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THE

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I.—ON THE CONSTITUTION OF A SUPREME COURT OF APPEAL FOR THE BRITISH EMPIRE.*

By Alexander Edward Miller, Q.C.

THE movement which has at length led to the relinquishment by the House of Lords of their ancient jurisdiction as the court of last appeal from the superior courts of law and equity in the United Kingdom is due to the progress of a principle of very recent growth, at least in this country, which may fairly be described as "intolerance of fictions."

Down to a very recent period the current of public opinion set precisely in the contrary direction, and any institution which practically "worked well" was regarded with all the more favour if it appeared by the aid of some ingenious fiction in the guise of some obsolete system which it had in fact superseded. But this feeling is rapidly disappearing. Any one who will take the trouble to follow the course of modern legislation (disregarding cases whose form has been determined by the exigencies of party warfare) will find an ever-increasing tendency to rise out of—I will not say *above* the question of practical workability, and endeavour to give to our institutions something of that philosophical symmetry on the absence of which, not so very long ago, we rather prided ourselves. It would be easy, were it of any moment,

* Read at the Glasgow Social Science Congress, October, 1874.

to multiply examples of this tendency, but we need not go beyond the case of the House of Lords to find an instance of the phenomenon in its completest form.

It is admitted, I may say on all hands, that the practical working of the House of Lords as a court of appeal has, at least of late years, been on the whole thoroughly satisfactory. It is not suggested that its judgments have been weak or unreliable; on the contrary, they command an amount of respect wholly disproportionate to the authority of its members *as individuals;* it is not alleged that its procedure is cumbrous or ill adapted to its object; it cannot be charged with any faults in the nature of delay (for it is absolutely without arrears), or with any greater expense than is inseparable from the careful and detailed investigation of questions of the highest importance by judges and advocates of the greatest eminence. The only serious defect in its constitution is that the sittings of the court are dependent upon the session of Parliament, and are consequently liable to interruption at all sorts of inconvenient times, and certain to be suspended during a considerable portion of every year. This could, however, be got rid of by an easy fiction; such, for instance, as constituting the Law Lords a permanent Committee of Appeals, with power to hear and report to the House notwithstanding an adjournment or prorogation, providing at the same time that the judgments of the House, when recorded, should relate back to the times when judgment was really given by the Committee. Not long ago some such expedient would have been adopted and considered satisfactory, while the *à priori* objection to the jurisdiction, which has in fact prevailed to its overthrow,* would not have been regarded as consituting any objection at all. That the jurisdiction is exercised not by the House but by the

* Throughout this paper I have assumed that the abolition of the appellate Jurisdiction of the House, provided by the Act of 1873, as regards England, and acquiesced in as regards Ireland and Scotland by the Bill of 1874, is to be taken as now irrevocable.—A. E. M.

legal peers in its name would have been looked upon, not forty years ago, as no objection whatever, and yet this is the inherent deficiency which alone it has been found impossible to remove, and which in fact has caused the downfall of the system.

I have troubled you with these preliminary considerations because they seem to me to point out the principles upon which the new Court of Appeal ought to be constructed; that is to say, it is necessary to preserve not only those characteristics to which the House of Lords owes its practical excellence, but also those which gave it its prestige and secured general acquiescence in its authority. The former quality depended mainly, if not exclusively, on the individual eminence of its members; while the latter was due partly to the unity and continuity of its decisions, but also in a great degree to the fiction which indued it with a representative character. It was felt, particularly in Scotland and Ireland, that the House constituted not an English but an Imperial Court, so that litigants from all parts of the kingdom met there as upon common ground. One great difficulty attending the institution of a new court of appeal will be to preserve this quality without imparing the efficiency of the court; for it follows from what I said that we can no longer rely for this purpose upon any fiction. It will be of no avail to interpolate the word "Imperial" into the name of the court, unless it be impressed with a really imperial character, and it will be hopeless to expect the courts, either here* or in Ireland, to tolerate that interference from any purely or practically English court to which they have cheerfully submitted so long as the court, though for the most part composed entirely of English judges, spoke from under the mantle of the House of Lords of the United Parliament. And yet the necessity of preserving this representative character will seriously interfere with the selection and qualification of the judges of the court.

* In Scotland.

I may here premise that the institution of a satisfactory court of final appeal seems to me to presuppose a complete system of localised courts of intermediate appeal, from all of which it should be essentially distinct. For if all the cases which reach the final court are to be heard, as they ought to be, by a body essentially, and not merely nominally, one, some means must be devised for so sifting the cases that none shall reach this final court which do not, either from the amount of property at stake or the importance of the principle involved, warrant that deliberate and thorough investigation which necessarily entails considerable expenditure both of time and money. This can not be attained without a system of double appeal. The judges of courts of first instance must necessarily be comparatively numerous, and the tendency to divergence of decision which is inseparable from the independent action of different minds can only be efficiently connected by constant and ready access to some common superior authority. It is, therefore, necessary to provide everywhere courts of first appeal, readily accessible, rapid in action, and inconsiderable in expense, which will at once correct the divergencies of the courts of first instance, and, by disposing finally of the less important cases, reduce the work of the supreme court within practicable bounds. But as these courts must, *ipsâ naturâ rei*, be distributed amongst the principal local centres, so as to be reasonably accessible to appellants in all parts of the empire, it follows that they ought all to be essentially distinct from the supreme court, which ought to bear precisely the same relation to them all, and which cannot under any circumstances be properly susceptible of any multiplication or subdivision whatever. But to this end the judges of this court must be permanent and distinct. I for one do not believe that any system can work satisfactorily which temporarily selects some few from amongst a number of judges of equal authority, and, without altering in any respect their status or emolument, clothes them for a limited period with a superior juris-

diction, which they are to exercise with the sword of Damocles, in the shape of the necessity for frequent reappointment, hanging over their heads.

Moreover, the reluctance which the non-English portions of the empire would naturally entertain to the supremacy of an admittedly English court would surely not be lessened if the court, though nominally "Imperial," were really but a division of a larger court whose other divisions were occupied exclusively with English appeals.

Besides, a court of last appeal ought obviously to consist only of judges of the highest eminence: it is not sufficient that it should *contain* such judges, because in this case, more perhaps than in any other, the strength of the chain is that of its weakest link, and the presence of even one judge of admittedly inferior calibre would have a very damaging effect upon the prestige of the court. It plainly follows that to fulfil this condition the court can never be very numerous.

Further, that unity of decision of which I have spoken can only be secured by so limiting the number of the judges that the court must ordinarily consist in a great measure of the same individuals. If once you have a court sufficiently numerous to sit in divisions (in other words, if its effective strength amounts to two full quorums), the judges will inevitably avail themselves of so ready a means of lightening their work by division of labour, and concurrent sittings of different divisions will in a short time become the recognised rule of the court. The history of the Court of Appeal in Chancery in England is an apt illustration of this. It certainly never was intended by Parliament to establish the Lords Justices as a court of concurrent jurisdiction sitting at the same time as, but separately, from the Lord Chancellor; but as soon as it appeared that the wording of the Act permitted this, that which was meant to be the exception was settled as the rule, and the sittings of the full court, instead of being, as intended, the ordinary practice, became so un-

usual that until lately such a sitting could only be obtained upon special application, for which some exceptional cause must have been shown. Hence we have had, practically, two distinct courts, however persistently they may have been called by a common name. This, which was of no great consequence in the case of courts subject to a further appeal, would be fatal to that continuity of decision the obtaining of which is one of the chief objects of the institution of a single supreme Court of Appeal. This consideration fixes the *maximum* number of the judges of the court at one less than two full quorums.

But the judges of this court must not only be separate and permanent; they must also be distinguished from all the other judges, whether of first instance or intermediate appeal, by superiority of position and increase of emolument. It is essential to attract to our proposed court, if it is at all to rival the prestige and authority of the House of Lords, the very first men that the legal profession can produce in any part of the empire. But this can only be done by making this court more attractive than any other judicial position in the country. Not only should the judges of this court hold office like other judges, during good behaviour; they should be given a precedence and paid a salary commensurate with the importance of the functions with which they are intrusted. What the precise amount of increased salary should be I do not care to inquire; but that it should be such as to make an appointment to this position an object of ambition to every judge in the empire, does not seem to me to admit of any reasonable doubt.

And at this stage I arrive at a point on which I have the misfortune to differ from both the very learned lords who have lately introduced bills into Parliament dealing with this subject. I can, however, claim as an authority in my favour the Act of 1871 for the appointment of the salaried members of the Judicial Committee. I am strongly of opinion that no one should be appointed to a seat in this court direct from

the bar, and that these appointments should be reserved exclusively for judges of tried and approved experience. The position of a judge of a court of final appeal calls for the possession of remarkable judicial excellence, and this can only, in ordinary cases, be obtained by considerable judicial experience. Here and there a man of extraordinary capacity is recognised, even while still at the bar, as "a great judge;" but these cases are few and far between; while on the other hand even the most brilliant forensic career has more than once proved a prelude to unmistakeable judicial failure. What should be a sufficient qualifying service as judge is a matter of mere detail, but I should suggest five years as supplying a satisfactory test of judicial capacity and a reasonable amount of judicial experience.

The next question is—What is the best number to select for a quorum? It has been found by experience that the presence of a large number of judges at once is not conducive to the efficiency of the court, whether because division of responsibility produces want of care in considering the case, or because the judges, in mutual reliance upon one another, relax their attention to the proceedings. There is a considerable concurrence of opinion amongst those who have most carefully studied this question that any increase of number beyond five is likely to impair the quality of the court. On the other hand, the numerical strength of a court of appeal ought obviously to exceed that of the court appealed from. Such is the constitution of men's minds, so hard is it to induce them to weigh rather than count opinions, that there is great danger lest any superiority (or even equality) in the number of the judges appealed from, as compared with those of the court of appeal, should tend to shake public confidence in the authority of the latter court. But no one, I should suppose, would think of suggesting a smaller number than three for a quorum of the courts of intermediate appeal: to do so would be to weaken those courts as compared with the courts of the first instance, and thus to multiply further

appeals; in other words, to unfit the courts of first appeal for the very important function of sifting the appeal cases, so as to get rid of all except the most important of them, which alone should be permitted to reach the highest court. Hence it follows that we must fix a quorum of the supreme court either at four or five, thus making the maximum number of its judges either seven or nine. It is obvious that such a limitation of number must materially affect any scheme for giving a representative character to the court.

The question whether an even or odd nnmber of judges is more desirable in an appeal court is one of considerable difficulty, and upon which opposite opinions have been held by persons of great authority. I find, however, a considerable preponderance of opinion in favour of an odd number, and this has in the particular case before us the additional advantage that by selecting five, and thus obtaining nine as the full number of judges, we have a far better chance of obtaining something approaching to an adequate representation of the different courts appealed from than would be possible with the smaller number.

The conclusion, then, at which we have for so far arrived is—that in every part of the empire there should be provided adequate local courts of appeal from all the courts of first instance within their jurisdiction, and that from all these courts (with whose constitution we have at present nothing to do) there should lie an appeal to one central and supreme court, distinct from that superior to them all; that this court should consist of not more than nine judges, of whom five should be a quorum, and should therefore be incapable of subdivision; that its judges should (with one obvious exception) be appointed during good behaviour, and should be paid a salary and given a position sufficient to induce every other judge in the empire to desire the appointment. It is, moreover, necessary, in order fully to maintain the authority of the court, that it should in some way or other, which remains for consideration, be impressed with a representative character.

There are four distinct sets of local courts which seem to require effectual representation in this court. Besides the courts in England, Scotland, and Ireland respectively, each of which must obviously have some share in the proposed court, we have the High Courts of Judicature in India and the Supreme Courts of the Colonies, from all of which an appeal now lies to the Judicial Committee, and is to lie to our new court, and which ought, as it seems to me, to be in some manner distinctly recognised in its composition. Having regard, however, to the nature of these courts, the qualification of their judges, and the extent to which they are at present represented or unrepresented on the Judicial Committee, I think that it will be sufficient to include them all in one class, for which convenience I will call "Colonial," and that no position lower than that of Chief Justice on one of the high courts in India, or of a supreme court in one of the colonies, ought to be looked upon as an equivalent to that of judge of the High Court of Judicature in England or Ireland, or Lord of Session in Scotland. To these classes, then, and to judges of not less than five years' standing in them respectively, I propose to limit the appointments of judge to the Imperial Court of Appeal. For convenience of reference I will henceforth speak of the Courts in England, Scotland, Ireland, and the Colonies respectively, as the "Constituent Courts" of this Court of Appeal. I further think that all the judges of the court should be equally called upon to take part in all business which may come before it, and that no attempt should be made so to distribute the attendance of the judges as to give to any one of them any peculiar connection with the appeals from the courts from which he was taken. From whatever quarter he may have been originally appointed, he ought upon becoming a judge of this court to take part in all its business indiscriminately.

It only remains to consider upon what principle the requisite representative character should be imparted to the court; and here I am perfectly conscious that what I am

about to propose is open to many of the objections which have been urged, and which I am about myself to urge, against the proposals which have heretofore been made and rejected; but I venture to think that it more nearly combines the various objects to be desired than any other plan yet offered for consideration.

In the course of the attempted legislation upon this subject three principles of selection have been successively suggested and rejected. Of these the most obvious is that proposed in Lord Hatherley's Bills of 1871, which may be termed "direct" representation. According to this plan the court was to be constituted of a certain definite number of representatives of each of the constituent bodies, and the perpetuation of this character was to be secured by filling up all vacancies as they arose upon precisely the same principle. The disadvantages of this scheme was twofold. In the first place, it would certainly happen sometimes, and might happen often, that the very most eligible man for the position would be permanently excluded, while a succession of admittedly inferior men were appointed to the court, merely because the vacancies did not any of them take place among the members whom he was eligible to succeed; or, again (which is an aggravated form of the same objection), cases might arise where no person of sufficient eminence could be found in the body to be represented, and it would become necessary either to leave the place vacant for a time or to appoint an admittedly inferior man. In the next place, there would be very great danger that direct representation of this kind would lead to some such distribution of the attendance of the judges as above mentioned, and thus the very *raison d'être* of the court—the submitting the law of every part of the empire to the control of one practically uniform body—would be defeated.

Another system of representation was foreshadowed and partly carried into effect by Lord Selborne's Act of 1873. It may be called "official" representation. It consisted in

placing in the court certain *ex officio* members, holders of high judicial offices in the various constituent courts, and supplementing them by other "ordinary judges," selected without any reference to a representative character. The disadvantages of this plan also seem to be twofold. First of all, this scheme is, as regards representation, as mere a fiction as the House of Lords itself. No *ex officio* representatives of India or any colony could possibly take any part in the business of the Court, and even those from Scotland and Ireland would be seriously impeded in the discharge of their ordinary functions, if their attendance were more than nominal or occasional. Practically none of them ever would attend, except upon some exceptionally important appeal from their own courts, thus reproducing in an aggravated form one of the objections already noticed in considering the scheme of direct representation. Secondly, there are very evident objections to any plan which requires the same judge to act as judge as well of first instance as of appeal. And these objections are all the more cogent when, as in the arrangement under consideration, there is a plurality of such judges, so that they would be able—and called upon—mutually to review one another's decisions. If this led, as in the Court of Exchequer Chamber it has led, to occasional instances of mutual reversal, it could not but impair the authority of the court, and would besides run considerable risk of unsettling the law. A judge of final appeal should not, I think, have his mind distracted or his time occupied with any ordinary judicial routine, and particularly should not be subject to have his deliberate decisions, in whatever capacity pronounced, exposed to reversal or review.

The third principle of representation is that proposed in the Lord Chancellor's Bill of last session, which may be described as "virtual" representation. It consists merely in extending to the members of all the bodies proposed to be represented equal rights of eligibility to the court, and leaving it to the Executive Government for the time being

to select on their own responsibility the fittest men for the vacancies as they arise. This scheme, which seems at first more plausible than the others, is nevertheless, like them, open to a twofold objection. First, the power of selection would sometimes be, and would oftener be believed to be, unfairly exercised. Where such a selection has to be made from a tolerably homogeneous body, such as the Bench or Bar of any one of the constituent countries, there are pretty sure to be such means of comparison amongst the possible appointees as, on the one hand, to render any very flagrant abuse of the power of selection impracticable, and, on the other, to silence any unfair criticism of a really judicious appointment. But when the selection is made from among the members of a number of distinct bodies possessing no common standard; no such means of comparison exist; and, on the one hand, much greater opportunity is afforded for the indulgence of jobbery or favouritism, while on the other it is more difficult to defend from specious misrepresentation even the most unexceptionable exercise of the power. Secondly (and this objection seems to me very important), this system, however theoretically perfect, would in practice inevitably ensue to the benefit of the Bench and Bar of England at the expense of all the others. Not only are these more numerous than any of the other "constituent courts," not only do they, from their central position, occupy a more prominent place in the public eye, but they are also much better known to those upon whom the duty of selection would unavoidably devolve, and they have much better opportunities of making their voices heard where such audience is of most importance. For, no matter to whom may be intrusted the duty of formally appointing the judges of this court, the real power of determining the selection will in all ordinary cases lie with the Lord Chancellor for the time being, and he will naturally be more cognizant of the merits and more alive to the claims of those amongst whom he has lived and worked, and with whom he is familiar, than of those

whose qualifications, however high, he has had to learn from the voice of fame or the testimony of others.

> Segnius irritant animos demissa per aurem,
> Quam quæ sunt oculis subjecta fidelibus.

Hence an unrestricted power of Government selection, however guardedly it may be exercised at first, would inevitably gravitate towards the production of an exclusively English court. I am aware that a very high authority, holding a judicial office of great importance in Ireland, has given it as his opinion that this is a desirable result; but in this opinion his lordship, as I believe, stands alone.

The plan which I have the temerity to propose consists of a very simple combination of the suggestions of Lord Cairns and Lord Hatherley, which seems to me, while not open to all the objections urged against either of them, to combine, in part at least, the advantages of both.

In the first place, it is obvious that in any possible scheme the Lord Chancellor for the time being must be one of the members and president of the court. This leaves eight judges to consider, and a very small restriction upon the discretionary power of selection proposed by Lord Cairns would seem sufficient to obviate the serious danger shown to arise from his plan, without running any practical risk of really hampering the action of the Crown.

I propose that the Crown should ordinarily be entitled to select at discretion the judges of the supreme court from amongst all the judges qualified as before mentioned, subject, however, to this restriction; that at no time should there be less than one of such judges (exclusive of the Lord Chancellor) taken from each of the constituent bodies, the Crown being entitled to appoint from any one of such bodies at pleasure any number of these judges from one up to five. It is scarcely conceivable that, under these circumstances, it should ever be requisite either to pass over an exceptionally fit man for want of a vacancy or to appoint an obviously unfit man to fulfil the required condition, and thus the repre-

sentative character of the court would be preserved without any injury to the calibre of its members.

I am deeply sensible that this paper is rather a series of superficial hints than a satisfactory examination of the question, but my object has been rather to elicit, if possible, the due discussion of a subject of immense importance before it is too late to affect the action of the Legislature, than to pretend to have done more than make a somewhat crude and imperfect attempt at the solution of the problem. To each of my hearers I would earnestly say

Si quid novisti rectius istis,
Candidus imperti;

I hardly dare to add—

Si non, his utere mecum.

II.—THE STATUTE OF MERTON—ITS TRUE TEXT WITH A TRANSLATION AND WITH A NOTE ON C. IV.

AN ancient Statute, constantly cited in our courts, ought to be accessible through the most accurate text now remaining, a direct translation of that text, and a position or accompanyiug notice shewing its proper place in legal history, its relation to earlier law, and the relation of later law to it.

The Statute of Merton, the fourth chapter of which is cited in almost every case touching common of pasture, is not so accessible. The authorised text is singularly ill-chosen and corrupt, the authorised translation is one of which nothing is known, except that it was printed in 1751, and both are so placed and so noted as to mislead rather than to instruct.

It would seem that some early collector of statutes, having found written records of the proceedings at the Court or Parliament of Merton, and at other Courts or Parliaments held shortly before or after it, had pieced them together under the general name of the Provisions of Merton, and that this compilation had been widely spread through constant transcription. Such a notion never, so far as appears, occurred to the editors of "The Statutes of the Realm," although clearly suggested by the very document which they printed as text, and proved by two records which they printed as notes, and by two well known printed books, Bracton and the Annals of Burton. Neither of those books are even noticed in "The Statutes of the Realm."

The authorised text is divided into ten chapters, the authorised translation into eleven, the sixth of the text, the sixth and seventh of the translation, being equivalent.

The first five chapters form a garbled version of the true Statute of Merton—that is to say, of those articles which, having been "provided" by the great men, were "conceded" by the King, and so became a "constitution" or "statute." Other articles so "provided," but not so "conceded," will be noticed presently.

The Court or Parliament of Merton was held on the 23rd January, 20 Henry III., 1235-6. On the 30th January was sent forth the King's Writ of New Constitution to the Sheriffs throughout England and to the Justices in Eyre, in Hants, and Wilts, ordering the New Constitution set out therein to be read in full County Court and firmly kept. This Writ was enrolled,* and is in print.† About twenty years afterwards the first four chapters of the New Constitution were embodied in Bracton.‡ Early in the next century the proceedings of this Parliament were entered in the "Annals of Burton" §

* Rot. Cl. 20 Hen. III., m. 18 d. † Stat. Realm I, 4 n.

‡ c. I., f. 312, b; c. II., f. 96; c. III., f. 236, b; c. IV., f. 227.

§ Edit. 1864, p 249.

que postea per placitum dotes suas recuperaverint de tenementis de quibus viri earum obierunt seisiti recuperent simul cum dotibus suis de illis qui de injusto deforciamento convicti fuerint dampna sua scilicet valorem totius dotis illas contingentis a tempore mortis virorum suorum usque ad diem quo ipse vidue per judicium curie nostre seisinam suam recuperaverint et ipsi deforciatores nichilominus sint in misericordia nostra sicut prius solent.

II. Item quod omnes hujusmodi vidue de cetero possint legare blada sua in terra tam de dotibus suis quam de aliis liberis terris et tenementis suis salvis serviciis dominorum que debentur de dotibus.

III. Item si quis fuerit diseisitus de libero tenemento suo et coram justiciariis itinerantibus seisinam recuperaverit per assisam nove disseisine vel per cognicionem eorum qui disseisinam fecerint vel quocunque alio modo per judicium curie nostre et ipse disseisitus per vicecomitem seisinam suam habuerit si üdem disseisitores postea post iter justiciariorum vel infra iterum eundem conquerentem disseisiverint et inde convicti fuerint statim capiantur et in prisona nostra detineantur quousque per nos pro redemcione vel alio modo deliberentur. Eodem modo fiat de illis qui seisinas suas recuperaverint per assisam mortis antecessoris et similiter omnibus aliis qui terras et tenementa quocunque modo in curia nostra per juratam recuperaverint vel quocunque alio modo per judicium curie nostre si postea inde disseisiti fuerint a prioribus deforciatoribus versus quos recuperaverint.

