

ART. IV.—*On the Law and Legal Practice of Nepál, as regards Familiar Intercourse between a Hindú and an Outcast.*—By BRIAN HOUGHTON HODGSON, Esq., M. R. A. S., Resident at Kat'h-mandhu.

Read 7th December, 1833.

THE Penal Law of Nepál, a Hindú state, is necessarily founded on the *S'ástras*; nor is there any thing material in its marvellous crimes, and more marvellous proofs, for which abundance of justificatory texts may not be produced out of the code of MENU, and others equally well known on the plains.

The only exceptions to the truth of the above general remark are, first, that, by the law of Nepál, the *Parbattiah* husband retains the natural privilege of avenging, with his own hand, the violation of his marriage bed; and, secondly, that this law expressly confounds Muhammedans with the outcasts of its own community. But it may be remarked, in regard to the first point, that the husband's privilege is rather a licensed violation of the law than a part of the law; and that all nations have tolerated, and do still, some such privilege.

Nor can it be denied, in reference to the second point, that if the followers of Islám are not expressly ranged with ordinary outcasts by the Hindú Law *S'ástras*, it is merely because the antiquity of the books transcends the appearance of the Moslem in India; since, by the whole spirit and tenor of those books, "all who are not Greeks, are *Barbarians*";—all strangers to Hindúism, *Mléch'ch'has*.

If, then, there be any material difference between the Hindúism of Nepál, considered as a public institution, and that of the Hindú states of the plains, the cause of it must be sought, not in any difference of the law, the sanctity and immutability of which are alike acknowledged here and there; but in the different spirit and integrity with which the sacred guides, common to both, are followed in the mountains and in the plains.

The Hindú princes of the plains, subject for ages to the dominion or dictation of Muhammedan and European powers, have, by a necessity more or less palpable and direct, ceased to take public judicial cognisance of acts, which they must continue to regard as crimes of the deepest dye, but the sacredly prescribed penalties of which they dare not judicially enforce; and thus have been long since dismissed to domestic tribunals and the forums of conscience, all the most essential but revolting dogmata of Hindú jurisprudence.

We must not, however, forget the blander influence of persuasion and mutual concession, operating through a long tract of time. The Moslems, though the conquerors, gradually laid aside their most offensive maxims:

the Hindú princes, their allies and dependants, could not do otherwise than imitate this example: and hence, if there is much diversity between the Hindú laws and Hindú judgments, now and for ages past given in the public tribunals of the Hindú princes of the plains, there is no less between the law of the Korán and its first commentators, and the judgments of AKBAR and his successors.

But neither persuasion, nor example, nor coercion has had room to operate such a change in these mountains; the dominant classes of the inhabitants of which, originally refugees from Muhammedan bigotry, have, in their seclusion, nursed their hereditary hatred of Islamism, whilst they bade defiance to its power; and they have latterly come, very naturally, to regard themselves as the sole remaining depositories of undefiled, national Hindúism. Hence their enthusiasm, which burns all the fiercer for a secret consciousness that their particular and, as it were, personal pretensions, as Hindús, are and must be but lowly rated at Benares.

The proud *Khás*, the soi-disant *Kshetriyás* of Nepál, and the *Parbattiah Bráhmans*, with all their pharasaical assertions of ceremonial purity, take water from the hands of the Kachár Bhoteahs; men who, though they dare not kill the cow, under their present Hindú rulers, greedily devour the carrion carcase left by disease;—men, whose whole lives are as much opposed to practical, as their whole tenets are to speculative, Hindúism.

In very truth, the genius of polytheism, everywhere accommodating, is peculiarly so to its professors and their like in Nepál. Here, religious opinions are utterly disregarded; and even practice is suffered among the privileged to deviate in a thousand ways from the prescribed standard. The *Newárs*, or aborigines of the valley of Nepál, are, for the most part, Budd'hists; but they are deemed very good Hindús nevertheless; pretty much in the same way as RÁMA MOHAN RÁYA passes for a good Hindú at Calcutta. A variety of practices, too, which would not be tolerated even in a Hindú below, are here notoriously and avowedly followed. They are omissions, not commissions, for the most part. But there are daily acts of the positive kind done in the hills which could not be done openly in the plains*.

