could not forget that he had

private interests to subserve, in that awful presence, where no man has any right to remember himself or his friends, or to know that he has any private advantages, either of interest or fame, which he can subserve, if he would. *Fiat justitia ruat cælum*, is the only maxim which a judge has any right to regard, or to know. The maxim is no more trite, than it is awful, in the place of judgment.

There is scarcely one of Lord WESTBURY'S judgments which will be remembered with admiration, or even with common respect, in after times. There is a spice of conceit, of vain-glory, of self-seeking about them all, which leads one to distrust their soundness, even when they are of the most private concern. And in all his acts, which in any sense partake of a public character, as in that of the judgment on the appeal from the decision of the Colonial Metropolitan of Capetown, in the case of Bishop Colenso, every word is instinct with the wire-drawing and the hair-splitting spirit of the mere political advocate. We do not suppose that a judicial opinion can be found in the history of the English bench, where more marked departures from fair and liberal constructions have been adopted, apparently with the view of subserving private ends, than in the judgment just alluded to.

We must say, in conclusion, that it seems fortunate for English jurisprudence that Lord WESTBURY decided so few cases of leading weight and importance, and especially in the House of Lords, during his administration. We scarcely recall one, as yet published, which will produce any marked influence upon English jurisprudence, whether in England or in this country, in the generations yet to come.

The long-contested question of ancient lights, and how far the proprietor could forfeit his rights by an attempt to secure an advantage beyond his just claim, and which had been for many years in a very unsettled state, was finally decided by his lordship's leading opinion in the House of Lords; and in a manner which will be likely to be accepted, we presume, in America, as well as in England, where the judgment will be of binding authority until qualified by Act of Parliament. The ground maintained upon this long-contested question in the House of Lords is, that the right to ancient lights, when once established by the requisite prescription, is perfect, and no more subject to forfeiture, by a claim beyond the right, than any other vested right.

There are, doubtless, many other cases, of more or less general importance, which have received their final formative touch from



his lordship's self-confident hand, in the court of last resort; but if there be any of more than a Provincial or Colonial consequence, many of which character we now recall, upon appeals to the Judicial Committee of the Privy Council, they have escaped our recollection at the moment.

Of the Digest; or, Revision of the Statutes of England, chiefly performed, we presume, by other hands, we have already sufficiently spoken, as the main ground upon which his lordship can prefer any just claim to the gratitude of his countrymen.

In regard to his lordship's proposed Digest of the entire body of the common law, we desire to say a word more, lest we might be misunderstood. We have said that we had hoped his lordship would have been spared, (or would have spared himself,) to go through with that work in his own way, not because we entertained any the remotest expectation that such a work could prove a success. Far from it. We have long entertained the most thorough conviction that any such attempt is the merest pretension; that it is, in fact, the most shortsighted empiricism; or even worse, that it is the result of mere foolhardy audacity and disreputable charlatanry; or else that it must result from a false education, and a diseased imagination, falling little short of well-defined insanity. Any such scheme, if it could succeed, would inevitably prove the greatest calamity, in changing a system of unwritten law, in full life and vigor, into a dead code, which could only be kept in operation thereafter by a process of galvanic operations, at short intervals, as the experience of the American states abundantly proves. And the fact, that among all the long line of Lord Chancellors of England, to whose especial care all law reforms are particularly committed, but two have been found sufficiently audacious to propose such a scheme to themselves, even; and that one of these, far the wisest and most learned, abandoned the project, upon the first experiment, as utterly hopeless; and that both of them retired from office in disgrace: the one under impeachment, by an actual conviction of bribery and corruption in office; and the other, under a vote of censure from the House of Commons for corrupt official practices of a scarcely less discreditable character; these considerations, we think, ought to convince all that the project of a Digest of the common law is a chimera and a dream.<sup>1</sup>

I. F. R.

<sup>1</sup> Lord WESTBURY delivered the opinion of the Judicial Committee of the Privy Council, in *Williams vs. The Lord Bishop of Salisbury*, 10 Jur. N. S. 406, in which the doctrine of the Essays and Reviews is discussed. But the opinion is remark-

able for nothing, unless it be its latitudinarian character, and evident tendency to confound all distinctions between heresy and Christian truth. It really ignores the doctrine of the inspired truth of Holy Scripture, and virtually declares that no such doctrine exists in the Church of England. We believe the bitterest foe of that church, if it have any, could not desire a more damaging declaration from the court of final appeal, in all matters pertaining to doctrine and discipline in the National Church.

His Lordship, too, delivered the leading opinion in the House of Lords, in the much-agitated *Alexandra Case*, where so many vital questions of international law were discussed, and in regard to which the American government felt so deep an interest. But as usual, in all embarrassing controversies, in the hands of politicians and political judges, the result was much like that of the last chapter of Johnson's *Rasselas*—the conclusion in which nothing was concluded. The decision was dissented from by Lords CRANWORTH and WENSLEYDALE, and is certainly one based upon such refinements, as do little credit to the highest judicial tribunal of the mightiest empire in the world, where courage and straightforwardness might have been expected, if anywhere.

The Lord Chancellor's latitudinarian views, in regard to all social and moral questions, are sufficiently evinced by his comments upon general questions, arising in cases of divorce before the House of Lords: *Gipps vs. Gipps and Hume*, 10 Jur. N. S. 641; *Pitt vs. Pitt*, Id. 785; *Yelverton vs. Longworth*, Id. 1209. The latter case is one of great interest, upon both sides of the Atlantic, and is discussed by his Lordship quite in detail, and in a manner to evince a facility for dispensing with all religious sanction, in the celebration of marriage, which is in marked contrast with the opinions of most of the other Law Lords. There is no subject where a judge is more likely to exhibit loose or latitudinarian views upon religious and social questions, if he entertain them, than in cases affecting the most sacred relation of husband and wife—the fundamental social relation. The comments of the Lord Chancellor in this last case are in disadvantageous contrast, as it seems to us, with those of Lord WENSLEYDALE and Lord KINGSDOWN. It has become a trite maxim, but one of great significance, that if there is any weak spot in a man's moral organization, or in his moral training, it will be sure to exhibit itself in his views of marriage and divorce, and this has proved eminently true of Lord WESTBURY. We should scarcely have expected such a man to entertain sound and conservative views upon these cardinal questions. We should rather have been surprised if he had done so.

We have carefully looked through his Lordship's judgments in the House of Lords and in the Privy Council, and find nothing to add to what we had before said. The case of *Tapling vs. Jones*, 11 Jur. N. S. 309, affecting the question of ancient lights, is really the most important of all his Lordship's opinions in the House of Lords. The case of *The Leather Cloth Company vs. The American Leather Cloth Company*, 11 Jur. N. S. 513, decided May 12th of the present year, in the House of Lords, wherein his Lordship's judgment in the Court of Chancery, 10 Jur. N. S. 81, reversing the decree of Vice-Chancellor WOOD, reported 1 Hem. & Mil. 271, was affirmed, is a case of some weight and importance, as affecting the question of trade-marks, and how far the assignee could use the same, without the commission of fraud. We have thus given a brief synopsis of his Lordship's contributions affecting leading questions in jurisprudence, during the brief period of his administration. It seems to us it will scarcely reflect much light upon the more intricate questions of jurisprudence, or leave any abiding monument of his Lordship's fame.