IV. Item quia multi magnates de regno nostro qui feoffaverint milites et libere tenentes suos de parvis tenementis in magnis maneriis suis questi fuerunt quod commodum suum facere non potuerunt de residuo maneriorum suorum sicut de vastis boscis et pasturis desicut ipsi feoffati sufficientem possent habere pasturam quatenus pertinet ad tenementa sua

Ita provisum est et a nobis concessum

Quod cum hujusmodi a quibus [cunque] feoffati assisam nove disseisine deferant de communia pasture—

1. Si coram justiciariis cognoverint quod sufficientem pasturam habeant quantum pertinet ad tenementa sua et habeant ingressum et egressum de tenementis suis usque ad pasturam illam tunc inde sint contenti et illi de quibus questi fuerint quieti recedant de hoc quod commodum suum de terris vel vastis vel pasturis fecerint.
2. Si autem dixerint quod sufficientem pasturam [non] habuerint vel sufficientem ingressum vel egressum quantum pertinet ad tenementa sua tunc inde inquiratur veritas per assisam.
   i. Et si per assisam recognitum fuerit quod per eosdem in aliquo fuerit impeditus ingressus et egressus vel quod non habeant sufficiéntem pasturam sicut predictum est tunc recuperent seisinam suam per visum juratorum ita quod per discrecionem et sacramentum ipsorum habeant conquerentes sufficientem pasturam et ingressum et egressum sufficientem in forma predicta et disseisitores in misericordia et dampna reddant sicut prius reddi solent ante provisionem istam.
   ii. Si autem recognitum fuerit per assisam quod conquerentes habeant sufficientem pasturam cum libero ingressu et egressu sicut predictum est tunc licite faciant alii commodum suum de residuo et de assisa illa recedant quieti.

Ita provisum est et a nobis concessum

V. Quod de cetero non currant usure contra aliquem infra etatem existentem a tempore mortis antecessoris cujus heres ipse fuit usque ad legitimam etatem suam ita tamen quod propter hoc non remaneat solucio debiti principalis cum usuris ante mortem antecessoris sui.

The New Constitution

according to the enrolled Writ of N. C.

On Wednesday the morrow of St. Vincent in our Court and before the venerable father E. Archbishop of Canterbury and his co-bishops and before the greater part of our earls and barons of England for the common weal of our whole kingdom it was as well by the aforesaid archbishop bishops earls and barons provided as by us granted

I. That from thenceforth all widows who after the death of their husbands may be ousted of their dowers or may be unable to have their dowers or their forty days without plea and who afterwards by plea may have recovered their dowers of the tenements whereof their husbands died seised may recover together with their dowers from those who may have been convicted of unjust deforcement their damages notably the value of the whole dower belonging to them from the time of the death of their husbands down to the day on which the widows themselves by the judgment of our court may have recovered their seisin, and the deforcers themselves may nevertheless be in our mercy as formerly they were wont.

II. Also that all such widows thenceforth may be able to bequeath their growing crops on the land as well from their dowers as from their other free lands and tenements saving the services of lords which are due from the dowers.

III. Also if one may have been disseised of his freehold and before the justices in eyre may have recovered seisin by assise of novel disseisin either by confession of those who may have done the disseisin or in any other manner whatever by judgment of our court and the disseisee himself may have had his seisin by the sheriff if the same disseisors afterwards after the eyre of the justices or within it may again have disseised the same plaintiff and thereof been convicted

let them be forthwith taken and in our prison detained until by us for ransom or in other manner they be delivered. In the same manner let it be done with those who may have recovered their seisins by assise of mort d'ancestor and likewise with all others who may have recovered lands and tenements in any manner in our court by jury or in any other manner by judgment of our court if afterwards they may have been thereof disseised by the former deforcers against whom they may have recovered.

IV. Also because many great men of our kingdom who may have enfeoffed their knights and freeholders of small tenements in their great manors have complained that they have been unable to make their profit of the residue of their manors as of wastes woods and pastures although the feoffees themselves may be able to have sufficient pasture so far as belongs to their tenements It was so provided and by us granted

That when such feoffees of any persons whomsoever bring assise of novel disseisin of common of pasture

1. If before the justices they confess that they have sufficient pasture as much as belongs to their tenements and have ingress and egress from their tenements as far as that pasture then let them be content therewith and let those of whom they have complained go quit of having made their profit of lands or woods or pastures
2. But if they have said that they have not sufficient pasture or sufficient ingress or egress as much as belongs to their tenements then let the truth thereof be inquired of by assise.
   i. And if it be found by assise that ingress and egress were in any wise hindered by the same persons or that they have not sufficient pasture as is aforesaid then let them recover their seisin by view of the jurors, so that by the discretion

and oath of the same the plaintiffs may have sufficient pasture and ingress and egress sufficient in the aforesaid form and let the disseisors be in mercy and pay damages as formerly were wont to be paid before this provision.

ii. But if it be found by assise that the plaintiffs have sufficient pasture with free ingress and egress as is aforesaid then let the others lawfully make their profit of the residue and go quit of that assise.

It was so provided and by us granted

V. That thenceforth interest may not run against any one being within age from the time of the death of the ancestor whose heir he was down to his lawful age so however that on this account the payment of the principal debt with interest before the death of the ancestor stand not over.

The fourth chapter, the most important of those still in force, requires special notice.

The old law of England viewed the waste of a manor as community-land, the lord and his tenants as making up the community seised of the waste, and every one of the community as entitled to use it for pasture in proportion to his several seisin of arable land.

Through events well-known to students of legal history, the law first separated the interest of the lord and the interest of the tenants, and, secondly, strengthened the former interest against the latter.

First, the law came to view those interests as differing in kind; the waste as the lord's own land, the lord as solely seised of the waste, the tenants as seised merely of their right to use it for pasture.

Secondly, the law came to view those interests differing in kind as differing in extent also,—the tenants as seised of a right to use a sufficient space only of the waste for pasture,

the lord as entitled at will to coarct that right to such sufficient space, and so discharge it from the residue.

The first step only had been taken when the Assise of Novel Disseisin of Common of Pasture was devised, and the practice in the Assise became settled in accordance with the the state of the law.

The second step could not be made good without a fresh settlement of that practice.

When the judges examined the parties in order to ascertain how the assise should be taken,* the plaintiff might, in answer to their question, confess that he had still sufficient pasture, but the judges could not take judicial notice of the new doctrine to which that confession appealed, although, if the plaintiff "conceded assise,"† and so elected to abide by the new doctrine, they could take notice of it as an agreement between the parties superseding the general law.

The fourth chapter of the Statute of Merton was the fresh settlement of practice wanting. It instructed the sheriffs and judges how the new doctrine of coarctation of common of pasture to a sufficient space should be judicially noticed in the Assise of Novel Disseisin of Common of Pasture brought by a tenant. It has always been taken for an affirmance of that doctrine between lord and tenant.‡ It was extended as a like affirmance of that doctrine between neighbours by the Statute of Westminster, c. 36. Both Acts were recited in English and confirmed by the Act 3 & 4 Edw. VI., c. 3. All three Acts were, by the abolition of the Writ of Novel Disseisin, 3 & 4 Will. IV., c. 27, s. 36, so far consigned to legal history.

The right of coarctation of common of pasture to a sufficient space, and the exercise of that right, should be viewed apart. The right is universal and perpetual, vested in every lord of a waste at all times. The questions, whether

* Bract., 183, b.

† 6 Henry III., Fitz. Abr. tit Comen. 26, f. 107, b.

‡ Bract., 227.6.

the right can be exercised, and, if so, to what extent, in any given waste, depend for answer upon the proportion for the time being of the waste to the common-rights.

How, and when, in contemplation of law, do these questions arise for answer? Coke, in saying, "When the lord makes an approvement it is a direct and good course to call the tenants for this that they may be able to be satisfied, that the approvement is reasonable," * intended to counsel prudence with a view to future peace, not to lay down a rule of legal principle or practice. The law contemplates no concurrence of commoners, no previous surveys and measurements of waste and of tenements with a comparative estimate. It contemplates, first, an *act* of coarctation, secondly, an issue raised whether such act is or is not referable to the *right* of coarctation. The act, if so referable, is lawful as an exercise of the right, if not so referable, is unlawful as a wrongful disseisin. There being, as to an act which may be as well lawful as unlawful, a presumption in favour of lawfulness,—there being also a presumption in favour of the party denying,—the burden of proof appears to lie on the commoners who allege an act of coarctation of common of pasture to be a wrongful disseisin of such common. On the other hand the law suggests to the lord a strong motive for self-restraint in coarctation, a liability, not only to restore seisin, but also to pay damages, and those treble by statute.

In Arlett v. Ellis,† Holroyd, J., held that a coarctation of common ought not to be *primâ facie* considered an injury to the commoners; ‡ while Bayley, J., § and Littledale, J., ‖ held the contrary.

If the latter opinion be correct—if the lord be bound to justify his minutest act of coarctation through a costly course of enquiry, and also under a liability to treble damages—the

* Rolle Rep. 365.

† 7 B. & C., p. 346 (1827).

‡ P. 374. § P. 370. ‖ P. 376.

law and the affirming statutes which purport to place coarctation upon a fair footing, appear to have partly missed their object, and to leave the advancement of tillage, which was much favoured in law,* at the mercy of every capricious commoner.

H. S. MILMAN.

III.—ADDRESS TO THE ARTICLED CLERKS' SOCIETY.

By PROFESSOR LEONE LEVI, Barrister-at-Law.

I NEED scarcely remind you, gentlemen, that although the legal as well as any other profession is open to all, its rewards are obtainable only by the few, and that though interest and influence may somewhat smooth your path at the outset of your career, it is not on such adventitious aid that any one can rest for real and permanent success. You must needs have a well disciplined mind, a mind well stored with forensic and general knowledge, to respond to the demands made on the profession for learning at once deep, thorough, and comprehensive, and you do well to add to the ballast of book learning the lighter cargo of beauty of character, dignity of manner, and power of oratory, which is best acquired when you leave the recluseness of your chambers, and meet face to face with your fellow-aspirants to positions of honour and usefulness. I have myself a high consideration for such Societies as this. I prize them for benefits I have myself acquired from them, and for the good they accomplish for others, and I believe that the practice thereby offered for debating any question, and, above all, those of a legal character, is well calculated

* 2 Inst., 85.

to invigorate the intellect, to sharpen wit and cleverness of repartee, and to strengthen personal confidence, which is a most necessary condition to success.

Much has been said of late on the expediency of establishing a new School of Law for both branches of the legal profession, and strenuous efforts have been made to induce the Inns of Court to throw aside their apathy, and to use their rich foundations in the promotion of legal education. The establishment of a School of Law was a favourite idea of Lord Brougham, and is now the pet scheme of Lord Selborne. What is it that is contemplated? A College or an University? If a College, in what respects can it afford better means of instruction than is given by the Universities of Oxford and Cambridge, or by King's College and University College, London? * Can it impose actual legal practice in the same manner as the College of Physicians can impose Hospital practice? Certainly not. A School of Law can only do more imperfectly because disjointedly from other branches of liberal education, what is already done, or what may be more effectively done by our Universities and Colleges. If it be an University that is aimed at, do not the older universities as well as the University of London confer degrees in Law? † And why should not such degrees in law qualify any person for practice as a barrister-at-law? I

* The law instruction now given in England may be summarised as follows: The Council of Legal Education provides lectures on Jurisprudence and International Law, Roman Law and Constitutional Law and History; Equity; Real and Personal Property; Common Law, and Hindu and Mohammedan Law. The Incorporated Law Society Common and Mercantile Law, Conveyancing, Real and Personal Property, and Equity. The Oxford University, Civil Law, English Law, International Law, Jurisprudence, and Indian Law. The Cambridge University, Civil Law, Law of England, International Law. King's College, London, English Law, Commercial Law, International Law, and Indian Jurisprudence. University College, London, Jurisprudence, Roman Law, Constitutional Law and History, and Laws of India.

† The first examination for LL.B. in the London University is in Jurisprudence, Roman Law, Constitutional History. The second is on Common Law, Equity, Real Property Law, Law and Principles of Evidence, Roman Law. The examination for LL.D. is in Roman Law, Common Law, Real Property Law, Equity, and either Jurisprudence or International Law.

venture to say that our Universities and Colleges are alive to the necessity of extending their departments of legal education to the full extent of national requirements, and that any encouragement which is in the power of the Inns of Court or the Incorporated Law Society to render it should be in the way of prizes and scholarships to students in such universities and colleges.

But we have nothing to do here with the education of Barristers or Solicitors. The object you have in view is, indeed, educational in the highest degree, only you seek to draw out the capacity of the articled clerk at the very eve of his entering into actual practice on his own account, by offering him scope for applying his knowledge of jurisprudence to the discussion of topics of present interest. And if I am right in so representing the object of this Society, permit me to suggest to you two or three topics, which, whilst admitting of abundant debate, are likewise of a nature to demand careful study. The first I would mention is the reform and Codification of the Law of Nations.

The proposal has been made of an International Code defining with all possible precision the rights and duties of nations and individuals in times of peace and war. In attempting to draw up such a code, will it not be necessary to distinguish those principles which obtain a general assent from those on which no agreement exists? And how should we deal with the latter portion of such principles, when we know that the different views represent the varying policy of States jealous of one another? The application of the word "Code" to any body of propositions on International Law is by no means free from difficulty. A Code is a body of classified laws. But can there be any law without a legislator? And who is the legislator of nations? Should we aim at more than the general assent of nations to certain propositions in the shape, or as an expansion of, the declaration respecting Maritime Law signed at the Congress of Paris in 1856? Or should we urge the conclusion of a series of treaties on the different questions? And what is the range

of subjects admissible in this International Code? Should Private International Law, or the Law of Domicile, Naturalization, Minority, Marriage, and Contracts, be added to the Law of Peace and War? Are we, in short, arrived at the points of preparing a series of International Laws, by means of the assimilation as far as possible of the Municipal Laws of different countries relating to the rights and duties of States, to the personal and private Law of Individuals; to trade rights of patents, copyright, trade marks, and the like, as well as to crime, extradition, courts, and evidence?

Another question of difficulty is the suggested Court of International Arbitration. Just think what kinds of disputes would be capable of being submitted to such a court. Would England submit to it any dispute between herself and Ireland, or any of the colonies? Would the United States have submitted to such a court her quarrel with the Southern States? And was the question between France and Germany capable of being so settled by arbitration? Yet if we exclude such questions as these, the grand object of arbitration, the avoidance of war, may never be attained. Who are to be the members of the board? Are they to be diplomatists or jurists? Is the board to be a council in which all nations are to be admitted, and is each State to be equally represented, irespective of size or power? And what authority should the award possess? If obligatory, where are its sanctions but war? If optional, would it have sufficient force to prevent war? But allowing that its effect may be purely moral, can any civilized nation afford to resist or withstand the solemn dicta of an international Council?

I have mentioned also the Codification of the Common Law of England as a subject of considerable interest and difficulty. The consolidation of the Statute Law is doubtless proceeding a pace, but consolidation is not codification. Were all the obsolete Statutes abolished and expunged, there would still remain the same want of order, the same difference of language, the same confusion of terms, as ever character-

ized the Statute Law of England. Nor has any means been suggested for rendering the whole system more homogenous in matter and more symmetric in enunciation. The Codification of the Common Law is a still more difficult task. Should the decisions of the judges be collated as they are, or should they be moulded or altered to suit the order and treatment of a code? Is it, in short, to be a digest or a code that is sought? But as a preliminary question, are you agreed on the desirability of giving fixity to the leading principles of Common Law, or would you prefer that it should continue to possess that flexibility of character which seems to have suited the Law of England so well? And youare sure after all that the English language is sufficienlty clear and comprehensive to serve the purpose of codification? To indicate such questions as these, is to suggest their extreme importance and difficulty, and when you begin to deal with them, what acquaintance will you require with the philosophy of language, what familiarity with historic precedents, what insight into the genius of the Nation!

You are entering the legal profession at a time when great changes are about to be inaugurated. The passing of the Judicature Act may in time revolutionize the practice of the law, whilst the erection of the new Palace of Justice will afford facilities for practice in the different Courts hitherto unattainable. How soon may we see a complete fusion of the principles of law and equity! How soon will the abolition of the jurisdiction of the House of Lords, and the establishment of the New Superior Court of Appeal, tend to the cohesion of the entire system of judicature, and to the establishment of new principles of jurisprudence. Why? the very word attorney has been practically abolished, reminding us of the lines of Pope—

> "Despairing quacks with curses fled the place,
> And vile attorneys, now an useless race."

Yet do not think that a perfect knowledge of the existing

system, with all its perplexities, all its anomalies, will be less required. There may be a new superstructure, but the foundation will be the same. There may be a change of form here and there, but the principles of law will continue unaltered. An old historic system as that of British Jurisprudence cannot be changed in a sudden, even by the imperious will of an Act of Parliament. But you have much in your power in endeavouring to place the principles of British Law more in accordance with the dictates of universal Jurisprudence. What was it, think you, that gave a peculiar charm and strength to the Roman Law? Was it not, because it was constantly moulded by the eternal law of justice, found in operation in the many States which owed fealty to the Roman Empire? Was it not, because while labouring to uphold the Laws of Rome, Roman Jurists were constantly drawing pure water from the fountains of Natural Jurisprudence? The position of England at the present moment is in many respects similar to that of ancient Rome. Under the sway of our gracious Queen are colonies and dependencies, wider in space, and with a population considerably larger than were ever embraced within the Roman Empire. The commerce of Britain is with the whole world. Her citizens are scattered all over the earth. And to her ultimate Court of Appeal cases are submitted which must be guided according to the principles of the Hindoo and Mohammedan law, of Spanish and French codes, and according to the customs and practice of the commercial world. What abundance of materials do we possess for expanding and liberalizing the Laws of England! what opportunities of departing from the pedantic practice of case Lawyers, and endeavouring to construct the Science of Law!

Nor can I end without referring to the need of elevating the profession above the charge of chicane and quibble, and of trying to establish a closer unity between Ethics and Jurisprudence. I am impressed with the conviction that there is an enormous amount of force concentrated in this

Society of Articled Clerks; and I would fain hope that it will be henceforth directed towards the attainment of high and noble objects in connection with the exercise of the honourable profession of the Law. Oh, let us endeavour by every means in our power to advance the realization of the magnificent spectacle presented in the establishment of such a beautiful system of juridical ethics, of such a universal empire of juridical reason, as shall impart its beneficent light alike to the dark regions of the poles and the soft and luxurious climate of the tropics. Then indeed, in the words of Mr. Justice Story, will be realized the splendid vision of Plato dreaming over the majestic fragment of his perfect Republic; and Hooker's sublime personification of the law will stand forth almost as embodied truth, "for all things in heaven and earth would do her homage, the very least as feeling her care, and the greatest as not exempted from her power."

Gentlemen, you will soon occupy a position of the utmost importance and utility in the great machinery of civil society. In your relation to the bar, in your relation towards your clients, you will have opportunities, ample opportunities, of displaying not only acuteness of intellect and a subtle mind, but especially much delicacy of feeling and true sentiments of honour and duty. When you consider how in your capacity as family solicitors, you will in all probability be called now to prepare a marriage settlement and now to draw up a last will and testament, and how in your duties as advisers to the merchant or the banker, you will have to master, if not to govern, the intricate and often not very intelligible or commendable operations of commerce,—you will admit that you need well be armed with a character not only above blame, but known and prized for purity of principle and singleness of purpose. Pardon me, I pray you, for this digression from my duties this evening. Enter into your work with joy and alacrity. Trust for success, and may you enjoy the fruit of your labour with comfort and affluence.

IV.—RECENT STATUTES AFFECTING THE LAW OF REAL PROPERTY.

DURING rather more than the last forty years, the Law of Real Property has had nearly every previously settled principle overturned except the principles settled by the Statutes *de donis; quia emptores* and the Statute of Uses. Fines and Recoveries have given way to common sense, and convenient and efficient ways of promoting their ancient purposes. The law of wills has been made conformable with the spirit of the times. The owners of particular estates have been endowed with powers consistent with the proper enjoyment of their estate, and the due protection of the postponed rights of the remainder; many of the judgments have been made a charge upon land, and that law has after some tinkering been repealed. The rules applying to trustees in the discharge of their trusts have been amended with a view to the protection of trustees, and facilitating their discharge of trusts. The Law of Descent and Prescription, we think we may almost say, have been codified.

We have not in the above description by any means exhausted the list of Real Property Law Amendments; we have said enough to shew that the changes which have occurred have been numerous and sweeping.

The last Session of Parliament, however, has contributed two short Acts to the former Law of Real Property, which in some way will affect nearly every future contract for the sale of Real Property. Another Act is imminent, having if anything a more sweeping operation than any which have been passed during this century.

The two Acts which have passed, and which will have so wide an application as we have stated are, "The Real Property Limitation Act 1874," (37 & 38 Vic., c. 57),

and "The Vendor and Purchaser Act 1874," (37 & 38 Vict., c. 78.)

The first of these Acts introduces some new periods of limitation into a branch of the law which we have just described as having been codified. A period of twelve years has been substituted for one of twenty, during which an action may be brought for the recovery of any land or rent, with a further period of six years in case of infancy, coverture or lunacy of the claimant. Thirty years is the extreme period allowed in case of any disability, although the disability has continued during the whole of the thirty years, and is existing at its termination and absence beyond the seas is no longer a disability. Six years is the limit allowed to a person under disability, to bring any action after the termination of the twelve years' limit, and the removal of the disability. In case a tenant of a previous estate is out of possession, the twelve years' limitation counts from his ceasing to be in possession, or six years from the subsequent estate, vesting in possession is allowed to the claimant whichever period may be the longest.

Possession for twelve years after a disentailing assurance by a tenant in tail will in future be sufficient against all remainder—men after a tenancy in tail, although the disentailling assurance may not be sufficient to bar the remainders limited to take effect after the estate tail.

The period of twelve years is also substituted for the present limit of twenty years, during which a mortgagor can sue for the mortgage debt, unless a payment has been made on account or a written acknowledgment given, in which case a further period of twelve years is allowed, and ten years is fixed as the period at which money charged upon land and legacies are to be deemed satisfied, in case no payment has been made on account or no acknowledgment been made in writing, and the fact that charges and interest are secured by an express trust is not to enlarge the time during which such sums can be recovered.

It is provided that these new periods of limitation, however, are not to commence till 1st January, 1879. The Vendor and Purchaser Act is of about the same length as the Limitation Act, and its first section quite accords with the spirit of the Limitation Act; in fact it is a kind of supplement to the former Act; by this section forty years is substituted for the sixty years' title, which a purchaser may at present require, and then follows five rules for defining the rights and obligations of vendor and purchaser, unless those parties otherwise provide. A lessee or assignor of a term is not to be liable to shew any title to the freehold Recitals of twenty years' old, unless proved inaccurate, which are to be sufficient evidence of the facts stated.

Then follow three provisions as to the production of title deeds. The purchaser is to have no right to a legal covenant to produce deeds where on completion he will have an equitable right to their production. The purchaser is to pay his expenses of covenants for production, the vendor being liable for his own costs and those of other necessary parties than the purchaser. And the purchaser is always to be entitled to retain title deeds relating to lands which he retains. These five conditions may be adopted by trustees either in selling or purchasing.

The legal personal representative is at last empowered to convey or surrender freehold or copyhold estate in mortgage on payment of the mortgage, and the same principle is carried further by vesting in the legal personal representative of any bare trustee any hereditament of which the trustee was seised in fee simple, and a married woman who is a bare trustee has the same power of conveying as a *feme sole*. That palladium of a third mortgage, without notice of a second, is at last taken away, and the non-registration of a will in Yorkshire or Middlesex is cured as against the heir-at-law by registration of a conveyance by a divisee under the will.

Provision for an application in a summary way to a judge

at chambers as to requisitions, objections, and claims to compensation, is the last enactment of the Vendor and Purchaser Act, 1874.

The very slightest view of these Acts shows, firstly, a determination on the part of the legislature to shorten terms of prescription and to compel the public to be active in the discovery and enforcement of their rights or to lose them, on the principle that the better means of communication and publicity in these days require us to get rid of those longer terms which were allowed by rules suitable to a different state of society *ratione cessante cessat regula.*

We would draw attention to the fact that the New Limitation Act, with the exception of section 8, applies only to corporeal hereditaments; section 8, however, applies to debts secured by mortgage judgment or lien, and this provision may be expected to be followed by further legislation as to the time allowed for proceeding for the recovery of debts and damages generally.