Still there are matters which the Durbár would not brook the discussion of with us; and I am afraid that their known deviations, in

* The gallant soldiers of these hills cannot endure the tedious ceremonial of Hindúism. When preparing to cook, they satisfy the law by washing their hands and face, instead of their whole bodies; by taking off their turbans, instead of their whole dress. Nor are they at all afraid of being degraded to *kúlís* if they should carry ten days' provisions, in time of war, on their backs. *Et sic de cæteris.*

many respects, would only make them more punctilious and obstinate in regard to those few which it is so much our interest and duty to get compromised, if we can, with reference to our followers. Unfortunately, these few topics are the salient points of Hindúism ; are precisely those points which it is the pride and glory of this state to maintain from the throne and judgment-seat, as the chief features of the public law ; *because*, nowhere else throughout India can they be maintained in the same public and authentic manner, or any otherwise than by the domestic tribunals of the people. The distinction between Hindús on the one hand, and, on the other, outcasts of their own race, as well as all strangers indiscriminately, it is the especial duty of the judges of the land to ponder upon day and night, to pursue it through all its practical consequences, as infinitely diversified by the ceremonial observances created to guard and perpetuate it ; and to visit, with the utmost vengeance of the penal code, every act by which this cardinal distinction is knowingly and essentially violated.

Of all these acts, the most severely regarded is, intercourse between sexes of such parties ; because of its leading directly to the confusion of all castes, of the greatness of the temptation, and of the strong inducement to concealment : and the concealment is deemed almost as bad as the crime itself ; for the Hindú agent or subject will, of course, proceed, till detected, to communicate as usual with his or her relations ; who again will communicate with theirs, until the foul contamination has reached the ends of the city and kingdom, and imposed upon all (besides the sin) the necessity of submitting themselves to a variety of tedious and expensive purificatory processes, pending the fulfilment of which all their pursuits of business or pleasure are necessarily suspended, and themselves rendered, for the time, outcasts. This, to be sure, is a great and real evil, deserving of severe repressive measures. But is not the evil self-created ? True : but so we may not argue at *Kat'hmandu*. The law of caste is the corner-stone of Hindúism. Hence the innumerable ceremonial observances, penetrating into every act of life, which have been erected to perpetuate this law ; and hence the dreadful inflictions with which the breach of it is visited. Of all breaches of it, intercourse between a Hindú and an outcast of different sexes is the most enormous ; but it is not, by many, the only one deemed worthy of punishment by mutilation or death. The codes of MENU and other Hindú sages are full of these strange enormities ; but it is in Nepál alone (for reasons already stated) that the sword of public justice is now wielded to realize them. It is in Nepál alone, of all Hindú states, that two-thirds of the time of the judges is employed in the discussion of cases better fitted for the confessional, or the tribunal of public opinion, or some domestic

court, such as the *Pánchayat* of brethren or fellow-craftsmen, than for a King's Court of Justice. Not such, however, is the opinion of the Nepálese; who while they are forcing confession from young men and young women, by dint of scolding and whipping, in order to visit them afterwards with ridiculous penances or savage punishments, instead of discharging such functions with a sigh or a smile, glorify themselves in that they are thus maintaining the holy will of BRÁHMA, enforcing from the judgment-seat those sacred institutes which elsewhere the magistrate (shame upon him!) neglects through fear, or despises as an infidel.

