LAW AND EQUITY BILL.

MEMORIAL OF THE COMMON LAW COMMISSIONERS RESPECTING THIS BILL.

In reply to the following letter of the Lord Chancellor, enclosing the "observations" of the equity judges on the Law and Equity Bill, a communication from the Common Law Commissioners has been presented to Parliament by her Majesty.

House of Lords, 24th April, 1860.

My lord,—I have the honour to submit to you a copy of a memorial from the Master of the Rolls and the three Vice-Chancellors upon a Bill framed with a view to carry into effect the last report of the Common Law Commission presided over by your lordship. I respectfully beg that this memorial may be considered by your lordship and the other commissioners, and that you would have the goodness to inform me how far you concur in its reasoning.

I ought to add, that as this memorial was laid before the House of Lords, I propose (with your permission) to lay before the House of Lords any observations you may be pleased to offer in answer to it.—I have, &c., CAMPBELL, C.

The Right Hon. the Lord Chief Justice Cockburn,
&c. &c. &c.

The Common Law Commissioners' communication is as follows:—

18th May, 1860.

My lord,—Our attention having been called by your lordship to the objections urged in the memorial of the equity judges against the Bill introduced into the Legislature on the recommendations contained in our last report, with a view to our offering such answer as our acquaintance with the subject might suggest, we beg to submit the following observations in reply.

We must begin by premising that the scope and effect of the alterations proposed in the jurisdiction of the common law courts has been greatly misconceived, while the objectors appear to have lost sight of the extent to which equitable jurisdiction has already been conferred on these courts, as well as of the great improvements which have been introduced in modern times into their procedure.

In the sweeping criticisms with which our recommendations have been assailed the proposal to confer further equitable jurisdiction on the courts of common law has been treated as a scheme of innovation and demolition, now first propounded, and the incompetency of the common law judges and the inadequacy of their procedure to deal with equitable rights has been taken for granted and unhesitatingly asserted, as though equitable jurisdiction had never before been conferred upon or exercised by the legal tribunals of the country.

We shall have no difficulty in showing that, with a single, and that a very unimportant, exception, in no instance is it proposed to enlarge the equitable jurisdiction of the common law courts, except where this jurisdiction already to some extent exists, and where the competency of these courts and of their procedure to administer it has already been established by practical experience.

It may not be inexpedient to pause for a moment to take a brief survey of what has already been done in this respect.

The rigid simplicity of the ancient common law and its strict and inflexible procedure having proved inadequate to meet the exigencies of a state of society becoming every day more complicated and refined, and the Legislature omitting to intervene to bring the law into harmony with the more liberal principles of rational and enlightened justice, courts of equity stepped in to supply the place of legislation, by the application of a rude yet not wholly inefficacious remedy—partly in eking out the defectiveness of the common law procedure, partly in mitigating the rigour of the law where an adherence to its letter would have worked injustice—not, indeed, by attempting directly to control the action of the legal tribunals, an attempt which would at once have been resisted, but by coercing the suitors by means of personal duress to forego their legal rights, and to submit to have justice done between them on equitable principles.

Experience, however, soon made men sensible that the benefits of this equitable jurisdiction were greatly diminished by the drawbacks of double tribunals and a twofold litigation, attended with a vast increase of expense. Hence, from time to time, during the last century and a half, according as particular inconveniences successively forced themselves on the attention of the Legislature, portions of the jurisdiction at first exercised only by the courts of equity have been transferred by statute to the courts of common law.

The power to relieve against the penalty of bonds conditioned on a defeasance, to relieve up to the time of trial against actions of ejectment on forfeiture for non-payment of rent, to relieve mortgagors in actions on mortgage bonds or actions of ejectment, on payment of the principal and interest, and the important process of interpleader, are examples of this transfer of jurisdiction.

To these instances of encroachment on the domain of courts of equity must be added the transfer, in our own time, of the whole of that extensive and important jurisdiction which was known under the name of "auxiliary equity." The powers included under this head being wanting in the original procedure of the common law, courts of equity, as has already been observed, took upon themselves to make good the deficiency. Better this, no doubt, than that such powers should nowhere be found for the protection of right; yet so great the evil that a Court in which a suit was pending should not have the means of doing justice between the litigants; so great the hardship of being compelled to resort to a second Court to supply the defects in the procedure of the first; so serious the harassment, and, above all, the expense of the double proceeding that the remedy was often more grievous than the absence of redress; and parties, especially of the poorer sort, more particularly where the matter in dispute was not of large amount, preferred to submit to injustice rather than have recourse to a remedy oftentimes far worse than the mischief to be cured. When, therefore, the Common Law Commissioners recommended the transfer of these powers to the courts of law, Parliament at once saw the propriety of the suggestion, and gave effect to it by legislative enactment. Yet the same argument might have been urged then which is resorted to now. The powers which it was proposed to confer on the common law courts were powers which the courts of equity for many generations had exclusively exercised, according to principles and rules with which, so far as their practical application was concerned, the common law judges could not be expected to be familiar. Yet these powers have now been extensively exercised by the common law courts to the infinite advantage of the suitors. The judges have had no difficulty in familiarizing themselves with the principles and rules established by the practice of equity in this department; and the machinery of the common law has proved itself abundantly adequate to the exigency of the occasion.

It may safely be asserted that, owing to the increased facility and diminished cost of the present mode of proceeding, for every instance in which the resort was had to a court of equity under the old system, hundreds of instances now occur in which the corresponding powers of the common law courts are called into action, and are found fully effective for the purpose.

The innovation introduced by the Legislature into the established jurisdiction of the different branches of our judicature did not however, end here; and assuredly a further and a great change was imperatively called for.

The existence of two conflicting systems of law, recognizing inconsistent and incompatible rights, the one called common law, the other equity, administered by two distinct sets of tribunals, each refusing to give effect to rights which would be