With regard to the Vendor and Purchaser Act, it may be remarked that its most prominent feature is the abolition of the bare legal right and the enforcement of the real equitable interest. Section 25, part 2 of the Judicature Act has prepared the way for this desirable benefit, and the Vendor and Purchaser Act has provided that in certain cases where the legal right existed along with the equitable interest, and not against it, the action of the equitable owner shall have the same effect as that of the legal proprietor. This disposition to get rid of the troublesome effects of legal technicality and bare legal estate, appears in paragraph 3 of section 2, and in sections 4, 5, 6, 7, and 8.

As to the provision made by section 7, abolishing the right of tacking a third mortgage to the legal estate of a first mortgagee, we cannot regard the abolition of the right with any regret, and any hardship of the new rule will speedily disappear when some such Act as the one for the universal Registration of Title shall have been passed, an Act which,

in all probability, will not be postponed beyond the next Session of Parliament.

A book on this branch of the law by an accomplished and reliable author comes at this time with peculiar advantage to the profession. It is with the utmost pleasure and gratification that we notice another legal work by Mr. Stephen Martin Leake. Mr. Leake has now an established position of the highest order as a legal writer. His first appearance in connection with the name of the late Mr. Bullen in the adaptation of the Chitty on pleading to the improved and altered system introduced by the Common Law Procedure Act, 1852, was the admirable execution of a most meritorious work, and so well was a great want met that "Bullen and Leake" has been for some years past the book most in use by every practising member of the Common Law Bar, and in fact a necessary volume to every such practitioner. The second work of Mr. Leake, namely, his treatise on the Law of Contracts, shewed that he had evidently been in some danger of being underrated as to the share of praise due to him in the work he had prepared along with his accomplished colleague—Mr. Bullen. And now a third work appears under Mr. Leake's name, a work which certainly does no injury to the high reputation which he has already secured.

Mr. Leake has, however, been somewhat daring. His work hitherto has been confined to common law labours. He has now turned his attention to the Law of Real Property, and his book may fairly be described as most connected with a conveyancer's practice. The book is called "A Digest of the Law of Property in Land."* Only the first part of the work has appeared, but the second and concluding part is promised. Very fortunately the arrangement of the work permits its author to notice the most recent legislation in the second volume. As far as the Acts of last session have affected the law embraced in the first volume the new law is noticed. We are impatient to see the second

* London: Stevens and Sons, 1874.

volume, and doubtless we shall have it as soon as is practicable with proficiency after the passing of a Land Transfer Act.

We never took up a legal book in which the matter was better arranged, and in which the interest of the reader in the subject was more fully sustained. We strongly recommend to students this book, though not as a first book on conveyancing law. After a student has read Williams on real property, and such part of one of the editions of Blackstone as deals with the same subject, we unhesitatingly say that Mr. Leake's is by far the best book available, and this on account of its logical arrangement and complete information.

HABITUAL DRUNKARDS.

THERE is no doubt that drunkenness long since assumed a form so seriously involving the public weal, that special recognition of the evil by the State, with a view to the initiation of a better system of dealing with the subjects of it, became imperative, but although it has long been admitted that legislation in the matter ought not to be delayed, very little has as yet been effected in regard to it.

The subject was, however, brought before Parliament in 1871-2-3. The bills were shelved, not so much, perhaps, on account of the necessity which every year massacres a mass of innocents, as in order that the various questions bearing on them might be further ventilated. It is our intention to consider the measures that were proposed, and make some suggestions as to the course which legislation might follow with the happiest results, and the best hopes of success.

That drunkenness, the parent of poverty, vice, and disease is a punishable misdemeanour, is not a question; neither is it now doubted that inebriety is sometimes the effect of disease. Many instances are known in which the victim has not been more accountable, morally, for the act of drinking to intoxication, than the lunatic, who has committed a murder, is held to be. And we are inclined to think that the moral responsibility of some classes of drunkards is less than that of some classes of lunatics. It is very hard to hold the individual responsible for that which he inherits from his parents; and this is just the case in which we see the sins of the fathers severely visited upon the children, even to the third and fourth generation. The innate thirst for alcohol is not, however, always a progeniture of a similar infirmity in the parent; it is as often—perhaps more often—the first-born of inherited insanity. One or two illustrations, communicated to us, will serve to make our meaning clear. A medical man, with a history of insanity in his family, developed an insatiable craving for alcoholic stimuli, which he resisted with a strenuous effort worthy of all commendation—never touching beer, wine, or spirits, nor keeping them in his house. But he would sometimes wake from his sleep a perfect fiend; and in the dead of the night, so overpowering was his "sensation of necessity" for stimulant, that he was urged by it to drink the tinctures in his surgery until he was hopelessly drunk and usually violently sick. The attack would speedily pass away, but only to recur; and ere long the unfortunate man was reduced from affluence to almost indigence, and was forced to give up his practice.

The second case is that of a woman; and it is highly instructive. Her history embraced a record of hereditary insanity; and the person, who had had a previous attack ten years before, had been drinking inordinately for a week. She went to a hospital with a good grace, under the delusion that in driving to the building she was driving to a warm place, sufficiently indicated by not men-

tioning. On her arrival she asked for brandy, which was refused; but the next day, when ordered some stimulant, she begged her attendant not to insist on her taking it. Almost all her symptoms of insanity had disappeared the day after her admission, and at the end of a month she left the hospital perfectly well. Before another month had passed over her head, however, she was again the subject of an attack of mania, of which the first symptom was a rush to the brandy bottle.

The third case is of interest rather as showing how drunkenness may be dependent upon insanity rather than as illustrative of inherited predisposition. The patient was a man who was the subject of recurrent mania, which followed upon, and probably originated in, an accident, in which he fell on his head. As a rule, he was a sober, painstaking, industrious man; but whenever the mania recurred, he became a drunkard.

We would here dwell emphatically upon the importance of an inquiry into the history of every case. It is the only means of determining whether the habit of inebriety has been acquired by the individual, or whether the propensity was written, as it were, with pen of adamant upon his constitution while yet in embryo.

Drunkenness is one of the earliest indications of mental degeneracy, and inherited disposition to insanity is a most frequent cause of that condition in the individual. It should be mentioned that Epilepsy, Hysteria, Neuralgia or any form of nervous disease in the parent, may be followed by any degree of mental degeneracy in the offspring, and may culminate in insanity. From the foregoing it is plain, that it behoves us to recognise, in our consideration, that a predilection for alcohol is often a symptom rather than a cause of insanity, and if we would insure the administration of the law without the grievous injustice which occasionally occurs, we must realise the fact, that the man who is "mad drunk" is more often drunk because he is mad, then mad

because he is drunk, and if the influence that urges the individual at one time to drink to intoxication, and allures him at another into the commission of a more definite crime, is brain disease, justice demands for him protection rather than punishment. But the class who drink in consequence of brain disease, are not the only habitual drunkards for whom legislation is necessary. There is another class, the individuals of which drink in the consequence of a moral obliquity and from choice, and they require dealing with in a more rigorous manner than our existing laws provide. Inebriation is a breach of the peace, and the offender, when brought before a magistrate, is liable to a fine. The fine usually inflicted is five shillings, and it is much more calculated to travesty justice than to work public good. Pilfering is held to be a consequence of a moral obliquity, and the corrective prescribed by law is imprisonment. Why, then, we would ask, should any difference be made in dealing with the subject of a moral obliquity when the obliquity manifests itself as inebriety? If a person becomes obnoxious to society, surely society has a right to protect itself, or to be protected, from the inconvenience likely to be produced by that individual's obnoxious behaviour; and certainly the accumulated inflictions on society, and the burdens it has to bear, are far greater in consequence of sots than they are by reason of those who have an imperfect grasp of the ideas of *meum* and *teum*. If a fine not exceeding five pounds for the first offence was followed up by a month's imprisonment without the option of a fine for the second, and a term not exceeding six months' imprisonment for the third offence, we should speedily have a marked reduction in the charges of drunk and disorderly, as well as the minor offences attributable to the effects of over-indulgence in alcoholic liquors. But we should have more: our streets would no longer be filled at night with rollicking topers, who from a fear of the law would abstain from the degrading debauches they now dedicate themselves to; and instead of the lamentable state

of pauperism that has assumed such prodigious proportions that we have failed to devise means of dealing with it, we should have our working classes well fed, well clothed, cleanly, thrifty, saving, and well-to-do.

The recurrence of drunkenness, after three or four committals to prison, would in all probability indicate the existence of disease; and it might then be a question for the discretion of the magistrate whether such a case should again be sent to prison, or to an asylum. In no case would the prison discipline be unattended with some beneficial results, even though more prolonged treatment might afterwards be necessary. Lord Aberdare, when Home Secretary, in speaking on Mr. Donald Dalrymple's motion in regard to inebriate asylums, of which we shall take notice directly, is reported to have said that "the cure for drunkenness must be a moral one;" and in this we quite agree; but we have some misgiving as to the divinity of the assertion, also attributed to Lord Aberdare, that "a perception that the vice of drunkenness is disgraceful is spreading through all classes;" and we are inclined to hold that no class will recognise the drunken misdemeanour as vicious, until it is included among the offences for which a magistrate commits to prison.

Of the class of cases in which inebriety is the consequence of disease, the condition is very similar to that of the insane, but it requires different treatment, and our lunatic asylums are not fitted for the reception of its subjects. What is wanted, is, an authority to take charge of the patients of this class, but the authority must be such as will isolate them from the lunatic. During the Parliamentary Session of 1871 a Bill "To Amend the Law of Lunacy, and to provide for the Management of Habitual Drunkards," was introduced by Mr. Dalrymple following up his motion for a Select Committee, the purport of which was:—that reformatories should be set up, which might be self-supporting, to which individuals, conscious of their want of self restraint, might go of their own accord, or to which drunkards might be sent by their

friends, and detained until a medical certificate is obtainable, that they have acquired the power of self-control. Mr. Dalrymple proposed further that Magistrates should have power to commit habitual drunkards to such an institution, and that the property of those persons should be placed for protection in the hands of trustees appointed by proper authority. Lord Aberdare, in speaking on the motion, pointed out that the State only interfered to restrain lunatics when they are violent and dangerous. Otherwise it lays no restrictions upon their detention, surrounding that which is effected by their friends with every available safeguard, and shewing the utmost jealousy of any meddling with individual freedom. A Select Committee sat and reported on the subject in 1872, and a Bill was introduced into that and the following session, but in each case was withdrawn.

Lord Aberdare's answer, however, appeared to omit a notice of a most important fact connected with our lunacy law, namely, that it is a permissive law, and Mr. Dalrymple's motion evidently was with a view rather to a permissive law than to any absolute or enforced interference with the liberty of the subject. The fundamental error in Mr. Dalrymple's Bill seems to have been the non-recognition of the two classes of drunkards we have defined. The patients of the class for which Asylums are wanted are burdens on society in precisely the same sense as lunatics are social burdens; they bring begging into their families in precisely the same manner as lunatics do, and yet the existing law is as insufficient to protect them, as it is to reach those who deserve imprisonment for drunkenness. The want of inebriate asylums is becoming more and more felt, and their establishment more and more desirable. They might be placed under the inspection and control of the same standing commission as lunatic asylums; but they require far greater freedom in their administration, than lunatic asylums, though the potentiality of control over the individual should be as great.

Voluntary patients might be admitted, but all orders for

admission, whether voluntary or involuntary, should be signed by a magistrate. By this means due protection of the rights of the liberty of the subject would be insured, while any person, whether rich or poor, if shown to be a dipsomaniac, would have the opportunity of deriving the benefits that might be afforded by asylum treatment. The more wealthy classes might have accommodation according to their means, while the work of the artizan classes would be found to be sufficiently remunerative, very soon after their admission, to cover all their expenses. Any deficiencies would have to be made up by the parishes to which the pauper patients belonged, but the burden on the rates would really be nil, for the asylums if well conducted would be self-supporting, the only real expense being the first, namely, that of establishment. All inebriate asylums ought to be public, and thus interested selfishness would have no influence in retaining a patient beyond the period of recovery.

The subject of inebriate asylums was brought into notice in a graphically-written article in the "Atlantic Monthly" some time ago; and we learn much from the experience of our American cousins. The first institution, having for its object the care and treatment of the inebriate, established in America, was the Washington Home, the idea of which originated with its first superintendent, Dr. Day, whose successful efforts are worthy of the highest praise and emulation. In his report for 1866, Dr. Day remarks that when he commenced his work he had no records of the past experiences of other institutions to warn or guide, and the experience upon which it was based was the result of his own observation. He says:—"I can say with confidence that we have learned much in the proper application of medical science to the treatment of this disease, and the beneficial results of our enlarged experience and more liberal views are plainly visible to me, in hundreds of cases that lie under my constant observation. Since my connection with the Home (about

nine years), there have been registered as admitted under its care the names of twenty-three hundred patients. Of this number four hundred and ten have suffered from the various forms of mania known under the general name of *delirium tremens*." He says further :—" Of course, it is impossible to estimate, with any degree of accuracy, the proportion of this number who have been completely reformed. Many are dead; and hundreds are scattered all over the country, or have passed from under my observation. But it is safe to say that the majority have remained firm to their determination formed while with us, while a much larger proportion have had their condition alleviated, with hopes of eventual and permanent cure." And in commenting upon the limited capacity of the building, he regrets the want of similar homes for ladies " who, in large numbers, and representing every phase of social life, are the victims of an insatiable appetite for stimulants, and who require the seclusion and treatment of an institution like the Washington Home." The annual grant of the State to this institution was 5,500 dols. Among the 349 patients admitted in 1866 were 56 merchants, 68 clerks, 8 lawyers, 6 physicians, 3 clergymen, 11 printers, 4 actors, and 2 chemists—the remainder comprising artisans, mechanics, and common day-labourers.

Dr. Day, in 1867, was appointed superintendent of the New York State Inebriate Asylum, at Binghamton, into which three classes of patients are admitted, viz. : *free patients*, who (or whose friends) must give proof that they cannot afford to pay for their support ; *paying patients ;* and *committed patients*, or those who are consigned to the care and treatment of the asylum under an Act, passed in March, 1865, and which provides, s. 4, " Any justice of the supreme court, or the county judge of the county in which any inebriate may reside, shall have power to commit such inebriate to the New York State Inebriate Asylum, upon the production and filing of an affidavit or affidavits by two respectable practising (*sic*) physicians and two respectable

citizens, freeholders of such county, to the effect that such inebriate has lost self-control, is unable, from such inebriation to attend to business, or is thereby dangerous to be at large. But such commitment shall be only until the examination, now provided by law, shall have been held, and in no case for a longer period than one year."

It appears that a sort of inquisition is held on every case admitted into these asylums, and the rule is certainly a good one.

From the admirable descriptions given, these institutions are situate in exquisite districts, the treatment is rational, the patients are not restrained to the same degree as lunatics, except when necessity renders restraint essential to their safety and welfare, while the success of these institutions has been much greater than could have been anticipated by the most sanguine expectation.

Some experiments in Inebriate Asylums have been attempted in Scotland, with good results, and the Scotch Lunacy Commissioners, in their eighth (1866) annual report, expressed, very strongly their opinion that opportunities should be afforded to persons unable to resist the tendency to excessive drinking, to place themselves under control and treatment, without authority from the sheriff, and by the "Lunacy Amendment (Scotland) Act" of 1866, asylum authorities were authorised to receive, for care and treatment, "any person who expresses to the Commissioners his wish, in writing, to become a voluntary patient, and has obtained their consent. This provision was taken advantage of, in 1867, by seventeen persons, of whom fourteen were admitted into the public and three into private asylums.

An institution known as Queensberry Lodge, which is attached to the House of Refuge in Edinburgh, is devoted to the treatment of inebriate females. But the Commissioners regard its situation as "unfavourable," though they approve of the principle of such institutions generally. They take exception, however, to the one we have mentioned, because it is not under official cognisance.

The Commissioners for Scotland remarked that they consider that the chief impediment to the success of these institutions in Scotland is the want of the power of compulsory detention, and they say that the propriety of legalizing such power has many strong arguments in its favour. They notice moreover, and remark upon the necessity for discrimination between the mere drunkard and the dipsomania. In Belgium we believe the legislation regarding Habitual Drunkards has been found satisfactory. The voluntary patient has to sign before a Magistrate a declaration of his willingness to be put under control, for a certain fixed time. Until that time has expired he cannot discharge himself; though he may be discharged by the authorities of the asylum, if they think him well enough.

Before leaving the subject we would say one word on the "Permissive Prohibitory Liquors Bill," introduced into the Parliamentary Session of 1871, the principle of which hardly seems capable of adaptation. To prohibit the sale of alcoholic liquors in one parish, will not, as Lord Aberdare suggested, place a mechanical difficulty in the way of procuring intoxicating drinks. If the drunkard cannot procure alcoholic liquors in his own parish he will go to the next, where, he probably will not find any difficulty in getting them. I believe the only mechanical impediment that can be imposed between the supply of alcohol and the drunkard, is the lock and key under which you place the latter. The Bill, as a measure, would interfere with free trade. It may of course be argued that if a trade is a bad or immoral one it ought to be suppressed. The *onus probandi*, however, rests with those who declare the trade to be immoral. Again it is a question whether the suppression of the trade would not be tyrannical, a measure affecting the poor without touching the rich, and, thirdly, it seems that it would deprive the way-farer of the possibility of obtaining refreshment at a time when perhaps he most needed it.

VI.—LAW IN THE UNIVERSITIES.

[*Continued.*]

TO a stranger the most startling result presented by the Report of the Universities Commission is the fact that, with all their enormous endowments, there is very little free teaching at the Universities. There is in both Universities a Professoriate which has gradually been thrust outside the academical system, and is only now beginning to fight its way back again. There are resident Fellows who, by reason of the emoluments derived from their fellowships, are willing to teach for very small salaries, and to that extent, and in that sense, the teaching of the Colleges may be said to be endowed. But the few lectures of the Professors have hitherto been useless, and the charge for College lectures would be considered high in any other than an English University. Both at Oxford and Cambridge an undergraduate pays from £20 to £27 per annum for the tuition supplied by his College. The effect of endowments, therefore, even on College teaching, has not been to render it, as compared with academical instruction elsewhere, remarkably cheap. Besides, the efforts of the Colleges are still to a large extent supplemented by the private tutors whom the undergraduates select for themselves, and whose fees are a considerable addition to the expense of an University education. At Oxford, within the last ten years, the vastly improved efficiency of the Colleges has almost quite superseded the private tutor, except where his services are retained by men of inferior ability or more than usual indolence. At Cambridge, on the other hand, the effective education seems to be almost wholly in the hands of private tutors. It is the private tutor and not the college who prepares men for the Tripos, and practically decides the order of the Class Lists. A German or Scotch student, coming fresh from Universities

where there are few endowments and still education is cheap, must stare to find that in Cambridge, where the Colleges are enormously rich, and fees for College tuition tolerably high, he must still educate himself at his own charges and very much at his own discretion.

It appears to us that one of the very first conditions of University Reform must be to cheapen University Education. Fees at present are not too high if we take into account the means of the students, and the extent to which they are in many cases supplemented from academical funds. But if we think that the Universities ought to be no longer closed to poor students, and if we reflect that poorer Universities supply a far cheaper education of the same kind, then fees are decidedly too high. We hold that the cheapening of public instruction in the Universities will form a first charge upon the revenues, likely to be set free by the changes now contemplated. The whole revenue now absorbed by the headships ought to go directly to the support of a Professoriate. The tutorial system, *i.e.* the system under which each College professes to undertake the entire education of all its students, and on that profession raises the fees already mentioned, will have to be materially changed. At Oxford and even more at Cambridge it is the cause of unnecessary expense, and of narrowness and disorder in the curriculum of studies. It is the prime reason why two subjects engross nearly all the talent of the teachers, why the mass of students learn little at the University that they had not previously learnt at School, why the standard of instruction remains always at the same level, and why the lecture system never yields anything but lectures. Day by day it is becoming less and less of a reality. In Oxford within ten years it has passed from a hard fact to a mere constitutional fiction. Colleges are compelled to league together for purposes of instruction, and we do not know that there is one efficient College where instruction even on the ordinary subjects is supplied wholly from its own foundation. There may be much confusion in the inter-

collegiate arrangements, but at all events the experiment has produced in a wonderfully short time a vast improvement in the capacity of the College lecturers. The operation of what remains of the old system is almost wholly for evil. The subject is much too large to be discussed here, but we may say shortly that the University will never fairly admit new subjects until the tutorial system has been abolished. Heretofore the Universities have taught little but Classics and Mathematics. They have of late years cultivated with success such new subjects as Science, Law, and History. Both old and new studies are regarded and taught mainly as accomplishments. The Universities have steadily refused to become professional Schools. We hold that for the two professions of Law and Medicine not yet directly represented, the Universities possess the means of contributing the preliminary part of the special instruction of students. We believe that such instruction can be given with better effect in the Universities than elsewhere. Until the directly professional character of the legal studies is recognised they will never be anything more than respectable failures. We do not wish to destroy the general education to which the Universities have hitherto confined themselves. Their great fault is that it has been too exclusive. With a little more liberty of choice to the student and a little more liberality in the recognition of subjects not directly connected with mathematics or classical literature, the University Education of England would be the best in the world. But we wish to see the Universities something more than schools of general culture. We wish to see, side by side with the schools of science and literature, professional schools for the study of law and medicine. Other professions, so soon as they exhibit a desire for a disciplined education and public spirit enough to set about organizing it, might be represented in the University curriculum. The Scotch Universities are making great progress in that direction. Engineering, agriculture, education, are among existing or contemplated Chairs. We should

like to see the Universities undertaking the regulation of all professional studies, and it is time we dismissed the mediæval conventionalism that the only professions are Law, Medicine, and the Church. For these, then, the Universities, which have supplied a general training, must now supply a professional training also. They can never, perhaps, give a complete training in any case, but they can give one, if not more, complete, at all events, of a higher character than any other school. We are claiming nothing for law that we should not be willing to grant for medicine or any other calling, to which the apprenticeship takes the form of an education. What we claim for law is, that the existing means of professional instruction should be utilized, that further means should be provided, and that qualified students should be allowed to proceed at once to their professional education without being obliged to pass through the course of literary or mathematical culture established in the Universities. Side by side with the students of arts should be the students of professional learning, with their special schools, professors, and prizes Let the University establish such preliminary standard as it pleases, such, for example, as the Pass Examination in Moderations at Oxford, and let it be offered to candidates on their first entering College. There are hundreds of young men who spend their entire course at the University in preparing for an examination which, with proper preparation at School, they might have passed when they came up. Such persons should be suffered to abandon at once a worse than useless training and betake themselves to subjects of professional value and interest. As yet neither the law student nor the medical student, nor any other kind of professional student, exists at the Universities.