When the banner of Hindúism dropped from the hands of the Mah-rattas in 1817, they solemnly conjured the Nepálese to take it up, and wave it proudly, till it could be again unfurled in the plains by the expulsion of the vile *Feringis*, and the subjection of the insolent followers of Islám. But surely the British Government, so justly famous for its liberality, cannot be fairly subjected to insinuations such as this? So it may seem: but let any one turn over the pages of MENU, observe the conspicuous station assigned to the public magistrate as a *ensor morum* under the immensely extensive and complicate system of morals there laid down, and remember, that whilst it is the Hindú magistrate's first duty to enforce them, to the British magistrate they are and have been a dead letter: let him look to the variety of dreadful inflictions assigned to violations of the law of caste, and remember, that whilst their literal fulfilment is the Hindú magistrate's most sacred obligation, British magistrates shrink with horror and disgust at the very thought of them; and he will be better prepared to appreciate and make allowance for the sentiments of Hindú sovereigns and Hindú magistrates. The Hindú sovereigns *dare* not, and we *will* not, obey the sacred mandate. But, in Nepál, it is the pride and glory of the magistrate to obey it, literally, blindly, unbiassed by foreign example, unawed by foreign power.

An eminent old *Bichari*, or Judge of the Chief Court of *Kat'hmandu*, to whom I am indebted for an excellent sketch of the judicial system of Nepál, after answering all my questions on the subject, concluded with some voluntary observations of his own, from which I extract the following passage:—

“Below, let man and woman commit what sin they will, there is no punishment provided, no expiatory right enjoined*. Hence Hindúism is destroyed; the customs are Muhammedan; the distinctions of caste are obliterated. Here, on the contrary, all those distinctions are religiously preserved by the public courts of justice, which punish according

* It is the exclusive duty of one of the highest functionaries of this government (the *Dharamádhihari*) to prescribe the fitting penance and purificatory rites for each violation of the ceremonial law of purity.

to caste, and never destroy the life of a *Bráhmán*. If a female of the sacred order go astray, and her paramour be not a *Bráhmán*, he is capitally punished; but if he be a *Bráhmán*, he is degraded from his rank, and banished. If a female of the soldier tribes be seduced, the husband, with his own hand, kills the seducer, and cuts off the nose of the female, and expels her from his house. Then the *Bráhmána* or soldier husband must perform the purificatory rites enjoined, after which he is restored to his caste. *Below, the S'ástras are things to talk of: here, they are acted up to."*

I have, by the above remarks, endeavoured to convey an idea of the sort of feeling relative to them which prevails in Nepál. It will serve, I hope, as a sort of apology for the Nepálese; but will, I fear, also serve to demonstrate the small probability there exists of our inducing the Durbár to waive in our favour so cherished a point of religion, and, I may add, of policy; for they are well aware of the effect of this rigour, in tending to facilitate the restricted intercourse between the Nepálese and our followers, a restriction which they seek to maintain with Chinese pertinacity. Besides, the *S'ástras* are holy things, and frail as holy; and no Hindú of tolerable shrewdness will submit a single text of them, if he can avoid it, to the calm, free glance of European intellect.

Having already given the most abundant materials* for judging of the general tenor of the judicial proceedings and of the laws of Nepál, it will not be necessary (or possible), in this paper, to do more than briefly apply them, as regards that intercourse between a Hindú and a non-Hindú, at present under discussion.

The customary law or licence which permits the injured husband in Nepál to be his own avenger, is confined to the *Parbattiahs*, the principal divisions of whom are the *Bráhmans*, the *Khás*, the *Magars*, and the *Gurungs*. The *Newárs*, *Murmis*, *Kachar Bhoteahs*, *Kirantis*†, and other inhabitants of Nepál, possess no such privilege. They must seek redress from the courts of justice; which, guiding themselves by the custom of these tribes prior to the conquest, award to the injured husband a small pecuniary compensation, which the injurer is compelled to pay.

