JUDICIAL DISCRETION.

We do not propose to discuss in this paper that species of discretion, so finely anathematized by Lord Chancellor Camden when he said, "The discretion of a judge is the law of tyrants; it is always unknown; it is different in different men; it is casual, and depends upon constitution, temper, and passion. In the best, it is oftentimes caprice; in the worst, it is every vice, folly, and passion to which human nature is liable." Since his day, judicial discretion has been limited and regulated by written and statute law. In almost every department of law, except, perhaps, in mere matters of practice, there is but slight scope for judicial idiosyncracies. From the individual judge there is always the remedy by way of appeal to a bench of judges. But as we have indicated, there are certain points of practice resting in the discretion of the judge, from whose decision thereon there is ordinarily no appeal. It is regarding these that we intend briefly to consider how the law stands.

In *McDonell* v. *McKay*, 2 Chan. Cham. R. 243, on an application to amend the bill, the judge before whom the motions came, allowed the applicant to file a further affidavit, and upon this new material granted the motion. It was held by the Court on re-hearing, that the order made being discretionary with the judge, it was not for them to interfere. So in *Chard* v. *Meyers*, 3 Chan. Cham. R. 120, the judge allowed an appeal to be brought from the master's report, after the usual time therefor had elapsed, and the full Court acting on the same principle, affirmed the order with costs on the re-hearing. It was previously laid down in *Anon.* 12 Gr. 51, that an appeal from Chambers will not be entertained in a matter which rests in the judge's discretion; in that case, the order complained of was one allowing the defendant in to answer, after the bill had been noted *pro confesso*. The same principle was enunciated by the Irish Court of Appeal in Chancery, in the case of *Re Lawder's Estate*, 19 W. R. 371, and by the English Court of Chancery appeal in *The Republic of Peru* v. *Renzo*, 22 W. R. 358, when the judge had made an order extending the time to produce. And again by the latter Court in *Ohlsen* v. *Terrero*, 23 W. R. 195.

In *Sheffield* v. *Sheffield*, 23 W. R. 378, s. c. L. R. 10 Ch., James, L. J., intimates that there are cases when the Court of Appeal would interfere to prevent a failure of justice, even when the order was in the discretion of the judge below. In that case, Malins, V. C., had refused to dismiss a bill for want of prosecution, when the plaintiff had undertaken, but had failed, to speed the cause. The Lord Justice observed that the judges below might well be trusted to consider the conduct of their own causes. He then pointed out that no question of right is involved, but only one of indulgence, and ends by saying: "I am not inclined to encourage appeals from a decision of the Court upon that which is really a matter of judicial discretion, and upon a matter of what I may call judicial indulgence to the parties."

Since the English Judicature Act, the same practice is observed. In *Golding* v. *The Wharton Railway*, 20 Sol. J. 391, the matter rose for the first time on an application to strike out some paragraphs of the defence as embarrassing. The Master refused to do so; there was a repetition of this refusal by Mr. Justice Denman in Chambers, and on appeal to the Queen's Bench division, this decision was affirmed. The plaintiff then came to the Court of Appeal and his appeal was dismissed with costs. Mellish, L. J., took the opportunity of stating the principle on which the Court intended to deal with such applications. He said that the judge