We find that Oxford as a school of law has made vast progress within the last generation—part, of course, of the general emancipation of studies which has been going on within that period. Undergraduates are now permitted a

wider range of choice in reading for a degree, and the best of the inferior class of students make use of it truly. The abler and better instructed men will of course stick to the schools in which glory and reward are chiefly to be won; but to the others the new studies are a salvation from years of idleness. Of the new studies law is naturally one of the most popular. For many years students have been permitted to select law and history as a subject for the final examination. The conjunction was based for the deficiencies of the University rather than on any natural connection between the subject; and by recent changes the school has been divided into two—modern history and jurisprudence. A student may thus take his degree in arts by the examination in the school of jurisprudence without concerning himself with the subjects of the ordinary curriculum after moderations. In addition to this there is now the revived examination for the degree of B.C.L.—somewhat of an anomaly, it is true, but still to a certain extent an encouragement to University men to study jurisprudence, if not during residence, at least immediately afterwards. Corresponding with changes in the examination system has been the recent increase in the strength of the legal professoriate. There are now three working professors and one reader on legal subjects. Civil law, international law, and jurisprudence are taught by the professors, and English law by the reader. The arrangement—if it is fair to call it so—is obviously a bad one, for English law is too much for one lecturer, and the three professors can hardly avoid trespassing on each other's domain. Besides these public teachers there are, as in other studies, a number of private tutors, by whom, in compliance with an inveterate system, the greater part of the practical work of legal education is performed. The public lectures are only indirectly useful for the examination, and are therefore hardly treated *au serieux* by the students. It is very seldom indeed that a *bona fide* law student, reading for the schools, ventures to risk the loss of so many hours by a systematic attendance on a course

of lectures on jurisprudence or international law. Those who do attend are mostly persons interested in the philosophical treatment of legal questions bearing on their own departments of study. The professors in law, like all other public teachers in Oxford, have no efficient share in the work of education. Whatever they may have to say that might be useful to a student preparing for the schools, will probably be taken down by a private tutor and repeated at second-hand to his pupil. But the professors themselves might just as well remain in chambers in London and publish occasional lectures. In Scotland, where the advocates are certainly not less completely instructed in the principles of law than barristers are among ourselves, legal education in everything but the details of business is entrusted to three or four Professors in the Universities, and private tutors are, we might almost say, unknown. It is through no personal fault of the Professors that the same thing cannot be said of the English Universities.

Endowments, as we know, are by no means the least important part of an educational system in England. In Oxford law possesses directly only a very small share in the Prize funds. The Vinerian Scholarship of £80 for three years open to graduates of a certain standing only is almost the only thing of the kind. There is the Stowell Civil Law Fellowship at University College, and the Fellowship at All Souls are professedly given for proficiency in the subjects of Law and Modern History. The latter, however, have never really encouraged either legal or historical studies; and if their pretended specialty is to be maintained, it must be by bringing them more directly into connection with the purely legal or purely historical schools. There is a prize for an essay on International Law, and there may be in the different colleges minor rewards for proficiency in legal studies. But the system may be summed up as depending on a strong but only partially utilized Professoriate, a very small prize-fund, and a small casual and unprofessional class of students.

We do not know that Cambridge presents many points of difference from this sketch of legal education at Oxford. There are, and long have been, University examinations in law, but, as at Oxford, they have been overshadowed by the mathematical and classical schools. There are three Professors, described respectively as the Regius Professor of Laws, the Dawing Professor of Law, and the Professor of International Law. The last is a recent foundation, and is, we believe, subject to the curious condition that the Professor must produce evidence of a certain minimum attendance at his lectures. There are one or two legal scholarships in the University; and here and there among the colleges certain fellowships are specially reserved for persons intending to be called to the bar. But Cambridge does not, any more than Oxford, aim at anything like a complete course of legal education. Both universities teach law to a limited extent, and both supply the means of testing proficiency in legal studies. But both lectures and examinations exist for the benefit of casual students who do not feel themselves equal to the common studies of the place, or who feel themselves able to take up the additional burden of a small amount of professional study. The position we maintain is that, with their splendid endowments, Oxford and Cambridge ought not only to supply a general education, as they do now, but to undertake a certain amount of professional education as well. We do not wish to interfere with one of the studies that now engross the entire strength of the Universities, or to wish for them a single change except such as the learned persons in charge of them may adopt of their own accord. We have no sympathy with the shallow criticism caught up from Continental observers and misapplied, that they themselves are merely *Lycees* or high schools, and not universities properly so-called. It is their glory to be the highest schools of their kind, to supply by means of their unique academical organization the most complete and most varied intellectual culture of the modern world. All we object to is that their manifold

resources should be limited to the supervision of general culture. Their methods are equally applicable to purely *professional learning, and professional education,* as it now exists, and is sorely in want of some such supervision. There are hundreds of students who cannot afford the time and expense of a general education at the University, who would be glad to begin or complete their professional training there. There are more, indifferent on the score of time or expense, on whom the general culture of the University is thrown away. There is ample room at the Universities for all of them, and ample means for taking the education of them all in hand. We desire to see the expense of residence reduced to the lowest possible amount; and there is no reason why it should not fall very nearly to the point at which it stands in a Scotch university or an Irish college. We desire to see professional studies recognised as part of the work of our English universities, and to secure for professional men the advantages of an academical training on easy terms. And we desire to see some useful work provided for the vast multitudes who, hardly through their own fault, go through the Universities without doing any work at all.

As we have already hinted, the success of legal studies will depend entirely on the co-operation of the various bodies entrusted with the regulations of the different branches of the profession. And between the bar and the solicitors there are many differences to be taken into account. The latter body are less solicitous than the former about mere literary proficiency in legal knowledge, and more concerned about the practical capacity of candidates seeking admission into their ranks. Oxford and Cambridge are under great disadvantages in this respect. The University of Edinburgh is in the centre of the chief legal district of Scotland. Young solicitors' clerks can walk out of their offices into the class-rooms. The students are thus able to carry on their academical studies in law step by step with their training in the details of actual business, and in many cases, also, they are persons who

could not afford to give up the income they receive from their clerkships. Nothing of the sort is possible in Oxford or Cambridge. Law students who go there must be independent of salary during the whole of their residence, and they must go elsewhere to learn the business of the profession. But there are plenty of young attorneys who can well afford the expense of a few years at college, and there are evident signs of a desire on the part of the authorities to encourage a higher culture in the ranks of the profession. We do not see why attendance at lectures should not be a condition of admission to the profession of attorney, and a preference ought to be given, as far as possible, to the lectures of University teachers. The degree of B.A. is at present accepted as the equivalent of a certain period of the term of an articled clerk, and it would be easy to apply the same rule to attendance at the Law Lectures or success in the Law Examinations of the University, or to both. Probably a compulsory curriculum extending over two years, and an examination, would satisfy all reasonable conditions. The profession of Solicitors would lose nothing by suffering the first two years of a clerk's articled life to be exchanged for the same period of residence at the University, and we may be sure that the clerks themselves would be immensely benefited by it in every way. The condition of apprenticeship after all affords very little security that the intending attorney possesses any business capacity at all, and it is a direct discouragement of his attempting to acquire anything else. The old plea so often urged against legal education that a lawyer must qualify himself before he can get business is at least a good reason for dispensing with some of the regulations intended to compel him to acquire business qualifications.

In the case of students reading for the Bar, the situation is very much easier. The Inns of Court have ceased to require familiarity with business as a condition of admission to the Bar, or to pretend that a course of dinners in hall secures

that condition. But they have made examinations compulsory, and they have assumed it to themselves the duty of teaching their students, leaving to their sense of individual interest or necessity to determine whether they shall read in chambers and attend the sittings of the court, or not. Such being the case, we do not see why the Universities should not concurrently with the Inns of Court be allowed to take the entire charge of legal education into their own hands. We do not say that the Inns ought not to establish a School of Law, or that they ought not to constitute the examining body, by whom candidates are tested as to their fitness for admission. We should be very well content to see them undertake both duties, and discharge them well. But they are not the only bodies fitted to teach and examine, or even the bodies best fitted to teach and examine. We hold that the Universities are better fitted than the Inns of Court, both to teach and to test. All that the Inns of Court do now for legal education could be done better at Oxford and Cambridge. We do not propose for a moment that the social connection between the Inn and its members should be destroyed. We do not propose that terms should be abolished, and eating in Hall brought to an end. There is no reason why compulsory dinners should not be maintained as before, although the Inns were to take the word of the Universities for the fitness of candidates, instead of testing it by special examiners of their own. Nobody supposes that the dinners have anything to do with a man's intellectual qualifications for the office of barrister. There is not even a fiction left to support the plea that the Inns of Court have peculiar facilities for training or testing students. At the same time the dinner system is defensible on perfectly different grounds. We doubt whether any member of the bar would seriously care to see it abolished, and the vast majority would uphold it strenuously on its merits. It unquestionably forms a means of social union among law-students and young barristers, it creates and maintains a quite peculiar *esprit de*

corps among the members of the profession, and it is intimately connected with the whole machinery of bar discipline. We have no objection, therefore, to the Inns of Court retaining intact their social monopoly. But we see no reason why they should retain their educational monopoly as well. Let the students go on keeping terms as before at their respective Inns; but when the time comes for ascertaining whether they are fit for the profession, let the verdict of the Universities be accepted as equivalent to that of the Council of Legal Education. Nothing short of this concession can be the basis of a satisfactory union between the Universities and the Inns of Court; and without such a union the Universities will never do much for Legal Education, and Legal Education will never become quite as good as it might be made. The analogy of most other professions and the example of most other countries might if necessary be urged in support of this proposal.

There need be no great difficulty in settling the terms of the treaty between the Inns and the Universities. On the one hand the Inns would have to concede for the first time to the Universities the right, not of licensing students to practice, but of certifying that students are fit for license. On the other hand, the Universities would have to make provision for a new class of students, differing in many respects from the present. A joint commission appointed by the Inns and the Universities should settle in general terms the kind of standard to be enforced at examinations of the length of residence to be required, and the number of lectures to be attended. It would be easy to arrange for the Inns, being represented on the Board of Legal Studies in each University, and if necessary on the Board of Examiners at each examination. We cannot see what the Inns could lose by such an arrangement. Even now they do not directly exercise the privilege of examining candidates, and we do not see why they should not repose as much confidence in the decision of University Examiners as of the

Board appointed by the Council of Legal Education. On the part of the University there might be more serious obstacles in the way. The first and greatest will be the reluctance of the authorities to admit professional students into the academical body, and we need not disguise the fact that it is a reluctance that will not be very easily overcome. The new class of students would probably be composed of older men than the present undegraduates, and most of them would have completed their general education in some other, and possibly quite different school. Further, College extensions not being probable, we should have practically an immense increase in the class of unattached students. There might be difficulty in enforcing proctorial discipline over a large number of students scattered over the lodging houses of the town, and not held on hand by the reins of College authority. Curiously enough, when any changes affecting the University are under discussion it is the question of proctorial descipline that is first regarded. The fear of what would follow by allowing students to live in Oxford, as they live elsewhere, nearly ruined the scheme for admitting unattached students into the University. It was the fear of moral contamination that led the University into a violent opposition to the proposal of making Oxford a military centre, although it gave the University a chance of becoming a military school. Nor need we scruple to admit that when we cease to regard university students as schoolboys, the proctorial system must be given up. Neither law students nor medical students would be likely to submit to it without remonstrance. The system itself is hardly worth retaining. It is vexatious in its operation, and futile in its efforts. It would not have survived so long, but that until the other day the authorities of the University were all celibates and clergymen.

If we suppose that the Inns of Court are willing to admit an Oxford and Cambridge degree in law as a sufficient qualification for a call to the bar, all that remains for the Univer-

sity to do is to re-organize its legal studies. This also would have to be done in co-operation with the Inns of Court, and the details might require a good deal of consideration. An increase of the Professoriate would be absolutely necessary, first of all; and the professors would require to lecture at least once a day during term-time. It is useless to go on multiplying professorships of the old ornamental character. The law professors ought to have the entire charge and responsibility of the legal studies in the University. They ought to be working professors, actual teachers, as professors are elsewhere; and private lectures ought to be ignored. We see no objection to a large increase in the number of professors or readers in law, provided they hold office on these conditions. It would probably be found advisable to charge a small terminal fee for each course of lectures, and to require a certificate of regular attendance on a certain number of courses before admitting a student to examination for the legal degree. There would be no great harm in having more than one lecturer on the same subject; and there are many special subjects that would each require the whole time of one lecturer. Equity, for example, is unrepresented in the University system; and so is Commercial Law. A staff of six or seven professors' lectures or readers would probably be found quite sufficient; and the income required for their support would form but a very modest charge upon the revenues of the colleges. The utilization of two or three headships would solve the money question at once. It might be a further question whether scholarships should be provided for successful candidates in the degree examinations, and for promising beginners on their entering the legal classes. The Inns of Court might do worse than devote a few thousand pounds to the foundation of scholarships for law students entering on the legal course at the University; and the colleges will have money enough to spare in course of time for the same purpose.

It is only by some such union as we have here sketched

that the Inns of Court and the Universities can work together as joint forces in the cause of legal education. We believe that the absence of the moral "faculties" of law and medicine is a source of weakness in the English Universities admitting of very easy remedy. Oxford and Cambridge have only to hold out their hands if they wish to make themselves the centres of professional, as they now are the centres of the higher general, education. Oxford alone might educate, in addition to her two thousand undergraduates, five hundred medical and five hundred legal students. It is useless to say that Oxford is already large enough. It can only be kept from growing larger by retaining and increasing the restrictions which have hitherto made it the patrimony of the rich, or by scattering its property broad-cast over the country. Remove these restrictions, and you will increase the number of students every year. With numbers so increasing, you cannot force indiscriminately upon all and sundry the traditional studies of the place. You will have men coming up to the University who know little and care less about Eton and Harrow, and who, not having learnt there to acquiesce in the notion that an unprogressive acquaintance with a few classical authors is an education in itself, will look about them for subjects worth studying for their own sake and likely to be useful to them in their after life. The University will do wisely to take the initiative on itself of providing for the inevitable effects of its own inevitable extension.

The chief advantages of the scheme we propose would be, 1, that legal studies in the University would receive a powerful impulse, and, 2, that the best possible preliminary training would be provided for persons intending to follow the profession of the law. We may add also that some such arrangement as this would meet two of the main objects proposed by Lord Selborne in his plans for the reform of legal education. Attorneys and barristers would pass through precisely the same training during the early part of their career. And there would be provided for all persons wishing

to know the laws of their country, but only intending to practice as lawyers, a public school of law of the highest character and capacity.

The present moment is particularly favourable for urging the by no means novel scheme of a union between the Inns of Court and the Universities. The Inns, like the University, are waiting for impending reform. At the very same moment they are in the hands of the experimentalists. This is surely the very time for bringing the two powers to an understanding; and we do most strongly urge that, so far as legal education is concerned, it should be settled on a basis resting equally on the Universities and on the Inns. Lord Selborne wishes to create an independent School of Law in London, and we sincerely hope he may succeed. But it never will be the only school, and there are schools likely to be much better, which only want the recognition of the profession to make them a success. Two things, however, we have assumed throughout these proposals. We have assumed that the accounts of the University will be dealt with on uniform principles under a Parliamentary scheme, overriding the intention of the separate corporations and correctly ascertaining the amount of money available for any academical purpose. We have assumed also that the Inns of Court will be willing to confide to the Universities the power of testing the fitness of candidates, in point of legal knowledge, for the profession of the Bar.

E. ROBERTSON.

VII.—A FRENCH SCHOOL OF LAW IN JAPAN.

THE October number of the "Revue de Législation Ancienne et Moderne" (1874) contains some information concerning the infusion into the newly-opened Eastern land of the principles of Western law which can hardly fail to be of interest to us in England, among whom Japanese students have already come honourably to the front.

Few circumstances could be more worthy of our attention, or more indicative of the strides that the land of the Mikado has been taking within the last few years in the direction of Western culture, than this opening of a School of Law in Yeddo, by a French Professor, lecturing to Japanese students in his own tongue, and quoting for their instruction some of the most celebrated definitions of Ulpian and other great Roman jurists. "Honestè vivere, néminem eddere, justuum cinque tribuere," maxims which were read or spoken to many a class among the students of the Roman bar, have gone eastwards to meet the sun, and form a generation of practitioners in a world to which the Roman eagle never penetrated.

M. Boissonade, one of the editors of the "Revue de Législation," and an "Agrégé" of the Paris Law Faculty, was selected by the French Government, together with M. Bousquet, to proceed to Japan and carry out the wishes of the Mikado's Government for the establishment of a native school of jurists, trained on Western principles, who should in time become the judges and magistrates and the barristers of New Japan. Before the pupils of these Paris professors the Old Japan of the Daïnios and Ronius must needs rapidly fade away; and the establishment of the school on a firm basis cannot but be accounted one of the most important steps taken in the direction of sound progress. For hitherto, as M. Boissonade points out, the administration of justice in Japan had rested upon the uncertain footing of unwritten

traditions and customs, and local practices, and sometimes natural equity, as interpreted by the Governors of the various Provinces. Whether these magistrates of the Empire decided on the whole well or ill, it is evident that the system was far too arbitrary to last the moment the nation came into contact with Western civilization. Everything must now undergo change; the civil law must provide an ownership of land that shall no longer be, as of old, revocable and precarious; the criminal law must provide the magistrate with a uniform rule and a precise text, promulgated by lawful authority, and enforced by the sanctions of the State; and education must help to diminish crime by raising the moral tone of the people.

The subject which M. Boissonade chose for his inaugural lecture was Natural Law, the only portion of the field of jurisprudence, as he considered, fitted for the study of his pupils at a time of transition, when the old law is disappearing, and the new law is not yet formulated. This natural law, in his view, is to lead up to positive law, which ought to be its clearest possible expression, its most indisputable formula. "When the law promulgated by men;" said St. Thomas Aquinas, "deviates from natural law, it is no longer law, but the corruption of law." The legislator's task, then, according to M. Boissonade, is to make the law natural, clear, and determinate; and it is a task which is nowhere concluded, and can never be concluded, amid the constant changes and developments of nations, and of the moral and intellectual as well as of the material world—changes of which the very scene of M. Boissonade's prelection affords a striking evidence. This natural law, however, is not in the French professor's eyes that of the so-called state of nature of eighteenth century philosophers, but that of man living in a social state—the only state which we know, and the only one which has need of a law, *i.e.* a rule of conduct laid down by a superior (impérativement tracée), and also the only one in which the fulfilment of duties can be demanded.

It is difficult, as M. Boissonade admits, to draw the line in many cases between natural law and morality. The circle of morals doubtless comprehends that of natural law, and extends beyond it; but who shall say at what point we have left the one and entered upon the other? Perhaps we may approach most nearly, he thinks, to a solution of the problem if we say that natural law is limited to the precepts of justice, which tend directly to the preservation and development of the social state, while the precepts of morality tend in addition to the preservation and development of the individual in a state of well being. But even under this definition it is admitted by its author that there remains the difficulty of knowing whether a given precept affects the social state, and it is so hard to conceive of a precept that should tend to better the individual without also affecting society at large that one is induced to extend the sphere of law indefinitely.

From the natural law thus understood, which is anterior, to positive law, flows both public and private law, and also, in M. Boissonade's view, political economy, which is the body of natural laws that regulate the production and increase of the wealth of nations, but which, curiously enough, is not yet allowed by the Japanese Government to form part of his course.

Following Montesquieu, who said "I have strong support for my maxims when I have the Romans on my side," M. Boissonade embodies in his introductory sketch of natural law some of the maxims and definitions of what is still, as he justly observes, the fairest and richest jurisprudence that can be studied. After rejecting the definitions of Bossuet, Montesquieu, Portalis, and Mirabeau, as wanting in precision, we are brought back to the "Ors boni et æqui, justi et que injusti scientia" of Uiplan, the stoic philosopher. But this famous utterance demands no less severe a criticism than some of the others which have already been put aside. For what, asks the French Professor, is "bonun," and what

is "justum?" Then, again, in the other proposition which we quoted at the outset of this article, "Honestè vivere, neminem lædere, jus suum cuique tribuere," there is a confusion of law with morality, and the spheres of the two, are not distinguished. Strictly speaking, as M. Boissonade observes, these are moral precepts developed and applied by positive law. But they prescribe some of the most salient duties of the social state, the respect of the right of ownership, the prohibition of rapine, the duty of repairing injuries done to a neighbour, and thus may be said to embrace civil, criminal, and commercial law within their scope; so full of meaning are those few words of the Roman jurist. They include all our social duties, says M. Boissonade, not excepting our duties to the State or organised society, which call upon us to defend our country with our life's blood, and to contribute towards the public expenses out of our private means; for, manifestly, we should hurt our neighbours if we allowed the burden of supporting the social organisations, without which the individual would perish, to fall upon them. They include also the duties imposed upon us with penal sanctions, because although penal law does not lay down explicitly that we must not hurt our neighbour in his person, his honour, or his property, it nevertheless attaches external penalties to the violation of the precept, "neminem lædere."

In the Japanese tongue this primordial precept of the natural law runs thus: "Hito-o gaï-sourou na." This it is which the legislator has to vivify and develop, and hence its fitness for being so strenuously urged at the opening of a school intended to be the nursery of the forensic and legislative intelligence of Japan. Hence also its fitness to interest us in M. Boissonade's work, of which we cannot take a more suitable leave than in his own closing words—"As moral law may push its consequences and deductions much further than human law, if we observe all that our conscience and reason reveal to us, we shall at the same time satisfy both human and moral law."

VIII.—THE PLACE OF ROMAN LAW IN LEGAL EDUCATION.*

IT is natural, and even necessary, for those beginning a new subject of study, to inquire what they may expect to gain from it. It is necessary to know what objects are to be kept in view, if these objects are to be accomplished with certainty. Now there are certain studies that carry their purpose and justification, so to speak, on their face. It requires no argument to show that a dentist should have some knowledge of the anatomy of the teeth, that a chemist should learn the reactions of the substances he has to compound, that a surgeon should study anatomy, or a physician physiology and pathology. In like manner, no one doubts that a conveyancer must know the law of property, and that an advocate should be familiar with the departments of law in which he practises.

So far everything is clear. An English lawyer should know English law. But is it necessary that an English lawyer should know Roman law—the law of an empire that has been dead for a thousand years? This question is the more pertinent because the relation of English law to Roman law is, at least on the surface, very different from the relation of Scotch, French, or German law to Roman law. When Napoleon began his work of codification, his object was as much to establish a uniform system of law throughout France, as to arrange, purify, and systematise the law. His codifiers had to make one system out of two; for in certain parts of the country customary law prevailed, in others the Roman law. As might have been expected, the Roman law asserted itself as the backbone of his code. In England, the Roman law, as such, has nowhere established a supremacy.

In so far as it has affected the English law, it has done so

* The Introductory Lecture to the Class of Roman Law, University College. London, October, 1874.

imperceptibly; its doctrines having been quietly absorbed by the judges with little reference to the source whence they were obtained. Moreover, the remarkable victory of feudalism in this country placed a large part of the law at variance with the Roman Jurisconsults; and, by a historic accident, the contest of English laymen for supremacy over the ecclesiastics, led to a violent and ill-founded hatred of the very name of Roman law. The result is that during the last two hundred years, the common law has appeared to advance in a path of its own, owing nothing to Rome, but everything to the genius of the soil. At one time, the Roman law was cultivated with great zeal and success; but since the great ecclesiastical quarrel of the sixteenth century, it has been kept in the background, and only within the last few years has it again begun to flourish in this country.

Quite manifestly, therefore, the Roman law cannot rank in importance with common law, as a subject of study for an English student. A man may be an English lawyer without knowing Roman law, or the law of any country but his own. This fact, however, does not dispose of the claims of Roman law to our attention. In all professions, and indeed in many of the higher mechanical trades, it is not considered enough to know by rule of thumb what directly bears on practice. The recent demand for technical education among artisans attests a growing conviction that, in order to learn even a handicraft, it is advisable to know something of the scientific principles upon which the art is based. Thus the necessity of a preliminary training in botany, zoology, and the like subjects is recognised in the teaching of medical students, although a man might make a very fair practitioner without knowing anything of those subjects. If Roman law, then, is a proper or necessary subject of study for barristers or solicitors, it must take rank as part of their preliminary education; and as such must be admitted to have a more direct, practical bearing on their future work than the studies that form the staple of teaching in the Universities. The

question, thus, comes to be, is the place of Roman law to be found among the scientific branches of a lawyer's education?