Nothing further, therefore, need at present be said of them. In regard to the *Parbattiahs*, every injured husband has the option, if he please, of appealing to the courts, instead of using his own sword: but any one, save a learned *Bráhmán* or a helpless boy, who should do so, would be covered with eternal disgrace. A *Bráhmán* who follows his holy calling cannot, consistently with usage, play the avenger; but a *Brahman*

* In allusion to other Papers by Mr. HODGSON.—*Ed.*

† I hope, ere long, to be able to furnish some curious and interesting particulars of the history, character, and manners of these peculiar races.

carrying arms must act like his brethren in arms. A boy, whose wife has been seduced, may employ the arm of his grown-up brother or cousin, to avenge him. But if he have none such, he, as well as the learned *Bráhma*n, may appeal to the prince, who, through his courts of justice, comes forward to avenge the wrong (such is the sentiment here), and to wipe out the stain with blood ;—death, whether by law or extra-judicially, being the doom of all adulterers with the wives of *Parbattiahs*. *Bráhmans*, indeed, by a law superior to all laws, may not be done to death by sentence of a court of justice. But no one will care to question the *Parbattiah* who, with his own hand, destroys an adulterer, *Bráhma*n though that adulterer be. If the law be required to judge a *Bráhma*n for this crime, the sentence is, to be degraded from his caste, and banished for ever, with every mark of infamy. If a *Parbattiah* marry into a tribe such as the *Newár*, which claims no privilege of licensed revenge, he may not, in regard to such wife, exercise the privilege.

But must not a *Parbattiah*, before he proceed to avenge himself, prove the fact, and the identity of the offender, in a court of justice? No! To appeal to a court would afford a warning to the delinquents to escape, and so foil him. He may pursue his revenge without a thought of the magistrate; he may watch his opportunity for years, till he can safely execute his design; and when he has, at last, found it, he may use it to the adulterer's destruction. But he may not spare the adulteress: he must cut off her nose, and drive her with ignominy from his house, her caste, and station, for ever gone. If the wife have notoriously sinned with many, the husband may not destroy any but the first seducer: and though the husband need prove nothing beforehand, he must be prepared with legal proof afterwards, in case the wife should deny the fact, and summon him before the courts (no other person can), for murder and mutilation.

And what is deemed legal proof in this case? The wife's confession, made in the presence of two witnesses. But who is to warrant us that the confession is free? This, it must be confessed, is an awkward question; since, by the law of *Nepál*, the husband's power over his wife is extreme. He may beat her; lock her up; starve her *ad libitum*, so long as he endanger not her life or limbs: and that he will do all this, and more, when his whole soul is bent upon procuring the necessary acknowledgment of her frailty, is too probable. But still, her honour, her station, and her beauty, are dear to a woman; and every *Parbattiah* wife knows, that the terrible avowal once made, she becomes in an instant a noseless and infamous outcast. There is little real danger, therefore, that a true woman should be false to herself, by confessing, where there was no sin, *for fear of her husband*; and no danger at all,

I apprehend, that, as has been imagined, she could be won to become the *tool* of some *petty malice* of her husband, or of the covert *political spleen* of the Durbár. There are, indeed, some married *Bráhmans* among the soldiery of Nepál; and the wife of a *Bráhma*n may not be mutilated. But in proportion as the station of a *Bráhma*ní is higher than that of all others, so must its prerogatives be dearer to her; and all these she must lose, if she confess. She must be driven from her home by her husband, and degraded and banished the kingdom by the state. But there is certainly a contingent hazard to our followers, arising out of the circumstance of the adulteress, if she have sinned with many, being required to name her first lover; for since she must, in every court, suffer the full penalties of her crime, it may well be supposed, that, under various circumstances, she might be led to name, as her first paramour, one of our *Sipáhís*, instead of a country fellow. This however seems to me a vague and barely possible contingency.

PROCEDURE.