Perhaps the word "scientific" had better not be used, as it may mislead, but what I mean by a scientific knowledge of law is a knowledge of the uses or purposes and value of the rules of law as distinguished from a mere acquaintance with the rules as rules. Rules of law exist for certain ends; a man who know the ends to be kept in view as well as the rules by which it is hoped to attain them, is a better lawyer than the man who, ignoring the purposes of law, is in continual danger of sacrificing the spirit to the letter, and of creating an artificial and technical hardness repugnant to the good sense of the community. Still more important to the lawyer, the rules of law are limited, or qualified, by the ends for which they are intended. Few, if any, rules of law are absolute and universal, and even when stated in the most general terms, law is subject to numerous tacit exceptions. Moreover, when there is the slightest antiquity, law has to be interpreted with reference to its ends or purposes. Hence, in the wide subject of interpretation, one cannot advance a single step, surely, without a firm grasp of the purposes and methods of legislation. The processes with which a lawyer is concerned are either interpretation, ar induction, or both; and to these processes a mere mechanical memory for cases is not enough. A naked memory for cases is all very well, so long as there are no inconsistent cases, and there are cases on all fours with the point in litigation; but when a point is really unsettled, a pleader must exercise the talent of analysis as well as of memory.

For the purpose of training a man to the uses and processes of law, nothing is to be compared to Roman law. In the first place, it has the advantage of expressing, so to speak, the ideas of English law, in its latest phase, and the English law of the present day is not great, but in form and style the difference is very great. The necessity is recognized on all hands of learning a foreign language, similar to ours,

if we are to understand our own. The facile and ingenious Greeks fell into serious and obvious blunders, from the circumstance that they knew no language but their own. In like manner, it may be said that a lawyer never really understands the law of his own country until he has learned some other and different system. No doubt great sagacity and patient study of even one system will go far to render unnecessary a recourse to foreign systems; but, having at hand such a body of law as was collected for us by Justinian, we should be throwing our advantage away, if we did not avail ourselves of it as a means of education.

It is instructive to observe the English-Roman law, when they seek the same objects by like means; but it is even more instructive to observe how they adapt themselves to the wants of the two civilizations. We are thus taught in a manner never to be forgotten, that law plays, although an important, still a subordinate part in the structure of civilised society. We learn that great as is its influence on the moral feelings and institutions of a people, it is the handmaid, and not the mistresses of the sciences of morals and legislation. As one example, we may refer to the law relating to parent and child, husband and wife. These two relations are more important in their direct relation to the happiness of individuals, as well as the permanence of society, than any others known to law. In the Roman law everything depends on the relation of parent and child; the relation of husband and wife had scarcely any legal questions, except as affecting the primary relation of parent, or rather father and children. In the English law, on the contrary, there is no legal tie between parent and child, except indirectly through the Poor Law, and, when the child is a helpless infant, through the criminal law. There is no common law obligation to make a suitable provision for one's children, but a husband is bound to maintain his wife. On the contrary, in the Roman law, so far as I can make out, there was no legal obligation imposed on a husband to main-

tain his wife. The most significant circumstance of all is that in the ancient Roman law, as it may be found in the earlier period of the Republic, there was a closer legal tie between husband and wife, described to us by Gaius by the word "*manus*," and by this *manus* a wife acquired a decided legal relation to her husband, but in what capacity? as wife? no, but as daughter. She was in law reckoned as one of her husband's children; and as a child took her share of his property on his death. But before the close of the Republic the *manus* had fallen into disuse, and the legal tie between husband and wife was about the loosest the world has ever seen. From the strictness of the tie between parent and child, and the laxity of the tie between husband and wife, arose a law of marriage settlement very different in its origin and objects from an English marriage settlement. An English settlement always looks beyond the wife, and in general gives her only a life interest; it is equally a provision for the children of the marriage. But a Roman marriage settlement was a provision for the wife alone, and not for her children after her. The main object of a marriage settlement in England is to provide for the death or bankruptcy of the husband, and so generally becomes of most use when the marriage is at an end. A Roman marriage settlement lasted only during the marriage, and was ended by the dissolution of the marriage. The theory of the English marriage settlement is to provide for the wife and children, when the husband is no longer able to provide for them; the theory of the Roman marriage settlement was that it was to enable the husband to bear the expenses of supporting another man's daughter. For so strict was the tie between parent and child, that a father was bound to keep his daughter after marriage as much as before. Hence a very singular example of law is found in the Digest. The question arises, who is bound to pay for a wife's funeral? The answer is that it is, in the first instance, her husband, out of the moneys provided for her on her marriage; if no such moneys, then her father is com-

pelled to pay the charges; and if he is too poor, the burden is thrown in the last resort on the husband.

How it comes to pass that the English and Roman law should be so profoundly different in their attitude towards the elementary relations of social life, is a question that cannot be answered with brevity, but the importance of its bearing on the study of law is manifest. Doubtless the best justification of our system is that, as experience proves, there is no necessity for any stringent legal tie between parent and child; parents and children will discharge their reciprocal duties without the interference of law. That is the general rule, which has, however, its limits. Again it may be said, that if the relation of husband and wife is on a sound footing, the relation of parent and child will naturally be so too. Still we have the strange spectacle that the tie between parent and child is very slight in English law, while it is very stringent in Roman law. So, the relation of husband and wife is very loose in the Roman law, and very stringent in the English law. This raises the question whether the Roman wives suffered from the laxity of the law, or the English wives benefit by the stringency of the law; whether the Roman children were any the better for the strong tie binding them to their father; or English children suffer from parental irresponsibility. At this point, however, as students of law, we stop. We have carried our inquiry to the threshold of the science of legislation, and there we must leave it.

It may be said, what is the use of knowing the Roman Law of Marriage Settlement when it is based upon a state of social feeling, the very opposite of that which prevails in England? And no doubt, for many reasons, the portions of Roman Law that more closely resemble our own, are to be preferred for minute study; but these subjects have a great interest, not merely from an historical point of view, but from a more practical one. It shows the flexibility with which law must adapt itself to the ever varying conditions of life. According as social demands change, so must law

change too. The adjustment of these two things is the work of the legislator, and it is well for us to study that work in examples far away from the circle of our personal interests and prejudice, with impartial indifference.

I may advert, for a moment, to another subject that has a great historical interest, but is also full of instruction to one whose study is the operation of law. I mean slavery. This is the subject, beyond all others, that divides the Roman from the English law. It is the boast of England that no slave can breathe on English soil, that the soil or the ship covered by the English flag is an enfranchisement. The pursuit and capture of slaves is vitiated by English statesmen as a crime akin to piracy. By what a gulf are we separated from the Romans. The capture and enslavement of prisoners of war was the proudest and most lucrative business of the Roman. The "domestic institution," as it has been euphonistically termed, although it is an institution that suppresses the most sacred domestic ties for the great bulk of the population, the domestic institution was in later times, at any rate, an essential factor in the government of Rome. Not merely the rough manual labour of the country, or skilled work of artizans, but the management of trading vessels and the conduct of extensive business was entrusted to slaves. A great, perhaps much the greatest, part of the agriculture, manufactures, and commerce of Rome, was entirely conducted by slaves. Slavery thus confronted the lawyer at every step. Scarcely a question of law arose in which at some point or other the value of acts done by slaves had not to be determined; and thus the law of slavery must be sought for in every department and ramification of Roman Law. No one can understand Roman Law without thoroughly mastering the legal relation that subsisted between master and slave.

But if slavery be obsolete, what is the use of all this to an English student of law? It must be admitted that the subject is very remote from the requirements of an English

student; indeed, from that point of view, it may be described as the most useless part of Roman law. Along with this admission I may be permitted to say that to the student of history, and of the history of law, the subject cannot be overlooked. It is most interesting to observe how the institution of slavery worked throughout every phase of social life. No one can understand the organization of the ancient world who has not mastered the leading outlines of that now happily obsolete, but once extensive, department of law. I think it may be summed up in this lesson, that as much should be given to the plan as was consistent with the fundamental character of the institution. The law in Rome became one of growing humanity to slaves.

But, although the law of slavery is mainly of historical interest and value, and, indeed, much of it is of purely antiquarian interest, nevertheless it is not one that can be neglected even by those who do not wish to add to their legal accomplishments a knowledge of the history of law. Apart from its essential connections with so much of the Roman law, it illustrates many principles that are found largely in our own law. For example, slaves were the only persons who could be agents for making contracts, using the word agent in its strict sense. Thus, so far as the Romans developed a law of agency, it is to be found within the relation of master and slave.

If we had time to examine the corresponding parts of English law, we should strike upon some singular coincidence. Of course the persons who, in England, correspond to the Roman slaves, consist chiefly of those usually called the working classes. It is a curious circumstance that the English law exhibits a progress resembling that of Roman law. The difference is that the English law started from a point slightly in advance of the utmost liberality of the Roman law. In the time of Justinian, alongside the great class of slaves, properly so called, were to be found *colour*, or serfs. At the opening of English history, we also find a

class of serfs, or villeins, but no slaves, in the old sense of the word. But the workmen in England, who were not serfs, were they free labourers? Far from it, a perusal of the statute of labourers (Edw. I.), and of the many similar statutes to be found about the same period, show that the labourer was not free, and that he groaned under a bondage, differing in name more than in substance from slavery. In the first place it was a crime for a workman to ask or receive higher wages than it pleased the Justices of the Peace to allow. Thus so far from having a right to sell his labour at its highest value, a labourer who dared to attempt such a thing was punished by imprisonment. In the next place, a workman could not remove from his place of abode except under such restrictions as to make it practically impossible. The right of free locomotion was denied him. In the next place, in many instances he was not allowed to choose his own employment, but was compelled to work as an agricultural labourer. Finally, any attempt of labourers to combine together to improve their position was summarily dealt with by the criminal law. Although it is a chapter of the history of English law, lying somewhat out of the beaten track, and not much known, it is not devoid of interest to those who at the present day begin to read the law of master and servant. Whoever reads the series of statutes to which I have referred will have no difficulty in understanding the strange characteristics of some parts of that law. When Sir H. Maine says that the progress of society was from stratus to contract, we may state more specifically the steps of this progress. The Roman law began in a hard law of complete personal slavery; it ended by greatly alleviating the position of the slave, and especially of raising him to the standing of a colon or serf. The English law began with serfs, and persons in a position resembling serfs, and it has slowly moved on, till now in practice the old relation of master and slave is replaced by that of employer or workman or terms regulated by united agreement; and in law there

remain but the dregs of the old legislation which still keep the law somewhat behind the age.

2. The second benefit from the study of Roman law is one that belongs perhaps rather to the accomplishments, than the equipment, of a lawyer. It is the study of Roman law as a growth, as a development, as a progressive system adapting itself from generation to generation to the new wants of the time. Here we find a most instructive comparison with the growth of English law, just as there is, I venture to think, a remarkable resemblance between the English and the Roman intellect. The Roman law, however, has an independent value of its own. It reveals a great chapter in the progress of civilization. It is a great chapter, but not the first. No mistake could be greater than to suppose that even the most archaic fragments of Roman law represent the legal ideas of primitive man. On the contrary, it was in some respects far in advance of the law of those northern conquerors who extinguished Rome itself. We do not find in the remotest period trial by battle, nor trial by ordeal. The laws of the XII. Tables, so far as we possess their fragments, give us the first light on the early law of Rome. But the law of the XII. Tables is the law of a civilized people, and not only of a civilized people, but of a people over whom the State or the City has established its supremacy. The earliest chapter of Roman law discloses to us the subjugation of the patriarchal family, the triumphant victory of the central authority, and all that remains is but to follow out the victory to its logical conclusions. But Rome gradually advanced from the position of a city to be the capital first of Italy, and then of nearly the whole world. The problem that its jurists and legislators patiently, slowly, but steadily and successfully accomplished was to work upwards from a narrow system, suited only to tripod government, and to very small communities, to a body of rules under which it is scarcely an exaggeration to say the whole human race could live, if that federation of the

world, of which the poet sings, were to be an accomplished fact. They created a criminal law, they transformed the legal relations of husband and wife, parent and child, they so altered their law of property that the first jurists would not have recognized it, they developed a vast law of legacy, they developed a law of contracts out of very rude and scanty material, and they twice re-organized their civil procedure. Comparing the beginning with the end there is a wide contrast, but from beginning to end the continuity is unbroken. The evolution proceeded by slow and often imperceptible steps; there has been change, but no catastrophe. A knowledge of the steps is of great value to a student of law, because the connection between the origin of a rule of law, and the meaning of the rule, is much closer than that which subsists between the derivation and meaning of a word.

3. Another advantage may be gained from Roman Law. This benefit is, however, too often lost, and is besides relative to the present state of English Law. Owing to the almost necessarily fragmentary way in which English Law must be studied, it is of great advantage to acquire a knowledge of a complete system of law, viewed as one whole. This advantage we may derive from Roman Law, on account of its bulk. There is very much in Roman Law of little or no use to an English student, and what remains is not too great for ordinary diligence. All the various parts of law are related to each other, either as approaching the same end from a different point of view, or as supplementing each other's defects, and hence a knowledge of law in fragments is necessarily defective. It is not easy, if it is even possible, for a student to obtain a complete outline of English Law; but it is possible to do that for Roman Law. Such a systematic knowledge is of great use in facilitating the acquisition of English Law or of any other system.

4. There is one benefit that ought to be gained from the study of Roman Law, which as yet it is not in one's power to obtain. The study of Roman law, as a growth, is not

complete unless it is accompanied by a similar study of English law, as a growth. We ought to pursue the same historical and systematic treatment of English law that we do of the Roman law. But the material is too scanty. No professor of English law has done for it what Gaius did for Roman law. Isolated works, then, are of value and importance, but it is nevertheless a regretful circumstance that in the first place we have not a full and accurate history of the development of English law, and very inadequate knowledge of the extent to which the English law is original, and how much it owes to others, and chiefly the Roman, systems, and venture to think that the study of Roman law will never attain its best place in legal education, until it is taken along with the law of our own country. That is a view which we may hope one day to see filled up, with the result of making law not only more interesting, but more intelligible.

At present the English law has reached a point similar to that at which the Roman law had arrived about a generation or less before the time of Justinian. There is in fact much more likeness between the two than is sometimes supposed. Seeing the Roman law in a reduced and expurgated form, we are apt to ascribe to it a fondness for general principles, which is, perhaps, not undeserved, but which would probably be merited as much by our own law if it were treated in the same way. The digest consists of about 15,000 verses, and the code and novels of Justinian are nearly of the same extent. If now we began, as we have done, by an expurgate edition of the statutes; if we educate local and temporary statutes, and, above all, if we were to consolidate most of the remaining Acts, we should have accomplished for our statute law more than was done by the eminent Justinian and his coadjutors. The size of the digest, containing, as it does, only 150,000 verses, compares favourably with the bulkiness of our own law; but then we must remember that the digest is a mere residue, a twentieth part only of the law before

Justinian. Remembering, also, that a great part of the digest consists of reports of cases, written with the brevity almost of marginal notes, in the English reports, we must admit that, considering the absence of printing, the Romans attained as conspicuous a success as ourselves in swelling the dimensions of the law to an extent beyond any human capacity. *The great bulk of the Roman law was case-law,* and in that lies its value. It is the record of many minds working out by daily experience the adjustment of legal rules to the facts of life, and in that circumstance, more than in its being a sort of treasure-house of the inspiration of legal genius, must we recognise the real importance of Roman law. The English and the Roman possessed the same practical turn of mind, the same tenacious adherence to the usages of the past, combined with a certain openness to new light.

In attempting, therefore, to fix the place of Roman law in legal education, we must keep this consideration in view. But we ought not to forget that to some branches of English law, Roman law is by far the best introduction. Ecclesiastical law has been shorn of its dimensions, but it still provides a certain quota of litigation. In times of peace, the Court of Admiralty does not make any severe demands on counsel and attorneys, but the frequenters of that court must be often at a disadvantage if they are ignorant of Roman law, and the Law of Wills, and in International Law, so much is due to the Romans that an acquaintance with the law of Justinian is almost an indispensable introduction. But even for the branches of law that seem least directly connected with Roman law, we must remember that the study of Roman Law, even if confined to a dry knowledge of its rules, is far from lost. To no smaller extent, the learning of Roman law is the learning of English law, for a good deal of English law is taken bodily from the Roman law. There is no room for doubt that a man somewhat acquainted with Roman law, say with the Institutes of Justinian, gains

rather than loses in his capacity for rapidly assimiliating English law.

Roman law thus appears to occupy the same place in the course of legal education that pure scientific study does in medical education. It is a preparatory study, familiarizing the mind with the methods, and, to a certain extent, with the subject matter of the strictly professional work. It is such studies that dignify a profession; which elevate the minds of professional men, and enable them to take a wide view of their work. At the same time it ought to be borne in mind that Roman law is a preliminary study only. A great authority in medical education has recently raised his voice against the sacrifice of professional to preparatory studies. There does not appear to be any danger, for some time at least, of the scientific studies of young lawyers being carried too far; but it is not an unusual thing in this country to rush from one extreme to another; and it may be that Roman law, which has been so long left out in the cold, may now be over fed and bloated. If we may go by the time allotted to law studies in England, I think one year is enough for jurisprudence and Roman law. The time altogether may be too short, for the law school of Constantinople five years was the curriculum, and it is difficult to see how any one can get even a moderate acquaintance with the English Law in three years; but, having regard to that period, one of the three is as much as can be spared for Roman law.

W. A. HUNTER.

IX.—UNIVERSITY AND FREE TEACHING OF LAW IN FRANCE.

WITH NOTES ON THE FREE SCHOOL OF POLITICAL SCIENCES IN PARIS.

THE tender attentions of a Paternal Government have, for years, restricted the University instruction in jurisprudence throughout France within narrow limits, quite insufficient to meet modern requirements. This is the more keenly felt by thoughtful minds in the ranks of the French jurists, that they see their Teutonic neighbours taking a wide and statesman-like view of the importance of juridical and political science almost at their doors, and on territory which, but a little while ago, was French. At a University delicately alluded to as one "recently created, in some sort gathered together from all quarters, and which may pass for the last expression of higher instruction in Germany," which can easily be identified with the University of Strasburg, it appears that there are no less than twenty-seven courses of lectures and conferences, given by fourteen professors of the various branches of jurisprudence, and representing one hundred and ten hours of legal instruction weekly. In France, on the other hand, according to the latest published official statistics (1865-68) there are only eleven Faculties of Law, a number unchanged by the events of 1870-71, as Bordeaux has been added to the list from which Strasburg has disappeared. In the departments there are seven or eight chairs attached to each Faculty, while in Paris there are fourteen. These chairs are thus allotted:—

(*a*) Civil Code, Departments, 3 chairs; Paris, 6 chairs.
(*b*) Roman Law, Departments, 1 or 2 chairs; Paris, 4.
(*c*) Civil Procedure and Criminal Legislation, Departments, 1 or 2; Paris, 2.

(*d*) Commercial Code, 1.

(*e*) Administrative Law, 1.

Supplementary courses, in two Universities, namely :—

Grenoble, Toulouse } Political Economy.

Toulouse, in addition, chair of History of Law.

In Paris alone was there a somewhat better bill of fare, for here were to be enumerated the following chairs :—

(1) Criminal Law and Comparative Penal Legislation.

(2) Law of Nations.

(3) History of Roman and French Law.

(4) French Law, studied in its feudal and customary sources.

(5) Political Economy.

M. Flach, advocate at the Paris Court of Appeal, to whom we are indebted for the above statistics, states, in his article on the subject in the December number of the "Revue de Législation Ancienne et Moderne," on which we base our remarks, that the want of libraries containing legal books of reference both for professors and students in Paris is lamentable. Reading space for twenty persons is truly ludicrous by way of accommodation for a Law Faculty of 3000 students, and the yearly allowance of 200 francs (say £8) for keeping up and adding to departmental libraries is a most miserable pittance. In 1865 the total number of law students throughout France was 5,249, of which Paris alone furnished 2,800, while the State receipts from payments by students amounted to 627,667 francs.* Since this time things have remained, says M. Flach, pretty much *in statu quo*. There are 19 chairs of law in Paris, 10 at Toulouse, 9 at Nancy (by means of the partition of the Chair of Civil Procedure and Criminal Legislation), 8 at Aix, Bordeaux, Caen, Dijon, Grenoble, Poitiers, Rennes ; 7 at Douai, where there is only one chair of Roman Law. The teaching

* Statistique de l'enseignement supérieur (Paris, 1868, pp. 453, 473).

body is composed of 19 professors and 9 " agrégés " in Paris, while in the provinces there are only 58 professors and 23 " agrégés " for 82 chairs. A sum of 10,500 francs is borne on the budget of the Law Faculties for supplementary courses in the departments, and an allowance of 12,000 francs is made for similar purposes in Paris.

Two of the Paris supplementary courses deserve to be noted. M. Renault has commenced a course on Private International Law, which we might have expected to have been long ago in operation; and M. Lyon-Caen, an active member of the French Society of Comparative Legislation, is giving a useful course on Industrial Legislation, in which he will explain the law of Carrier Contracts, in relation to shipping, railways, &c. The receipts from the Law Faculties appear, by the accounts of 1874-5,* to be increasing, for the State is credited with profits to the amount of 727,175 francs.

There are several grave lacunæ in the official French courses of instruction which are justly animadverted upon by M. Flach, namely, the absence of any teaching of the History of Law, Comparative Legislation, and International Law. There is also a complete blank in regard to political and admistrative science. Hence the foundation of a school unfettered by State restrictions, and able to provide instruction in the branches omitted in the official programme, clearly answers an acknowledged need which no existing institution supplied, or was likely to supply. Such a school, which may fairly be expected to give the rising generation of French students of law, diplomacy, and politics, a better and wider training than their own Universities offer them, is to be found in the Free School of Political Sciences, now at work in the Rue Taranne, Paris. A glance at the list of subjects and teachers for the opening session of 1874-5, given in the " Revue de Législation " for December, will suffice to

* Budget de l'Exercice, 1875, pp. 132, 940.

shew the variety and excellence of the instruction to be obtained there.

Courses from 23rd November, 1874, to 5th June, 1875 :—

I. Administrative Organization and Practice in France and foreign countries, by M. Demongeot, 1 lecture, weekly; with 2 conferences, by M. Alix.

II. Financial Organization and Administration in France and foreign countries, 1 lecture, weekly, by M. Leroy-Beaulieu; with 2 conferences, by M. Machart.

III. Geography and Ethnography, 1 lecture, by M. Gaidoz.

IV. Diplomatic History of Europe since 1789, 1 lecture, by M. Albert Sorel; 2 conferences, by MM. A. Sorel and Renault.

V. Political Economy, 1 lecture, by M. Dufloyer.

VI. Statistics, and Economic Geography, 1 lecture, by M. Levasseur, during the first quarter, and by M. Jugear, during the second quarter; together with a conference, by M. Pigeonneau.

VII. Comparative Civil Legislation, 1 lecture, by M. Glasson.

VIII. Languages: German, 2 lectures, by M. Leser; English, 2 lectures, by M. Beljame.

The full course is calculated to extend over two years' Sessions, and the subjects to be studied during the winter of 1875-6 will include comparative, industrial, and commercial legislation, the law of nations, constitutional history, and the history of theories of social reform.

In this scheme, full as it is, there are, no doubt, as M. Flach points out, some lacunæ, and we may, with him, hope to see in future courses the addition of private international law, and parliamentary and administrative history. But it is a great step in advance of the existing University teaching, and we, therefore, heartily re-echo M. Flach's good wishes not only for the prosperity of the new Paris school, but, also for the extension of its

action to the provinces, and for its exercising such a pressure upon the official mind that the State Professorships may be thrown open to branches of scientific training whose importance is daily increasing. "No one," says M. Flach, "can in these days remain without a knowledge of political and administrative science, who wishes to have his legitimate portion of influence in the affairs of his country;" and the best school, we may say in conclusion, to which a Frenchman can at present go for this knowledge, is the Free School of Political Sciences in the Rue Taranne.

X.—THE JUNIOR BAR, ITS POSITION AND PROSPECTS.

OUR new contemporary, "The Law," commences its second Number with an article headed with the title which we have copied. The title is an attractive one because of the number of the Junior Bar who will look with interest to any suggestion which may be made for the improvement of their prospects.

Whilst we admit many of the facts stated with regard to the Junior Bar, we cannot say that we entirely agree with the estimate formed by our contemporary as to the position and character of the Junior Bar, nor can we entirely agree as to the view taken of the prospects of the Junior Bar.

The article starts with the assertion which no one can deny, that the number of large incomes made at the Bar is few, and that of these many would have been made with much less difficulty by the pursuit of commerce. We quite admit this. Many of the men who have advanced to the front rank

of the legal profession are men of great general ability and strong character, clear-sighted, intelligent and pains-taking, calculated to succeed in anything which they earnestly took in hand. Our contemparary might have gone further and said, that of the many men who are waiting in inactivity there is a fair number of intelligent men who, not having the highest natural abilities, would, by applying themselves to trade, soon make both position and fortune. Of the great number of men who overstock the bar let it be remembered that there are many who have not even respectable ability, many who have not even qualified themselves for the work to which they aspire, many who have both industry, learning and ability, but not the particular disposition and ability necessary to an advocate who is to be of any use to his client.

We quite agree with one of the remarks of the author of the article, and that is that the bar has not sufficiently adapted itself to the changes which have been going on for more than half a century. It has, for one thing, maintained too strictly the mere letter of its *etiquette*, and not sufficiently a proper and honourable SPIRIT of etiquette. It is absurd in these days to see a junior careful not to enter the assize town before commission day, not to enter the coffee room of an inn during assizes, not to recommend a leader, and not to go out of his way to flatter or make friends with an attorney. Nor can a junior be expected to do this when he sees older men than himself keeping the letter, though evading the spirit, of such rules constantly and systematically, but it is now equally necessary for a member of the bar, as it has always been, not to lose his self-respect, not to show himself capable of holding out a bait to secure a client, not to expose his professional brethren to any censure, stigma, or remarks which he would not like to be applied exclusively to himself. Let us not be supposed to advocate the doctrine that a barrister may obtain business by any means by which he can. He is not a mere tradesman whose wares may be bought of either himself or his next-door neighbour, and who is under

no further obligation than to expose his wares and say *caveat emptor*. He is a member of the first and highest profession in the land, and which requires the highest and most delicate sense of fitness, honour, and truth, to the full and proper discharge of its duties, and he is bound, under all circumstances, to demean himself so that he may be able to act with independence, and not feel under an obligation to assent to the requests of his client when his judgment cannot approve such a course, as a tradesman would to a customer, in consideration of the profit which he made out of a bargain. The position of a barrister is much more responsible than even many of the bar are inclined to suppose. A barrister has not only to be faithful to his client, but he has, also, the obligation of preventing the Court, in its process, from being abused, and he is bound to preserve such a demeanour as will enable him to discharge both these duties, and this he cannot do properly if he is guilty of undue familiarity with those who instruct him, or if he puts himself under any serious obligation to them. The spirit of the old rules of etiquette is quite right, and for the objects we have stated it is useful, but when any of its observances cease to be useful they become silly. To criticise, fully, all the rules of bar etiquette would occupy more space than we can allow at present.

We now propose to draw attention to those parts of our contemporary's article with which we do not agree. One is that as the attorneys have acquired a right of audience in county courts and police courts, the bar must be beaten first out of those fields of practice, and then out of the field of advocacy altogether, and the other is that the attorneys are better educated and qualified for their work (of which advocacy is a part) than the bar, and that, on this account, therefore, also must the bar lose the confidence of the public and its exclusive audience.

As to the first of the above contentions we can only say that practice in County Courts and Police Courts may serve

to shew that a man has the capabilities for making a successful advocate, but practice in those courts can never either make him a good advocate and can scarcely ever improve him. The old worthies of the English Bar were made neither at County Courts nor at Police Courts. As to money results we doubt if very much is to be made in these courts. There is not enough business in them to pay for advocates regularly attending them. The County Courts are, no doubt, much more important than they were, (whether they have ceased to fulfil their original purpose of small debt courts in the attempt to make them do an intermediate kind of work we will not now venture to determine), but they are the most unsatisfactory and inconvenient courts that could well be contrived for the character of contentious business which has of late years been so much pushed upon them. To train the English Bar in such courts as these could soon rob it of the character it has gained for intelligence and independence. We pass by the question of Police Courts, for it can scarcely be seriously contended that the bar by settling in them could make either money or reputation, and as to the County Courts we will, in a few remarks, deal with the probabilities of success in a local bar settling in them in good numbers.

There are local bars in some of our large towns, and in the very largest towns some barristers are making fairly good incomes out of their local practice; but these local bars are not composed of many members, and there is a very small proportion of really competent men amongst them. Grave suspicions as to breaches of professional etiquette in securing work also are, in certain well-known cases, whispered against some local barristers who have a large show of work. We say that in proportion there are as many idle barristers at the local bars as there are in London, and that localization will not do much to alter the incomes of the junior bar. But the reply will be made that the junior bar must in the County Courts compete with the attornies who now mono-

polise the practice there. First of all, we say to this, that the attornies themselves do not as a rule make much out of their County-Court practice. Such practice, in any country town, amongst the attorneys is always looked on as third-rate, or of the lowest class. The best offices, indeed, except in a few cases, will not conduct it: the County-Court business of such offices generally goes to counsel. The sums made by the County-Court advocate are such that he always, if he can, retires from it, and devotes himself to a different class of business. We have seen these County-Court advocates conducting cases in which the amount involved was 7s. 6d.—in short, conducting the case for nothing. Is this the competition to which the junior bar is to devote itself—competition in the County Courts with attornies? Does "The Law" know what this means and involves? We will state what—keeping, by means of bribes, on good terms with the officials, in the offices of the registrar, and high bailiff, and so securing their influence and recommendation; keeping a tout, or touts, at the public house which is always found opposite or next door to the court house. Such devices as these are absolutely necessary to that competition with the attornies of which our contemporary speaks. They are the daily practice of County-Court advocates. There is also another strong influence to compete with in some County Courts, namely—the interest which a local barrister may have who happens to be related to the judge or registrar, or both. These family parties are becoming more predominant, and the Lord Chancellor has not yet interfered, though we hope he will eventually do so, to prevent either abuse or scandal in this direction.

We spoke of the independence of the Bar being lost by localization in the country. The chief features of County Court advocacy should not be forgotten. Its most successful form is judicious flattery of the judge, and absolute submission to his judgment. No County Court advocate who hopes to succeed ought to acquire a habit of appealing from the ruling of the judge, and obtaining a reversal of this

judgment, nor should he shew a partiality for jury trials. Absolute submission and contentment with the judgment of a County-Court judge is the high road to success in this forum. This last state of things, amongst others, is a cause of constant complaint by the bar, who are occasionally called to County Courts, and we venture to say that a vast majority of the bar would not choose a County County in which to conduct business when they could do the work in a superior court. This necessary submission amounts to servility and so cannot exist along with independence.

As to the statement, "we might point to several attorneys who in their own line of advocacy cannot be matched at the bar." It would doubtless have been very gratifying to the advocates alluded to if this page of our contemporary had been turned into an advertisement sheet, and the names mentioned of these particular advocates who are so superlatively excellent "*in their own line of advocacy.*" The statement, notwithstanding its saving clause, is too monstrous to require refutation. There may be many attorneys who, as advocates, would have been in the first rank of the bar, with a good bar training, but we would draw attention to some of the most successful attorney advocates, and ask whether their loud shop-boy manner, sharp and incisive as it may be, would ever be tolerated at the bar, and what would this class of advocates have to recommend them without their distinguished manner? As attorneys they are eminent, as barristers they would collapse.

As to the prospects, then, of the junior bar being bright when the chances of localization and County-Court practice is taken into account, we say that we cannot agree in any such conclusion. The good work there is insufficient in amount and pay to attract good men in sufficient numbers to make a healthy competition. The bar must be beaten in the competition with the attornies who make the practice in those courts their chief pursuit; and when a man has made a local connection of this kind it is always open to speedy

destruction by the combinations of influence and interest which ought not to exist, but which at present do exist and threaten to multiply.

Many of the County-Court judges are not men of sufficient intellectual calibre to appreciate, or to care to encourage a high-class bar. We do not now allude to such judges as those of the Southwark, Bradford, and some other courts. A high-class bar would cause much more thought and trouble than a mere placeman would care to bestow on his work, and there are inferior courts where the appearauce of counsel is in every possible manner discouraged. A high-class bar can only exist along with a high-class bench composed of a very different class of men to the generality of County-Court judges.

The very fact that the attorneys withdraw from County-Court practice as soon as it has served their purpose is a certain test that the bar will not acquire either profit or dignity by pursuing it.

There is, we regret to see, in our contemporary a prevailing opinion in the article we are reviewing, that mediocrity and average ability are the great features of the bar, whilst sufficient training and ability mark the character of the other branches of the legal profession. We have nothing to do with the latter at present. As to the former, however, we would remark that the untrained and incompetent have no right to look for business, and whether they localize or not they ought to be equally unsuccessful, and we hope, in the interests of suitors, that they always will be. Let them seek occupations for which they are fitted. The only parties who have any right of complaint are the competent members of the bar. There are many such waiting for business, and there are many clients who would be glad to get at them. They have not, however, gained the public ear through the newspapers. There are many not very competent men doing forensic and chamber work, and the intelligence of attorneys cannot be better employed

than by discovering men who are fit to advise them. It is not fair for attorneys to complain of the incompetency of the bar because they have not found the first barrister that has come to hand equal their expectation. The newspapers are not the best guides as to the most competent men, though they may show who are securing the greatest amount of business. Attorneys are not always sufficiently considerate in selecting counsel who are not overburdened with work. They have no right to accuse their counsel of incompetency when their other engagements have not allowed them an opportunity of giving a difficult and intricate case all the attention that might have been bestowed upon it with advantage.

XI.—LORD ROMILLY.

WE have to record with regret the death of Lord Romilly, which took place on the 23rd ult. His lordship, who was for many years Master of the Rolls, an office he resigned in 1873, was at the time of his death Arbitrator of the European Assurance Company, having succeeded the late Lord Westbury. His lordship had occasionally suffered from ill-health, but notwithstanding he was able to accomplish the whole of the work of the arbitration of last session. Up to a few days ago there was no serious apprehension as to the state of his lordship's health, but having taken a severe cold, which laid him prostrate, effusion of the brain set in with fatal effect.

The following account of the career of his lordship we extract from the *Standard*:—

"The late Lord Romilly was born on the 10th of January, 1802, and had, therefore, nearly completed his seventy-third year. The distinguished son of a distinguished father, he was naturally drawn towards the profession in which Sir

Samuel Romilly hed made his name and fortune. He was educated at Trinity College, Cambridge, where he took the degree of M.A. in 1826, and having previously entered at Gray's-inn, he was called to the bar by that ancient and honourable society in 1827. With many men of unquestioned ability a call to the bar is but the commencement of a long and dreary period of pining in utter brieflessness, and of weary waiting for opportunities which may never come. From this, the most painful part of barristerial experience, Mr. Romilly was happily delivered. He began life with the advantage of connections which his father had formed, and by which the son was enabled, so to speak, to travel along a ready-made and well-made Macadamised road. Hence, within five years of his call, we find him standing for Bridport, in the Liberal interest, and gaining the seat in the first flush of popular enthusiasm begotten of the passing of the Reform Bill. But in his case, as in many others, the hopes of 1832 proved delusive. He lost his seat in 1834, and remained for twelve years a stranger to the floor of St. Stephen's. In 1846 he was again returned for the same borough, but on the dissolution, in 1847, he transferred his affections to the borough of Devonport, which he continued to represent till 1852. Meanwhile, the rewards of political fidelity and professional eminence were falling thick and fast upon him. In 1848 he was made Solicitor-General, in succession to Sir David Dundas. Two years later, on Sir John Jervis's promotion to the Chief Justiceship of the Common Pleas, he became Attorney-General, and in 1851 he was appointed Master of the Rolls, on the death of Lord Langdale. That judicial office did not then disqualify its holder from retaining a seat in the House of Commons, and Sir John Romilly availed himself of the privilege until 1852, but at the general election in that year, and subsequently, he very wisely abstained from Parliamentary contests, though it was more than once rumoured that he would have been willing to re-enter the House as representative of the University of London.

Of Lord Romilly's career as a judge it is enough to say that it was worthy of the traditions of the order to which he belonged. He was eminently clear-headed and painstaking, courteous to the advocates who practised before him, and, above all things, anxious to do justice to the suitors whose causes he had to decide. To the utmost of his power he strove to minimise the evils of the law's delay, by getting as quickly as possible to the real point of each case, and stripping it of the fringe and trappings by which forensic ingenuity

sometimes endeavours to conceal the weakness of arguments by which the worst is made to appear the better reason. Hence he was able to get through a far larger amount of business than his contemporary Vice Chancellors, who heard causes at greater length, and pronounced upon them in more leisurely fashion. Of necessity it sometimes happened that this promptitude or precipitancy led him astray, for not even judicial nature is equal to mastering an intricate series of facts by that species of intuition which tempts quick-sighted men to trust too implicitly to their first impressions. The frequency of appeals from his decisions often furnished matter for remark, though the proportion of those appeals to the business dispatched was not greater than that of the Vice Chancellors with whom he was sometimes disparagingly compared. In 1866 he was raised to the peerage by Earl Russell. Since his elevation, while giving a general support to his former allies, he has chiefly spoken with reference to measures of law reform, which have so largely engaged the attention of the Legislature during the last few years. In the discussions on the Judicature Bill he made many valuable suggestions for the effectuation of the object which the leaders of both parties were endeavouring to accomplish, but he raised an unavailing protest against the surrender by the peers of their ancient jurisdiction as a supreme court of appeal. With his resignation of the Mastership of the Rolls last year his services as a single-handed administrator of justice were believed to have terminated. The death of Lord Westbury, however, left the European Arbitration unfinished, and, greatly to the satisfaction of the share and policy holders in that unfortunate undertaking, Lord Romilly consented to assume the vacant post, and complete the work his predecessor had begun. In the main these favourable anticipations were fully realised. But, most unfortunately for the interests of the chief sufferers, his lordship declined to follow the rules which Lord Westbury had laid down upon the the vexed and peculiarly puzzling subject of novation. In opposition to the course taken by Lord Cairns in the Albert Arbitration, Lord Westbury had refused to allow amalgamating companies to novate by simple non-resistance on the part of policy-holders who found themselves handed over by one company to another without their consent and against their will. He insisted upon proof of clear and distinct acts, sufficient to show a definite intention to accept the one in the place of the other, as a condition precedent to the release of a solvent company and the substitution of a rotten and bankrupt concern in its

place. On this footing calls had been made and claims supported, when Lord Romilly announced his conviction that Lord Cairns was right and Lord Westbury wrong, the effect being once more to unsettle much that had been done, and to prejudice the policy-holders by relieving large bodies of proprietors from heavy burdens. When such authorities are at issue it is not for us to pronounce in favour of either. But we may observe that Lord Westbury's view was most generally approved by the outside public, and that when Lord Romilly's opinion became known some critics asked what would happen if he, like his predecessor, should die before his task was done, and a third arbitrator should be appointed, who might try back on the lines which the first had laid down. By the melancholy event of yesterday the first of these contingencies has been realised. It remains to be seen whether the second, with all its consequent inconveniences, will follow. In either event, these conflicting decisions furnish fresh illustrations of the law's "glorious uncertainty." Happily the universal esteem in which the noble lord whose decease we have this day to chronicle was held furnishes fresh and cogent proof of his fidelity to the lofty traditions of the English bench, and of the confidence with which its utterances are received, even by those whose interests are adversely affected by its decisions."

APPOINTMENTS.

The Right Hon. Charles Henry Rolle, Baron Clinton, and the Rev. Hugh G. Robinson have been appointed paid Charity Commissioners for England and Wales; Mr. W. C. Beasley, Recorder of Hull; Mr. Metcalf, Q.C., Recorder of Norwich; Mr. Cooper, Recorder of Ipswich; the Hon. Robert Butler, Master of the Court of Exchequer; Mr. Alfred Marten, Q.C., M.P., Vice-President of the Cambridge Board of Education; Mr. E. R. Wodehouse, barrister-at-law, private secretary to Sir Philip E. Wodehouse, K.C.B., Governor of Bombay. The following barristers have been appointed Commissioners for the trial of Municipal Election Petitions for the ensuing year: Messrs. Dowdeswell, Q.C., Saunders, Prentice, Q.C., Prideaux, Q.C., and Charles Colman; Mr. Henry Charles Clerk, solicitor, has been appointed Coroner for the borough of Shrewsbury; Mr. Edward Bath, solicitor, Town Clerk of Glastonbury, and Clerk to the Borough Magistrates; Mr. James McKeever, solicitor, of Wigton, Clerk to the County Magistrates of that place.

MUNICIPALITY of LONDON.—Creation of Municipality and County of London—Extension of the Jurisdiction and Limits of the Corporation of the City of London and of the Limits of the County of the City of London—Alteration and Consolidation of Institutions—Dissolution or Alteration of the Constitution and Name of existing Public Bodies within the Metropolis—Amendment of Acts, and other purposes.

NOTICE IS HEREBY GIVEN, that APPLICATION is intended to be made to PARLIAMENT in the ensuing Session for leave to bring in a BILL and to pass an Act for the following (amongst other) objects or purposes, that is to say:

To extend the jurisdiction of the Corporation of the City of London to the Metropolis, as defined by an Act passed in the 18th and 19th years of the reign of her present Majesty, cap. 120, for the better local management of the metropolis (hereinafter called "The Metropolis Local Management Act, 1855), or to such other limits as Parliament may fix, and to create a county of London, and to enact that the area within such extended limits shall be governed by one municipal body, or by such body or bodies as Parliament shall approve, who shall be incorporated under the name or designation of "The Municipality of London," or such other name or designation as Parliament shall think fit.

To vest in the new Corporation all rates, duties, tolls, revenues, real and personal estate, charters, and customs of the City of London, and all rights, gifts, grants, liberties, and privileges, franchises, usages, constitutions, prescriptions, immunities, Acts, bye-laws, and standing orders which at the commencement of the intended Act shall be vested in the mayor, aldermen, and commonalty, or the mayor, commonalty, and citizens of the City of London, or in the Common Council, or in the Court of Alderman of the City of London, or any committees, trustees, or persons acting under the direction of or in connection with the said mayor, aldermen, and commons, and to constitute a council, committee, or other separate body, for any purpose to be mentioned in the intended Act.

To transfer to and vest in the New Corporation all or some of the functions, powers, authorities, rates and tolls, duties, revenues, and real and personal restates whatsoever, which at the commencement of the intended Act shall be vested in the Corporation of the city of Westminster, the Metropolitan Board of Works, vestries, district boards, and other public bodies, within the limits aforesaid, and to enable the new Corporation to use, exercise, and enjoy, and be liable for the rates, tolls, duties, revenues, real and personal estates, debts, and obligations of the said Corporation of the city of Westminster, Metropolitan Board of Works, vestries, district boards, and other public bodies, and to enable the new Corporation to levy tolls, rates, duties, and charges, and to repeal, alter, or extinguish existing tolls, rates, duties, and charges.

To define the rights, duties, and privileges of the members of the new Corporation, and of the officers and servants thereof, and to confer on them the duties, and privileges, and to alter and extinguish any existing rights duties and privileges, and to alter the style or title of the officers of the Corporation, to remove officers, and to pay them compensation by way of annuity or otherwise, and to appoint other officers and servants.

To extinguish and annul all rights, powers, privileges, jurisdictions, laws, usages, and customs now or heretofore used, exercised, or enjoyed, or in force within such extended limits or any part of the metropolis and the cities of London and Westminster, and of any extra-parochial and other place within the proposed limits, at the time of the passing of the intended Act, so far as the same shall at all obstruct or interfere with the objects and purposes of the said intended Act.

To reduce the number of councillors elected to the Common Council of the City of London, and to make such other alterations in the constitution of the present governing body within the City of London as Parliament shall think fit.

To extend the limits of the county of the City of London to the limits of the metropolis, as defined by the Metropolis Local Management Act, 1855, or to such other limits as Parliament shall fix, and to declare that the area within such extended limits shall constitute a county of itself, and shall bear the name of the County of London, or such other name as shall be determined by Parliament, and to alter the limits of the counties forming any part of the metropolis, by excluding from such counties respectively such portions as are within the metropolis, and, so far as may be necessary, to repeal, alter, or amend any Act which would interfere with the carrying out of such last-mentioned object.

To transfer to and vest in the new Corporation any hereditaments or personal estate vested in churchwarden or churchwardens, vestries, and district boards, as defined by the Metropolis Local Management Act, 1855, of any parish, or in any person or persons appointed by or on behalf of the said parishioners of the same in trust, or for the benefit of any charitable uses or trust whatever.

To vest in the Corporation and to enable it to exercise all or any of the duties, powers, and authorities vested in the vestry of any parish, or the district board, commissioners, corporations, or body, or in any officer exercising any powers in any district which may be wholly or in part comprised within the limits of the metropolis, and to extinguish the rights and powers of the officers, of vestrymen, and members of district boards, commissioners, corporations, and officers, and of all auditors of accounts, and other public officers exercising any powers within any part of the metropolis.

To appoint justices of the peace, salaried, police, magistrates, and other public officers, and to define their duties and privileges, and to authorise the exercise of police courts and other public buildings, with all necessary conveniences, and incorporate with proposed Act any Acts or Act relating to the government of counties and boroughs, particularly the Acts following, as far as the same are applicable, that is to say:

The Acts of the 5th and 6th year of the reign of his late Majesty King William the 4th, cap. 76, to provide for the regulation of Municipal Corporations in England and Wales, and of all Acts amending the same, and of all other Acts or part of Acts in force for the regulation of Municipal Corporations in England and Wales:

The Metropolis Local Management Act, 1855, and all Acts amending the same, or relating to the Metropolitan Board of Works:

The Act of the 10th year of the reign of his late Majesty King George the 4th, cap. 41, for improving the police in and near the metropolis, and all Acts amending the same, and all other Acts or part of Acts in force for the regulation of the Metropolitan Police Courts, or in relation thereto respectively:

The Towns Improvement Clauses Act, 1847;

The Town Police Clauses Act, 1847;

The Local Government Act, 1858, and all Acts amending the same respectively:

The Lands Clauses Consolidation Act, 1845, and the Lands Clauses Act Amendment Act, 1860; and particularly the Acts following, relating to the City of Westminster:—27th Elizabeth, 24 and 25 Vic., cap. 78; 1st James 2nd, 30th Chas. 2nd, 31st George 2, c. 18, 9th Geo. 4, c. 61, 7th and 8th Geo. 4 cap. 31. and all other Acts altering or amending such last-mentioned Acts.

And the provisions of any other Act which it may be necessary or convenient to incorporate for carrying into complete effect the subjects and purposes of the intended Act, or any of them.

So far as may be necessary for all or any of the subject purposes of the intended Act it is proposed to repeal, alter, amend, extend, and enlarge the powers and provisions of all Acts, charters, grants, licences, powers, and usage within the metropolis, or the limits of the several boundaries proposed and established under the powers of the intended Act, and particularly the Acts following:

Relating to the City of London:—43 Eliz., c. 2, 13 Edwd. 1, c. 5; 11 Geo. 4, c. 18; 24 Geo. 2, c. 48; 25 Geo. 2, c. 30; 12 and 13 Vic., c. 94; 11 and 12 Vic., c. 163; 14 and 15 Vic., c. 91; 1 James 1, c. 21; 8 and 9 Will. 4, c. 32; 6 Anne, c. 16; 57 Geo. 3rd. c. 60; 2 and 3 Vic., c. 94; 29 Geo. 4, c. 6; 20 and 21 Vic., c. 157; 22 and 23 Vic., c. 21; 11 and 12 Vic., c. 116; 27 and 28 Vic., c. 113; 20 and 21 Vic., c. 157; 4 and 5 Will. 4. c. 36; 10 and 11 Vic., c. 51; 15 and 16 Vic., c. 77; and all Acts amending the same, or relating to the Corporation of the City of London.