The proofs and procedure before the Nepál tribunals will fall more naturally under consideration, when we proceed to the next case. Suffice it here to say, that if, when the husband would cut off his wife's nose, or afterwards, the wife should hurry to a court of justice, and deny her guilt, the husband must be brought up to answer. In ninety-nine cases out of a hundred, the husband's answer consists in simply producing the two witnesses to his wife's confession of guilt. She, of course, affirms that the confession was extorted by unwarrantable cruelty towards her: and if she can support such a plea (it is hard to do so, for the husband's legal power covers a multitude of sins) in a manner satisfactory to the court, and if the husband have no counter-evidence to this plea, nor any circumstantial or general evidence of the guilt which he affirms, he may be condemned to death. But, in the vast majority of cases, his two witnesses to the confession, with such circumstantial evidence as the case, if a true bill, can hardly want, will suffice for his justification.

INTERCOURSE BETWEEN A HINDÚ AND A NON-HINDÚ—THE LAW.

He who may give water to a pure Hindú to drink, is within the pale of Hindúism: he whose water may not be drunk by a pure Hindú, is an outcast, an unutterably vile creature, whose intimate contact with one within the pale is foul contamination, communicable to the pure by the slightest and most necessary intercourse held with them, and, through them, to all others. If trivial and involuntary, it may be expiated, by the individual, if he alone be affected; or by all with whom he and they communicated before the discovery of the taint, if any such persons there be. The expiation is, by a world of purificatory rites, as tedious as

expensive; and the tainted must segregate themselves from society till these rites are completed. But there are many sorts of contact between a Hindú and a non-Hindú, or outcast, the sin of which is inexpiable, and the penalty, death. Such is intercourse between the sexes. But, by a primary law, the lives and members of *Bráhmans*, and the lives of women, are sacred. Subject to the modification of this primary law, the utmost vengeance of the code is reserved for this enormous sin. Men so offending are done to death. Women have their noses amputated, are rendered outcasts, if they have castes to lose, and are banished the kingdom.

A male outcast, who has intercourse, under any circumstances, with a pure Hindú female, and whether the female be the seducer or the seduced, be maid, wife, or widow, chaste, or a wanton, is adjudged to die; and the female is rendered noseless and an outcast; unless of the sacred order, when her nose is spared. If an outcast female pass herself off for one of a pure caste, and have commerce with a Hindú, she shall have her nose cut off; and he, if he confess his sin so soon as he discovers it, shall be restored to caste by penance and purification; but if he have connexion knowingly with such a female, he shall be emasculated, and made an outcast. If a *Sudra*, or one of lower degree, but still within the pale, have commerce with a *Bráhmaní*, he shall suffer death; unless the *Bráhmaní* be a prostitute, and then he shall go free.

If any such Hindú have commerce with a *Khásni*, she having been a chaste widow up to that time*, he shall die. If she were a maid, and willing, he shall be heavily fined: if a wanton, he shall go free.

Hindús, however low, whose water will pass from hand to hand, are in no danger of life or limb from such commerce with any others than *Bráhman* and *Khás* females. The latter are the *Kshetriyas* of Nepál, and wear the thread.

The following are the outcasts of Nepál:—

| NEWÁRS. | PARBATTIAHS. |
|---------------------------------|-------------------------|
| <i>Kúllú.</i> | <i>Kámi.</i> |
| <i>Pórya.</i> | <i>Damáí.</i> |
| <i>Kassái.</i> | <i>Sárki.</i> |
| <i>Kúsúlliah.</i> | <i>Bhár.</i> |
| <i>Khámákkalak, or Phungin.</i> | <i>Kingri, or Gáin.</i> |
| <i>Dúng, or Duni.</i> | <i>Dhobi.</i> |
| <i>Sangat.</i> | <i>Musálmáns.</i> |

The above enumeration of outcast *Newárs* may serve to introduce the remark, that the distinctions of caste, and their penal consequences,

* Chaste widows are supposed to be dead to the world, and devoted to religious exercises. Most of them burn with their husband's corpses.