And Notice is Hereby further Given that in the event of the proposed Act being introduced on petition, printed copies of the said Bill will be deposited in the Private Bill Office of the House of Commons on or before the 21st day of December next. Dated this 16th day of November 1874.

WYATT, HOPKINS, and HOOKER,

23, Parliament-street, Westminster.

Parliamentary Agents.

THE

LAW MAGAZINE AND REVIEW.

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I.—SUGGESTIONS FOR DIMINISHING THE NUMBER OF IMPRISONMENTS.*

By Rupert Kettle.

I THINK the growing interest in the means of suppressing crime justifies me in pointing out what I consider to be grave errors in our indiscriminate use of imprisonment, and for which I desire to suggest certain practical remedies.

There is at present a general impression in the public mind that imprisonment as a punishment has been found insufficient to suppress crimes of violence: and from what we read of the answers returned by courts of petty sessions to the circular of the Home Secretary, there is a strong tendency of opinion in favour of again resorting to corporal punishment. Some amongst us think we should increase the severity of prison dicipline to make the punishment more deterrent: others, on the contrary, think we should pay greater attention to the reformatory, and less to the penal element in our prison system. There is thus a conflict of opinion as to the remedy; but a concurrence of belief that our present gaol punishments do not produce satisfactory results. Hence I think it expedient to enquire, before we discuss such changes as a return to flogging, why imprisonment has, in modern times,

* A Paper read at a meeting of the Law Amendment Society, Monday, January 11th. 1875.

lost so much of its repressive force, and by what means that force can be restored.

All State punishments are intended to directly effect two purposes: one to be wrought upon the criminal, the other upon the criminally-disposed of our population; its indirect object is to give security to person and property. I propose to consider, to-night, our present system of imprisonment in relation to the second of these direct purposes: that is, the prevention of crime by deterrent example.

The fear of bodily pain, or of rigorous discipline, are not the only means by which the dread of gaol should be kept active in the minds of the lawless. It is only the most vicious whose evil propensities require the check of physical terror; I believe this applies to no social class, and only to a very limited number of individuals. A sense of personal degradation and shame, the loss of character and position, would in most cases, and before offenders become hardened, have a greater and more immediate preventive influence than the indefinite fear of what may happen inside a gaol. To keep moral repugnance to imprisonment as active and sensitive as possible should be one of the primary objects of criminal law administration. We lose sight of this object when we make imprisonment so common that either by experience, or by close and frequent contemplation, the sentiments relating to it become incorporated with the ordinary daily ideas of the ignorant or the careless, so that by familiarity its wholesome terrors are lost.

Men gradually become callous even to physical danger with which they are in frequent and close contact; much sooner do the ignorant lapse into indifference to moral danger with which they have become too familiar. A national example of this deadening of the sense of shame by communion of degradation was seen under our old poor law, when in whole districts pauperism was willingly incorporated with the ordinary life of the English labourer; and another sad

illustration of the degradation of morals when dishonesty has become so common that people pass over it lightly is afforded by the working of our bankruptcy laws. Some men now feel as little disgraced by "going through the court" as the day labourer of the last generation did by "going into the house." I am afraid there is a growing tendency amongst the ignorant and thoughtless of our population to regard imprisonment as one of the disagreeable contingencies afflicting those who do not like regular work—a condition to be submitted to like scanty clothing, or dirty lodgings. A laxity of feeling as to gaol arises when imprisonments are too numerous; and I contend that, at present, the excessive number of persons incarcerated weakens the external moral influence of that form of punishment.

Another deterioration of the retaining influence of gaol arises from inflicting imprisonment for trifling offences. The terror of gaol is weakened when any part of its inmates can be made the objects of neighbourly sympathy. For gaol to have its full repellant power, the whole force of public opinion must go with its use, and that to such an extent that in all cases where imprisonment is inflicted no reasonable man should doubt that it is thoroughly deserved.

What, then, is our modern policy upon these two important matters; limiting imprisonment to the smallest numbers, and inflicting it only upon actual criminals?

We have in both lapsed into grave errors. As the two are closely combined it will be more convenient to treat of them together; for the facts which account for the increase of numbers show also the trivial nature of the offences. It is true we have abolished imprisonment for debt. A judgment debtor cannot now be sent to gaol at the instance of his creditor, unless he is proved, by legal evidence before a judge, to have been guilty, after the judgment, of fraudulent misconduct. What was called the sheriff's gaol has been abolished; there is now no "side" in our county gaols for

civil prisoners. On the other hand, we have increased imprisonment in almost every direction. There is scarcely an act of misconduct or a breach of social order that is not at the present time, directly or indirectly, punishable by imprisonment. I say nothing of the vexed questions of breaches of civil contract under the Master and Servant Act; nor the excise and custom laws; nor the game laws; nor even of the ordinary penal laws by which person and property are protected. Besides all these, there are numerous special Acts passed to enforce all kinds of duties, and check all kinds of misconduct, by fine and alternative imprisonment. Not only is this done session after session by direct legislation, but every town council, and village board of health, railway company, dock company, gas or water company, and the like, can, subject in some cases to the approval of the Home Secretary, and to that of the chairman of quarter session in others, enforce strangely miscellaneous codes of bye-laws by the ultimatum of gaol.

As I know those who do not take a personal interest in the management of gaols are little aware of the number of committals, or of the nature of the offences for which they are inflicted, I will give you some authentic figures upon this subject.

My own county (Staffordshire) contains about equal parts of agricultural, manufactory, and mining population, and may, I think, be taken as a county fairly representing the different classes of convictions. The Rev. W. Vincent, senior, chaplain to our prison, reported to Epiphany sessions in 1872 an analysis of the warrants of commitment for the two preceding years (1870-71). As I have only to deal with relative proportions, these two years are sufficient for my purpose. In these two years, then, there were 8,188 prisoners committed to Stafford gaol. Of these only 1,031 were committed for trial—that is, a small fraction over one-eighth of the whole. Of the remaining 7,157, the number sent upon con-

viction for felony was only 1,570; and let me explain, as these are summary convictions, felony here includes the very pettiest of petty larcencies, committed by the youngest of the juveniles. Of the remaining 5,587 prisoners, no less than 3,560 were imprisoned for the non-payment of fines or penalties and costs, of which the enormous number of 1,607, or nearly one-half, were inflicted for drunkenness. These with committals without the option of a fine, for want of sureties to keep the peace, non-payment upon bastardy orders, and miscellaneous causes, including some debtor rogues, make up the very unsatisfactory total.

All this shows an indiscriminate use of imprisonment, which so increases the number who suffer it as to dilute, to say the least of it, the deterrent sentiment which its infliction is intended to create amongst the vicious. I also say these figures show such an extensive use of the common gaol for other purposes than the punishment of what are properly called crimes, as further to diminish in the minds of the ignorant the proper sense of the shame and degradation of imprisonment. The cunning, tramping vagabond, tempted by opportunity to rob a hen roost, may now feel he is only incurring the same kind of penalty as that inflicted upon a hundred others about him; upon the naughty child who purloins a drying garment from the wayside hedge; upon the ploughman tipsy after harvest supper; or, worse still as an example, the needy burgess who has carelessly infringed a borough bye-law.

I am fully aware that any remedy for what I venture to call the evil of multitudinous imprisonments must be such as shall not weaken the hand of the executive, and I know how difficult it would be to give to a new system any part of that which still remains, in traditional sentiment at least, of the repellant force of the ancient punishment.

Holding habitual criminals under police supervision has been so recently introduced, that it may still be regarded as

an experiment. I think fairly to test that system, its application should be extended to others than habitual criminals, accompanied, when so extended, by the additional safeguard of bail. Except as to this, the remedial suggestions I shall submit for discussion are all based upon the existing practice of our criminal law, and my propositions only extend the further use of known means to meet modern requirements.

Let me also add that I see the advantages which would result for such a revision of our criminal law, as would separate by a clearer line than that used at present what are properly called crimes from mere acts of personal misconduct. The ancient division into felonies and misdemeanors does not classify with sufficient distinctness breaches of criminal law. I do not intend, however, to touch upon that branch of the subject, but shall confine myself to certain remedial suggestions of an immediately practicable character.

I shall treat of three classes of cases :—

1. Imprisonment for non-payment of fines and costs.

2. Imprisonment for first offences, where securities for good behaviour can be procured.

3. Juvenile offenders.

First, take that large group of cases : imprisonment for non-payment of a fine. I assume, as I fairly may, that a fine is imposed with the intention of its being paid, and not as a mere formal preliminary to imprisonment. What, then, is a fine accompanied by the alternative of imprisonment ? In theory it is a deodand upon the person : a judgment of the forfeiture of money, for which the person of the defendant is adjudged to be held for a limited time as a pledge. Practically it is nothing more than a judgment debt of the Crown. It is a mulct imposed by the State for a breach of public law : it fixes the amount of *quasi*-damages payable to the exchequer upon such breach ; and it determines what money payment shall be sufficient to finish the matter of breach of duty as between the individual and the community. It is

true the idea of direct compensation does not arise, as in the case of liquidated damages paid for a private injury, but that is a consideration which affects the payee rather than the payor. Stripped of all technical theories, a fine properly imposed is a Crown debt. If so, why not recover it, as any other Crown debts? that is by levy on the goods of the debtor. Give it priority over all other debts, rent included. Let the judgment be by instalments, where it must be paid, out of future earnings. In all cases, however, satisfy the judgment by levy, if possible; and only when that fails, from the fraud or misconduct of the judgment debtor, resort to imprisonment. This involves no new theory. It is only making the fine in all cases the same as a fine for the breach of the revenue laws, for certain offences under the Police Acts, or for penalties the whole or part of which are payable to the informer.

The next large item in the number of imprisonments is non-payment of costs upon convictions at petty sessions. The arguments which may be used against the proposition that a fine is not practically a debt do not apply to costs; the State has nothing whatever to do with costs. Except such small necessary payments as are allowed by the court to witnesses, costs are the professional bill of the law officer of the court. How should this bill be paid? There is no privity by retainer between the defendant and the law clerk; nor has the clerk acted in the matter, even impliedly, upon the defendant's pecuniary credit: still the defendant upon conviction is adjudged to pay the costs, as a defendant would be in a civil action. As this is the only means of remunerating the clerk of petty sessions for his services, these orders are, and ought to be, rigorously enforced. It frequently happens that these costs are ten times as much as the fine. A defendant may be able to pay the small fine inflicted as a punishment, but not be able to pay the comparatively-heavy law costs of his conviction. Unless the clerk—as he often

does—not only foregoes his own fees, but actually submits to the loss of payments out of pocket, the condemned must go to gaol. "What a scandal it is upon our law for justices to send a poor lad to prison for gathering a few apples!" exclaims indignant Mr. Public: the fact probably being that the bench humanely avoided committing the little rogue for robbing the orchard. He was, in fact, fined sixpence and costs for the trespass, and had to go off in the police van because his parents could not pay down the ten or twelve shillings costs.

Let the payment of clerks of petty sessions by salary instead of fees be made compulsory, dealing equitably with existing interests, instead of leaving that arrangement, as at present, to the discretion of quarter sessions in counties, and the justices in boroughs. The public officer would then be paid for the discharge of his official duties out of public funds, and the treasury would be recouped by adding the costs to the fine-debt. Authority might be given to courts of petty sessions to carry out all I desire, by extending the provisions of the Small Penalties Act, 1865 (28 & 29 Vict. c. 127), so as to give justices power to order the amount of fine, with costs added, to be paid at a time to be fixed, or, in certain cases, by instalments, and in default to be levied as a Crown debt—of course retaining priority over other creditors. I would go further, and give justices power in such cases to accept sureties, and to levy upon such sureties when the principal made default.

I now leave the 3560 incarcerated for the nonpayment of fines, penalties, and costs, and address myself to the less numerous but more important class of cases. As to these, I will now lay before you some facts, from which I say it may be fairly presumed that a large proportion of these convicted persons might have been more satisfactorily dealt with, having regard both to their own reformation and the security of the public, without imprisonment.

Again I must ask you to rely upon figures taken from authentic sources. In the year 1864 there was established in the county of Stafford, by the Earl of Lichfield, the then lord-lieutenant, two Discharged Prisoners' Aid Societies, one for the north, the other for the south of the county. The societies have been at work ten years under the superintendence of the Rev. W. Vincent as Honorary Secretary. It is from their annual reports I take my figures; and I do this with confidence, because I know their tabular statements are made from, and carefully checked with the gaol books. It would have made my deductions more accurate if I could have traced through the records of the societies the cases of the 1570 I have before given as those imprisoned in the years 1870 and 1871 upon conviction—summary and by jury—of felony. This would occupy much time, even with the assistance of the societies' officers, whose time is not at my disposal; and the result when brought out would only assist the arithmetical and not, I think, the moral accuracy of my deductions.

During the ten years these societies have been in operation they have dealt with 7367 cases. Including persons of both sexes, old and young, those convicted of offences of almost all degrees of moral turpitude, some prisoners aided, had been before (653 once, 309 twice, 104 three times, 59 four times, 26 five times, and 71 no less than six times) convicted. A fair sample, I think, of our criminal population.

Of these cases so undertaken by the societies, 480 were found to require moral support only; each of these was induced to procure work, and start upon an honest career: 869 required intercession with relatives and friends, as well as moral support, to reinstate them in honest society. Not one of the 1349 prisoners required the aid of a single penny of money or money's worth from the society. As the statistical tables of these societies were not prepared for the purpose for which I am now using them, I cannot say how many

of the 1349 returned to gaol; but seeing that they were able *themselves, or by the assistance of relatives and friends, to* make a new start upon leaving gaol, I presume they were of the least unworthy of criminals. Taking this to be so, and from what I personally know of the business of the society in the south, I venture to assert that not twenty of these 1349 prisoners have returned to our county gaol.

I might, if time permitted, enter into some interesting and convincing details as to prisoners who have received substantial aid, in food, clothing, lodging, tools, stock, &c.; but it is enough for my present purpose if I take my stand upon the instances in which encouraging kindness and negotiation only were required. Without underrating, even for the moment, the influence of the religious instruction of the chaplains, or the advantage of the strict discipline in gaol, I deny that the gratifying results I have stated are dependent upon imprisonment. I also deny that punishment was a necessary condition precedent in all these cases to moral amendment. The results justify the assumption that it was advice, and sympathy, and encouragement—yes, and pardon, which influence some of these people for good—rather than the less generous assumption that they each and all required punishment as a preliminary to reformation.

Another fact, important from the wide range both as to the numbers and the variety of cases from which it is taken, convinces me of the advantages of sympathetic care and assistance as an alternative to imprisonment. I find that of unaided prisoners 29 per cent. return to our gaol within a year, whilst only 5½ per cent. of the 7,367 aided prisoners have so returned within ten years—the period to which our tables have been made up.

Let me now recur to my example cases, the 1,349 who required only moral aid. I say that such moral aid might have been as successfully administered before as after the degradation of gaol. 480 of these wanted only sound advice given

firmly, but hopefully, and the right way pointed out to them; and as to the 869, whose relations or former employers were induced to again receive them, I contend that negotiations on their behalf would have been at least as easy if friends and relatives could have avoided the disgrace to the convict, and to those connected with him, of an incarceration for felony.

Be kind enough to bear with me whilst I give you another illustration of aid sympathetically bestowed upon prisoners. I give it, because it is free from any objection that the persons helped might have had social or family connections able to protect them from evil. It occurred to me that the ordinary female domestic servant represented the general normal condition of the body of our hand-working population. Her condition is less variable than that of others of her social class. For this reason I thought that the cases of female servants would, although within a rather narrow limit, afford us a true test of the effect of kindly help. The officer of the south branch of our society has examined our books, and he reports to me that that branch has taken up the cases of thirty-eight female servants upon their liberation, after imprisonment upon convictions for larcency as servants. Mistresses were found who, with a full knowledge of previous delinquencies, were merciful enough to take each of these young women into their houses, and give them a chance to retrieve their character as domestic servants. Of these thirty-eight not one has been accused of pilfering at her new place, and of the whole all have turned out well except two, and these probably became tainted with some depravity other than pecuniary dishonesty.

Again I assume, and I say fairly assume, that there was no necessity to send every one of these young women to gaol, in order that she might desire, or deserve, or qualify herself to receive, the great mercy bestowed upon her; and as to the new mistresses who hired them, I cannot conceive it possible

they would have a more feeble will, or less hope, in the exercise of their courageous charity, if their erring sister had been entrusted to their care without a previous submission to the gaol taint.

Instead of sending adults to gaol upon a first conviction, I would extend the provisions of the Prevention of Crime Act.

By this statute the judge may, upon a conviction for felony, after a previous conviction for felony, in addition to any other sentence he may pass, order the convict to be kept, upon his release, under police supervision for any period not exceeding seven years. If no such order is made, then, by the provisions of the statute, the convict is placed under supervision for the full term.

I see no reason why such a practical mode of bringing compulsion to bear upon criminals, and thereby repressing crime, should be reserved until the propensity to commit crimes has become habitual. Police supervision leaves, in practice, a large latitude to the head of the local police, as to the way in which supervision shall be carried out. The object is to secure the public against depredation, and also to enforce upon the individual the duty of earning his maintenance by honest labour. Idle habits and bad companions will keep the police vigilant; on the other hand, regular work and a respectable home relaxes their watchfulness. Surveillance is, for the well-conducted, reduced to requiring the person to report himself once a month, at a time when he can attend most conveniently and privately, at the office. For those who continue their evil courses, the police do not wait for the public to suffer by the perpetration of new crimes; but they apprehend the convict under surveillance, and, unless he is able to prove that he is obtaining, or endeavouring to obtain, his living honestly, he is recommitted to gaol.

In cases such as I have before mentioned, where discharged prisoners yielded to persuasion, found work, and

made a fresh and hopeful start, and also in cases where relatives or employers have received them back to their former home and occupation, it would have been at least as safe to set free, subject to police supervision, such of them as may have been guilty for the first time, as to liberate old offenders under such supervision. In the former cases you would be able to obtain the additional security of bail for future good conduct. The fact of being taken again into honest society after passing through the gaol shows that in each case there was some one who still felt an interest in the welfare, or had a duty to perform to, and faith in, the degraded individual. It is natural to suppose that if the delinquent could have been rescued from the gaol, even at its very threshold, his old employer or his relative would have strained a point of compassion further, and entered into sureties for his good behaviour. When bail for good conduct could be found, whether in cases of convictions for petty theft, assault, trespass, or exceptional drunkenness, you would always secure a supervisor who has a direct pecuniary interest in his work, and who would probably be as vigilant as the policeman.

Upon first impression it may strike some of my hearers that few accused persons could find satisfactory bail; this is not so—for out of 4229 prisoners committed to Stafford gaol in the year now just past, only 104 were so committed in default of finding sureties.

I am well aware the plan I have roughly sketched could not be carried out without repealing section 2 of the 16 & 17 Vict. c. 30. and giving to courts of petty sessions power to estreat recognizances, and to levy executions in the nature of *distringas*. As to the former, I say that, apart from the purpose of this paper, it is desirable such jurisdiction should be conferred upon those courts. At present the expense and delay of going to quarter sessions for an estreat makes the petty sessions recognizance practically a nullity. The police are, as the old parish constables were, execution officers for

certain purposes—levying county court cess, for instance; and from my enquiry as to police duties, and my experience of the practice of county courts in executing warrants for small debts, I believe the police constables are well able to bear the extra duty of the latter.

A few words—and they shall be but few—about "juvenile offenders." Why do we use these words from the Latin to describe this group? Is it because, if we spoke plain Anglo-Saxon and called them, as they in fact are, naughty children, we should be ashamed to associate them, even in sentiment, with great castellated buildings, dreary corridors, and warders in semi-military uniform? I never could believe that the common gaol was a proper place for children; although they go to school inside it. To the young, routine, however disagreeable at first, soon loses its irksomeness. If children are really benefited by a residence in gaol it is from what they learn, and not from what they suffer. What a depression of moral tone you create by habituating a child to gaol life! In nine cases out of ten it is the neglect of the parent which is the primary cause of the child's delinquency. Apply proper and direct remedies to the cause. Use compulsion upon the negligent parent; but do not put the State in *loco parentis* for the purpose of relieving a father from the parental duty of guiding, controlling, and, when necessary, chastising his own child. Do not take the fledgling from the nest, and foster it as a "gaol bird."

The efficacy of my proposed remedy in the case of naughty children is obvious. Let the parent first be induced, by pecuniary guarantees, to be more vigilant in the discharge of parental duty. In this, where the compulsory clauses of the Education Act are in force, the school board will give him all the help he can reasonably require. If he refuses voluntarily to accept his natural responsibility, and to pledge himself by the ordinary sureties to do his duty, as a last resource commit the little derilict, not to the common gaol,

but to an industrial training school. When the purposes of the 28th section of the "Elementary Education Act, 1870," are properly carried out, direct your warrant of commitment to the Clerk of the School Board and not to the governor of the gaol. In either case rigorously enforce payment of the bare cost of the child's maintenance upon the neglectful parent.

I beg to say, that in all I have proposed I have kept in mind that changes of such importance should be initiated cautiously and tentatively. In the first instance I would give magistrates authority to exercise judicial discretion in adopting the new practice, and that in certain well-defined cases only; and if the new system works well, I would extend it, as experience may justify.

Upon the facts I have stated, and for the reasons I have given, I submit that by amending our criminal law in the manner proposed you would reduce the number of imprisonments, greatly increase the relative severity of that punishment, and make it more effective as a means of repressing crime. You would, moreover, be enabled, after winnowing out the light cases, to carry the full force of public opinion in making imprisonment positively, as well as relatively, more severe.

In conclusion, let me impress upon you that, when considering this subject, you should bear in mind that public punishments are exceptional interpositions of State authority, and should never be allowed to lapse into a substitute for private duty. The natural, primary, mode of preventing crime is the discharge by each of us of our personal duty to those belonging to us or about us. If the State continues to interpose a substitute for duties which are naturally imposed upon those who have the moral obligation to control the young, the thoughtless, or the vicious, such duties will be gradually neglected. This would lead to a double evil—one part of which must fall upon the public—the other upon those

whose moral power is enervated by the non-development of that high virtue, and moral courage, without which the ordinary dominant and servient position of social and family relations cannot be maintained.

II.—LAW REPORTING.

THE Council of Law Reporting has entered the tenth year of its existence. At first, it encountered a feeble and short sighted opposition from a trade whose policy, in most instances, has been liberal and far seeing. The financial success of Mr. Daniel's scheme has been complete, and the council stand on a footing which could be knocked from under it, only by such professional organization as brought it into existence. But it has succeeded hitherto in putting a stop to little of the evil it was formed to redress, and that little only what the course of events in a few years would have brought about. Nay, its very efforts have, in other respects, tended to maintain the excrescences of English law reporting. It would, however, be unreasonable to have expected a self-supporting institution seeking permanancy, should, in its first stages, direct its energies otherwise than in accordauce with apparent and immediate commercial expediency.

One of the evils complained of in the system, as it existed in the year 1864, was, that the so-called authorised reports were brought out in separate series by a number of private and irresponsible persons, at such expence that the larger number of practitioners subscribed to few of the series, and relied on the libraries of their Inn or friends for such use of these trade implements as they required, or contented themselves with subscribing to one of the periodicals brought

out by enterprising publishers, and which were rapidly reducing the profits of those older and more conservative rivals, the "regular" reporters. Further, the old reports were issued with extreme irregularity and frequently long after date. Both of these evils have been effectually cured. Of whatever importance they were, the opposition they provoked was rapidly effecting this cure. The extent of the former was the imposition of a small tax, the effect of the second was to compel persons to seek the latest information from other sources.