do not owe their existence in Nepál to the *Gork'ha* dynasty. It is true, that before that event the majority of the Nepálese proper were Budd'hists, having a law of their own : but so they are still. And when we advert to the facts, that the Budd'hism of the most distinguished tribe of them (the *Newárs*) admitted the dogma of caste ; that the sovereigns of *Kat'h-mandu* and *Patan*, though belonging to this tribe, were for three or four ages before the conquest, with many of their subjects, Bráhmancial Hindús ; that the *Newárs* and others, since the conquest, have all, as far as they were allowed, by availing themselves of the privileges of Hindúism, confessed its obligations to be binding on them ; and that lastly, all tribes have now for seventy years acknowledged the paramountship, *quoad hoc*, of the Hindú law of the conquerors ;—when, I say, we recollect all these things, it will appear clear, I think, that we are not at liberty to question the equitableness of the application of this law to our followers in Nepál ; inasmuch as it is *the unquestioned law of the land**.

THE PROCEDURE.

The round of operations by which a judgment is reached in a Nepálese court of justice is precisely such as a man of sense, at the head of his family, would apply to the investigation of a domestic offence ; and the contracted range of all rights and wrongs in Nepál renders this sort of procedure as feasible as it is expeditious and effectual. The pleasing spectacle is, however, defaced by the occasional rigour arising out of the maxim, that confession is indispensable ; and by the intervention, in the absence of ordinary proof, of ordeals and decisory oaths.

An open court, *vivá voce* examination in the presence of the judge, confrontation of the accuser, aid of counsel to the prisoner, and liberty to summon and have examined, under all usual sanctions, the witnesses for the defence—these are the ordinary attributes of penal justice in Nepál ; and these would amply suffice for the prisoner's just protection, but for the vehemence with which confessions are sought, even when they are utterly superfluous, but for the fatal efficacy of those confessions, and but for the intervention of ordeals. Ordeals, however, are more frequently asked for than commanded ; and perhaps it is true that *volenti non fit injuria* : at all events, with reference to enforced confessions, it must not be supposed that the infamous ingenuity of Europe has any parallel in Nepál, or that terrible engines are ever employed *in secret* to extort confessions. No ! the only torture known to these tribunals is that of stern interrogation and brow-beating, and, more rarely, the application

* The objection that may be raised to this law, in reference to our followers, on the ground of its inconsistency with the general principles of justice and humanity, is altogether another question, with which I presume not to meddle.

of the *korah**: but all this is done in the face of day, under the judge's eye, and in an open tribunal; and though it may sometimes compromise innocence, its by far more common effect is to reach guilt. Besides, with respect to ourselves, the mere presence of the Residency *Munshí*, pending the trial of one of our followers, would prevent its use, or at least abuse, in regard to him. Or, ere submitting our followers to the Nepálese tribunals, we might bargain successfully with the Durbár for the waiving of this coercion, as well as for the non-intervention of the proof ordeal, *unless with the consent of the party*. And if these two points were conceded to us, I should, I confess, have no more hesitation in committing one of our followers to a Nepálese tribunal at *Kat'hmandu*, than I should in making him over to our own courts. I have mentioned, that the prisoner is allowed the assistance of counsel; but the expression must be understood to refer to the aid of friends and relatives, for there are no professional pleaders in Nepál.

There are no common spies and informers attached to the courts of justice, nor any public prosecutors in the name of the state. The casual informer is made prosecutor, and he acts under a fearful responsibility; for if he fails to prove the guilt he charges, if he have no eye-witnesses to the principal fact besides himself, and the accused resolutely persevere in denial, a man of respectability must clear his character by demanding the ordeal; in which, if he be cast, the judgment upon him may be to suffer all, or the greater part of that evil which the law assigns to the offence he charged. At all events, deep disgrace, and fines more or less heavy, are his certain portion; and if it seem that he was actuated by malice, he shall surely suffer the doom he would have inflicted on the accused, be it greater or be it less. Informers and prosecutors who have evidently no personal interest in the matter; those who are the retainers of the Durbár, or of the Minister, are expected and required, under a Hindú government, to bring under judicial cognisance such breaches of the law of caste, and of the ritual purity of Hindúism, as they may chance to discover, are, of course, more considered than other informers; but they are liable, like ordinary informers, to the predicament of seeing their credit in society ruined, unless they dare the perilous event of purification by ordeal, with its contingency of ignominy and fines. Ordeals, however, whether for proof of innocence or for the clearing of the accuser, are rare, extraordinary, and seldom or never admitted where there is sufficient testimony of witnesses to be had. But whatever quantity of testimony be adduced, the confession of the accused must still be had. That confession is singly sufficient: without it, no

* A kind of whip.

quantity and quality of evidence will justify a condemnation ; a strange prejudice, producing all that harshness towards the accused, which (omitting the folly of ordeals, and that the people seem to love more than their rulers) is the only grave defect in the criminal judicatures of the country.

In Nepál, when the arraignment of the prisoner is completed, he is asked for his answer ; and if he confess, his confession is recorded, he is requested to sign it, and judgment is at once passed. If he deny the fact, the assessors of the judge call upon the prosecutor to come forward, and establish his charge. A very animated scene then ensues, in which the parties are suffered to try their strength against each other—to produce their witnesses and counter-witnesses, their presumptions and counter-presumptions. The result of this conflict is usually to make the guilt of the accused very evident ; and he commonly confesses, when the trial is closed. But if the accused persist in refusing confession, the assessors of the judge then go formally into the evidence, and urge upon the accused all the criminative circumstances, and all the weight of testimony. If these be strong and decisive, and he still deny, he is brow-beaten, abused, whipped till he confess ; or, if all will not do, he is remanded indefinitely to prison*.

If there be no eye-witness but the informer, or if the informer be not himself an eye-witness to the crime, and have no external witness to back his charge, he must, at all events, be furnished with strong presumptive proof (for woe betide him, as he well knows, if he have neither!) wherewith to confirm his accusation. This proof is vehemently urged upon the prisoner by the court and by the accuser ; and if the accused prevaricate or be sullen, he is scolded and whipped as before, till he confess. If he cannot be thus brought to confess, and there be but the accuser's assertion to the denial of the accused, the accuser, if he profess to have been an eye-witness, is now expected, for his own credit's sake, to make the appeal to the God of Truth ; that is, to demand the ordeal. But if he be a man of eminent respectability, the court will probably, in such circumstances, instead of permitting the ordeal, administer to the accuser, being an eye-witness, a very solemn oath, (witnesses are not ordinarily sworn,) under the sanction of which he will be required to depose afresh ; and if his evidence be positive and circumstantial, and in harmony with the probabilities of the case, his single testimony will suffice for the conviction of the court, which will commit the prisoner indefinitely till he confess.

In matters of illicit intercourse between the sexes, where there are two parties under accusation, if the one confess and the other deny, and

* This, in capital cases, is exactly the mode of proceeding formerly observed in the Dutch courts, and probably in many others in Europe.—*Editor.*

there is no positive testimony, and all the circumstantial evidence, however sternly urged upon the non-confessing party, fails to draw forth an acknowledgment, the court, as a last resort, may command that the issue be referred to ordeal of the parties; or that the contumacious party be remanded to prison for a time, whence he is again brought before the court, and urged, as before, to confess. And if this second attempt to obtain the *sine quâ non* of judgment be ineffectual, the Gods must decide where men could not: ordeal must cut the Gordian knot.

Upon the whole, though it be a strange spectacle, and revolting, to see the judge urging the unhappy prisoner, with threats, abuse, and whipping, "to confess and be hanged;" yet it is clearly true, that whippings and hard words are light in the balance, compared with hanging.

A capital felon, therefore, will seldom indeed be thus driven to confess a crime he has not committed, when he is sustained and aided by all those favourable circumstances, in the constitution of the tribunal, and in the forms of procedure already enumerated. Nor should it be forgotten, that if much rigour is sometimes used to procure a confession, the confession itself is most usually superfluous to justice; and is sought rather to satisfy a scruple of conscience, than as a substitute for deficient evidence.