Though the Law Reports have undoubtedly hastened the death of the old system, no one can deny that without the assistance of the new scheme the doom was impending. Some of the old reports had already begun to shew symptoms of old age. Some of their senilities were (of necessity) incorporated into the new body, and for the time, at any rate, has materially affected its efficiency.

A matter much complained of was the co-existence of so many concurrent series of reports not covering exactly the same ground; and the law reports have, with their December sweepings and weekly notes, done their best to prevent the appearance of the most trival cases not entered by them in other publications, but, in thus disposing of a temporary inconvenience, they have fostered a fungus growth, which must impede the healthy development of case law, if not, from the magnitude of the evil, drive the reformer to cut away this branch of law. The blame of this, in the past, cannot altogether be justly laid at the door of the Council; they have had to, and always must to some extent, cater to the professional appetite, and lawyers are not less given to hair splitting than of old. But the Council can now afford to walk in advance of the profession.

The extent to which this multiplication of authority has grown can be appreciated by the bare statement of the fact that in every year there are issued (in addition to the

statutes) at least nine volumes on an average of Law Reports, and that a hundred large octavo volumes would hardly represent the growth of eleven years. Some of this bulk is due to the luxury of broad margin and heavily leaded type; but there are a large number of cases reported, and those of the largest, which involve no new point of either principle or practice, to say nothing of exceeding verbosity.

But the Law Reports have by no means practically reduced the number of co-existing reports, though the New Reports at once retired, and the *Jurist* only survived a year, and thus the number of competitors was reduced to four (The early decease of these may perhaps have increased the vitality of their stronger rivals.) On the other hand, the Law Reports themselves have called into existence a double to each report; the double in their own case being strongly impregnated with the misty and uncertain nature of doubles in general.

The weekly notes, as they exist, are an almost unmitigated evil. It is no doubt of importance to the lawyer that he should be acquainted with any really important decision at the earliest moment, but the newspapers and legal gossip amply afford such information. A weekly or occasional register of important cases, stating in the simplest terms legal points decided, would, however, be most useful; but such register should contain no decision: it was not intended ultimately to report. This is what the weekly notes are not: they are not very accurate; the law in them is smothered in the facts; and they contain numbers of cases which never appear in the monthly issue, but once in print they cannot be obliterated, and become a source of nuisance in the hands of the diligent case lawyer. The weekly notes do contain certain practice cases of use which do not, but ought to, appear in the issue intended to be permanent.

The attitude of the profession renders it more difficult to move in the direction of reform. Length is apt to be consi-

dered synonymous with accuracy, and it is too generally the practice, in seeking for precedent, to look for minute coincidence of fact, rather than broad principle. Moreover, beyond the proper control of current matter, the mass of fresh reports require, and fresh reports from time to time will require, sifting and consolidation, a task which may, perhaps, require more authority than the Council possesses. But the public may fairly ask of them reports the best that can be produced as particular reports, and as a collection properly weeded of unnecessary and trivial cases.

To compare in detail an ideal with an actual report.—In the first place, the head-note should be clear and concise, confined, as far as possible, to principle, while at the same time guarded against wider terms than the particular case will bear out. A young and inexperienced reporter, in his eagerness, is likely to err upon the side of too much generalisation, while the cautious and indolent hack will relate facts without the labour of proper condensation, or seek out from the language of a judge some sententious platitude. Out of the head-notes of the present day, the principle, if any, has frequently to be extracted from a tangled heap of facts, long enough sometimes to serve for the statement in the body of the report, while this statement is too often swollen with unnecessary extracts from documents that might lead the reader to suppose that the authors were paid by length. Even in the arguments the Law Reports are unnecessarily long. An argument in a report is of little use except for affording a reference to cases cited; it should, as reported, be the merest sketch, but carefully indicating the bearing of each case cited. In this last respect the Law Reports on the whole show more care than others, but even they sometimes contain arguments and cases immaterial to the purposes of the report.

As to the mode of treating these three matters—the head-note, the statement, and the argument, there is not much

room for doubt. But in respect of the judgment, there is greater difficulty. Perhaps, under the present state of competition, even the Law Reports could not venture in most cases to curtail the argumentative part of the judgment, so far as it relates to law; taking this to be so, reports might be more abridged than they are. We think, however, though it may seem at first to contradict our remarks upon the head-note, that too much stress is laid upon the very words, and even logic of the judge. His business is, not to make a report but to come to a righteous decision; he having come to that decision, human nature and his past practice as an advocate will make him liable to overstate his reasons for his conclusions. Again, an unwritten judgment delivered on the spur of the moment, as the best decisions are, when reduced to writing, may be more fairly represented if re-stated and re-arranged by an able and careful lawyer than by the most accurate verbatim shorthand writer. As an extreme instance of this, we may refer to the decisions of Lord Hatherley, when Vice-Chancellor, whose reputation as a judge, more probably than any others, has been enhanced by his reporters.

Perhaps too, so long as the present competition exists, it will be impossible to cut down within proper limit, the number of cases reported. Any single case might possibly be of use on some occasion to some one, just as an item of accumulated rubbish would be, though it were well the whole heap were burnt. Though the Law Reports could afford to expunge a large part of its lumber, there are many cases which were better suppressed, they are hardly strong enough to report. On the other hand, there may be probably found many useful points of practice unreported by the Law Reports, except in their weekly notes, which would altogether occupy but little space.

As we have before observed, head-notes are in a large majority of cases complicated statements of fact; some of these cannot be reduced to principle; when that is so, the

case of course ought not to be reported at all. It may be stated as a safe rule that none such is worthy of a report, and in following this practice reporters have deprived themselves of a material help to a proper choice of subject. And even where a succinct statement of principle can be made, needless repetition prevails, which reminds one of that favourite story of childhood, "The House that Jack built." In interpretation of bad grammar in wills and private documents, precedent is useless, as is theoretically admitted by all. The nonsense in public Acts must of course be uniformly read, but the interpretation put on such nonsense should be stated in the barest manner. A necessary inconvenience of our legal system, which relies so much on precedent, is that the development of our settled law produces a bulk which can only be compressed by subsequent digesting; and some cases, therefore, which hereafter may become an incubus, must appear in any contemporary edition of reports.

We have seen the injurious effect of competition. On the other hand it is urged the best articles will be produced in this as in other matters under the influence of free trade. That is not so; there are many undertakings for which public organization and monopoly are desirable, if not necessary. The construction of roads is a usual matter for government, whether local or central; and if it may be said that our railways and canals have been made under the influence of private enterprise, they certainly have not under that of free trade, and had landowners been allowed to fix their own terms, they could not have been made at all. Under the state of public opinion, when they were first introduced the State could not have taken in hand these undertakings; but it is clear they would have been less wastefully constructed and worked, and more to public convenience. Again the carrying of letters could not be so cheaply or efficiently done except under a State monopoly, which might with advantage

be extended to parcels. And so we believe a monopoly would be on the whole advantageous in law reporting. The due preservation of an important portion of the law of the land is surely not a matter to be entrusted to, or rather left to depend on the self-interest of speculators. Moreover, there is hardly complete free-trade in reporting: the legal profession is to some extent close, and the closeness affects the supply of professional needs. There is also a strong trades union in favour of the law reports supported to some extent by authority.

That unionism, differing from others, in that its objects are liberal, would be fully able, if wisely directed, without State protection, to drive all competitors out of the field. The yearly reports reduced, within proper bulk, would take up not more than two volumes of the present size of the law reports; and we believe could, in a short time, be well sold, taking into consideration the probable increase in the number of subscribers, for even one-fifth of their present price—at any rate, for less than the actual price of any competitor. As matters now stand, it is only by reduction in price that the Law Reports can clear and keep the field free of rivals. There are other publications costing much less (especially when binding is taken into consideration) which contain the same information in more convenient form and bulk, which have been able to weather the storm of opposition for nine years. It is evident, then, they pay: were they induced to retire, and no alteration made, others would at once spring up.

The *Law Journal* has been ably conducted for more than half a century; other publications for less time. We should be sorry to see this valuable property destroyed in a contest, even if the exigencies of the profession required it. We should be still more sorry that the property should be thrown away if the contest were not necessary. And should the Council of Law Reporting ever resolve boldly to aim at

monopoly by a reduction of terms, they would probably succeed sooner, more surely, and at less cost by buying up existing publications. At the same time, the coming into operation of the Judicature Acts, at a period when the Law Reports will have completed a decade of existence, would be a most favourable time for a change. Perhaps there are minor improvements that might be effected, such as the arrangement of the volumes, so that they should contain cases more akin.

There is one objection to a change to be noticed. It may be urged with truth that the suppression of rivals would close for the Law Reports the school in which their staff is educated. The qualities, however, a good reporter requires, oratorical power aside, are much the same as an advocate requires; and there being a market for this kind of knowledge and power, there will be no lack of persons well qualified. The best reporters have not failed, when opportunity offered, to rise to the top of the profession. The work though, like most other practical work, involves much that is tedious, and gives experience in what can be learnt best, if not exclusively, by experience; and though in itself it may bring neither honour nor preferment, will be sought after by the able and industrious in a profession where there are so many of ability and industry waiting employment.

D. PITCAIRN.

III.—PROPOSED LEGISLATION IN REFERENCE TO COMPANIES AND FRIENDLY SOCIETIES.

By J. M. LUDLOW,

(Late Secretary to the Friendly Societies' Commission.)

FIFTY years ago—with three special exceptions to be presently noticed—the English law recognized only one form of association, unless by special authority from the Crown or from Parliament, that of private partnership, with unlimited liability for every partner. The exceptions were, 1st, Mining Companies on the cost-book principle, confined to Cornwall, in which the "purser" for most purposes by custom represented the partners; 2nd, Friendly Societies, which had obtained since the year 1793 a legal constitution of what may be termed a quasi-corporate character, enabling them to sue and be sued in the names of trustees, in whom all their property was legally vested; and 3rd, Savings' Banks, which had obtained in 1817 a similar constitution; and the same plan had been adopted in many special Acts relating to companies or bodies of Commissioners, when incorporation was not granted. Where no special privilege could be obtained from Parliament or from the Crown, defects of judicial procedure rendered the use of the form of private partnership impracticable if there were many partners; any attempt to modify it by the creation of transferable shares was an indictable nuisance under the Bubble Act, with the mysterious terrors of a *præmunire* superadded; and during a tenure of office of nearly half a century the ablest judge perhaps who ever held the English seals, Lord Eldon, had struggled, though in vain, to withhold all judicial aid

from large commercial associations, except for the purpose of breaking them up. An Act of 1824, the 5 Geo. 4, c. 114, which repealed the Bubble Act as respects marine insurance, was the first step towards a different state of things. The Repeal of the Bubble Act in the following year (6 Geo. 4, c. 91) was the second. Both these steps, however, were, it will be observed, purely negative ones. The first positive measure for facilitating associated enterprize was the Country Banking Act of 1826 (7 Geo. 4, c. 46), which allowed partnerships of more than six persons to carry on the business of bankers more than sixty-five miles from London, suing and being sued by their public officers. Then came, eight years later, the first Letters Patent Act, 4 & 5 Wm. 4, c. 94 (1834), the first general Act on the subject of an enabling nature, which empowered the Crown by letters patent to grant to companies or persons associated for trading, charitable, literary, or other purposes any of the privileges of incorporation, and especially that of suing and being sued by their officers,—an odd expression, since it is more especially the privilege of a corporation to be sued in its corporate name. Ten years later, again, in 1844, the first Joint Stock Companies' Act was passed (7 & 8 Vict., c. 110), with its congeners the first Winding-up Act (c. 111), and the Joint Stock Banks Act (c. 113), all three long repealed.

The Joint Stock Companies Act of 1844 was an Act of considerable scope, applying to all bodies with transferable shares, all Assurance Companies, and all partnerships of more than twenty members; but as respects the first and last class only, if established for a commercial purpose, or a purpose of profit, and with the exclusion of banking companies, schools, and scientific and literary institutions, and of friendly and certain other societies, which by this time had obtained Acts of their own. It sought even to embrace, during their first stages, all companies for executing Parliamentary works. The main defects of the Act were two;

first, by distinguishing between provisional and complete registration, it created a sort of larval stage in the existence of companies, during which they could do certain things, but could not do certain others, but during which—as the manner of larvæ is—they were found to be most voracious, eating up their subscribers' money with appetites that never failed; second, it attempted to fasten generally on commercial undertakings by numerous partners the unlimited liability of private partnership. The Joint Stock Companies' Act, 1856 (19 & 20 Vict., c. 47), both swept away provisional registration and granted limited liability. It is needless to dwell upon it, any more than upon other repealed Acts relating to Companies, as the system which it established, founded upon the memorandum and articles of association, has been only developed and expanded by the existing Acts, the Companies' Acts 1862 and 1867.

But what a change has taken place in the meanwhile! I have said that 50 years ago the law of England, with three exceptions, recognized no form of operation outside of private partnership, unless by special authority. At the present day, there are at least nine different ways in which whole classes of legal associations of various kinds can be originated, exclusively of those whose constitution is purely special, of those which may still subsist under forms now obsolete, and of illegal bodies. The power of creating corporations, formerly reserved to Parliament and the Crown, is now shared by them with four separate authorities—the Board of Trade, the Registrar of Joint Stock Companies, the Registrar of Friendly Societies, and the Charity Commissioners. The principal acts alone in the mass of legislation relating to these different bodies amount to more than 900 sections, or say about as many as the generally much shorter 911 articles of the German Handelsgesetzbuch or Commercial Code, and over 250 more than the French Code de Commerce. The largest article that I have been able to find (including a tag of recent

legislation), consists of 33 8vo., lines, whereas in the Companies Act, 1862, which is comparatively concise, you will find a section of 62 lines quarto.* I believe I am within the mark when I say that in positive bulk, our Statutory Law of Association exceeds the whole French Code Civil, with its 2,281 articles. And over and above this, there is the whole common law of partnership.

Tedious though it may be, I fear I must enumerate the classes in question. Beginning—*Ab Jove principium*—with Parliamentary Companies, and confining ourselves to those which form really a class, as being framed on a common model, we have,

1st. Companies within the Companies' Clauses Acts (three in number, besides a Scotch Act). These again, subdivide themselves into at least five several groups, according as they adopt or do not adopt (1) the Lands Clauses Acts (three, beside a Scotch Act), either singly, or together with any of the following groups of Acts, namely: (2) the Railway Clauses Acts (two), besides a Scotch Act, to which must be added the Railway Companies' Act, 1867, with a parallel one for Scotland, the two abandonment of Railway Acts, 1850 and 1869, the six Regulation of Railways Acts, 1840 to 1873, the Railway Construction Powers Act and Railway Companies' Facilities Act, 1864, with the Act amending the same, the Railway Companies' Securities Act, 1866, the Railway Companies' Meetings Act, 1869, and the Railway Rolling Stock Act, 1872; (3) the Gasworks' Clauses Acts (two); (4) the Waterworks' Clauses Acts (two), to which last two groups should also be added the Gas and Waterworks' Facilities Act, 1870; (5) the Cemeteries' Clauses Act, 1847. All these are bodies having a corporate character, which require indeed special authorization, as seeking by monopoly or otherwise to interfere with private property or rights, but which otherwise fall into definite categories.

* As to the French and German Law of Association, see note *post*.

2nd. Next come sub-Parliamentary companies (if I may use the term), which are constituted and incorporated by certificate of the Board of Trade, previously submitted to Parliament, under the Railway Construction Facilities Act, 1864, itself closely connected with the Railway Powers Act, 1864, and amended together with it by the Railway Powers and Construction Acts Amendment Act, 1870. These have also the benefit of the Companies' Clauses Acts, and of the bulk of the railway Acts.

3rd. Companies constituted and incorporated by the certificate of the Registrar of Joint Stock Companies, and subject to the Companies Acts, 1862 & 1867, with the Joint Stock Companies' Arrangement Act, 1870, form the third class. These divide themselves primarily into three groups under the principal act—namely, companies limited by shares, companies limited by guarantee, and unlimited companies; but the second group subdivides itself again into companies limited by guarantee that have a share capital and those that have none. Then the Act of 1867 introduces a fourth group, answering to the commandite companies of the Continent, where the liability of directors or managers is unlimited, that of the rest of the shareholders limited. And virtually a fifth group is created, of associations not for profit, which are restricted as to the holding of land, and may, by licence of the Board of Trade, enjoy limited liability, without fulfilling the conditions of the Acts as to publicity.

4th. The fourth class is that of societies constituted by the certificate, or under the authority, of the Registrar of Friendly Societies, either as such, or as barrister to certify the rules of savings banks, and which would fall thereby into two groups accordingly, were it not that in some cases there is a difficulty in determining in which capacity he deals with them; so that the easiest way of analyzing the class is perhaps by reference to the various Acts under which the societies are constituted. We find then, 1st, a sub-class of

societies constituted under the Friendly Societies' Acts, consisting itself of four groups, namely (1), friendly societies generally, or bodies assimilated to such by authority of the Home Secretary or Lord Advocate, constituted by certificate of the Registrar alone; (2) friendly societies granting annuities, constituted by certificate of the Registrar, and by that of an actuary combined; (3) friendly societies constituted by mere deposit of rules (whether granting annuities or not), and enjoying only certain of the benefits of the Acts; (4) benevolent societies, constituted by certificate from the Registrar in a peculiar form, and which are subject only to certain provisions of the Acts. 2nd. A second sub-class is that of Cattle Insurance societies under the Cattle Insurance Act, 1866, which are within the Friendly Societies' Acts generally, but differ from friendly societies in these remarkable features, that whilst the subscriptions of members under the Friendly Societies' Acts are purely voluntary, and certain of their benefits are limited in amount, the subscriptions under the Cattle Insurance Act are legally recoverable, as they are in bodies of the three former types, and the benefits are unlimited. 3rd. Societies of the third sub-class, established under the three Industrial and Provident Societies Acts, 1862, 1867, and 1871, have the benefit of certain specified sections of the Friendly Societies Acts, but differ from all other societies of the class hitherto considered, in being incorporated by the certificate, like bodies of the three former types, whilst with the Cattle Insurance Societies they have also legally recoverable subscriptions. 4th. Building societies under the Building Societies' Act, 1874, form a sub-class of bodies, incorporated like the last by the Registrar's certificate, but the subscriptions to which do not appear to be legally recoverable, and which are in no respect within the Friendly Societies Acts. 5th. Trade unions, registered by the Registrar of Friendly Societies under the Trade Union Act, 1871, form the fifth sub-class, and, 6th, loan societies, under

the *Loan Societies'* Act of 1840 (3 & 4 Vict. c. 110), made perpetual by that of 1863 (26 & 27 Vict., c. 56), form the sixth. These latter, being certified by the same officer, that of barrister to certify the rules of savings banks, form a transition to the last sub-class, 7th, that of savings banks under the Savings' Banks Act of 1863 (26 & 27 Vict., c. 8), to which must be added various provisions contained in the Post Office Savings Banks Acts. The last three sub-classes, like the first two, consist of bodies not incorporated, but whose property is vested in trustees, and which are represented by them in judicial proceedings.

5th. In Ireland, a type almost exactly parallel to the last, but under a different jurisdiction, exists under the Charitable Loan Societies Act of 1843 (6 & 7 Vict. c. 95), the Charitable Pawn Offices Act of 1842 (5 & 6 Vict. c. 75), and the Loan Societies (Ireland) Act (1843) Amendment Act, 1872. The rules of these two groups of charitable societies—Charitable Loan Societies, and Charitable Pawn Offices—are certified by a barrister appointed by the Loan Fund Board, and their property, like that of Friendly Societies, is vested in trustees, through whom they sue and are sued.

6th. Trustees of charities for religious, educational, literary, scientific, or public charitable purposes, who may be incorporated by certificate of the Charity Commissioners, under the Charitable Trustees Incorporation Act, 1872, must be considered to form a sixth class. Even without such certificate, religious congregations and religious or educational societies enjoy this privilege, that lands acquired by them for the purposes of a chapel, minister's residence or glebe, school-house or schoolmaster's house, garden, playground, college, academy or seminary, with or without grounds for air, exercise, or recreation, or hall or rooms for meeting or transacting business, or burial ground,

pass from one set of trustees to another without conveyance, provided these are appointed by deed (13 & 14 Vict. c. 28, 32 & 33 Vict. c. 62.)

7th. Last come Societies constituted by private contract. These, again, fall under two heads, namely, first, Mining Companies within the Stannaries of Devon and Cornwall, now regulated by a statute of their own, the Stannaries Act, 1869, to which must be added various provisions as to procedure of the Act of 1855, to amend and extend the jurisdiction of the Stannary Court (18 & 19 Vict. c. 32), so far as the same are not amended by the new Act itself. It would be too long to attempt the description of these bodies, which are called companies in their Act, but are not incorporated. Their chief characteristics seem to be that shares are transferred by entry in what is termed the cost-book, and that the company's interests are represented by the Purser. Second, Legal Private Partnerships. These, since the Companies Act, 1862, cannot consist of more than ten persons, if formed for the purpose of banking, or twenty, if formed for any other purpose of gain, but may be of any number if not formed for any such purpose. Although such partnerships are, in the main, subject to the old common law on this form of contract, I think it could be shown that the principles on which that law is being applied are gradually changing, owing to the effect of the Act of 1865, to amend the law of partnership (28 & 29 Vict. c. 86), which profoundly modified the liabilities of partners, by enabling advances of money to be made for a share of profits, and authorizing the remuneration of servants and agents by a share of profits, the receipt of annuities out of profits of widows and children of deceased partners, and the sale of a goodwill in consideration of a share of profits, without thereby constituting a partnership; although the lenders or vendors are in such cases postponed to other creditors in bankruptcy. The first of the above provisions virtually

introduces *commandite* partnership into our law. Private partnerships have, moreover, received a most valuable boon in Mr. Russell Gurney's Act of 1866, to amend the law relating to larceny and embezzlement (31 & 32 Vict. c. 116), which enables the prosecution of partners for those offences.

But we have not yet got to the end of our chaos. In some cases there is a sort of cross-classification of the bodies hitherto considered, which must be attended to. Associations for certain purposes, though constituted in various ways, or however constituted, are ruled by special laws. I will only refer to two instances—life assurance companies, and companies granting mortgage debentures.

1*a*. The Life Assurance Companies Acts, 1870 and 1871, apply to "any person or persons, corporate or unincorporate, not being registered under the Acts relating to Friendly Societies, who issue or are liable under policies of assurance upon human life within the United Kingdom, or who grant annuities upon human life within the United Kingdom." The Acts are almost purely restrictive, not enabling. They impose on future Life Assurance Companies the enormous obligation of a cautionary capital of £20,000, to be returned only when the accumulated life assurance fund amounts to £40,000, provide amongst other things for periodical investigations by actuaries, and returns of the results, impose strict rules as to amalgamations and the transfer of business, and allow the reduction of contracts on the winding-up of insolvent bodies.

2*a*. The Mortgage Debenture Acts, 1865 and 1870, apply only to companies incorporated under the Companies Act, or under any Act of Parliament, and entitled to advance money on the security of land. The purposes of such companies must be limited to the making such advances (certain securities being expressly forbidden), and to the borrowing of money on transferable debentures, or on their securities. Before obtaining the benefits of the Act they

must file a particular return in the Law Registry Office, and must have a paid up capital of not less than £100,000. A minimum value is fixed for their shares, on which a certain amount must be paid up; a minimum value is also fixed for their mortgage debentures, &c.*

It stands to reason, without the need of proof, that in such a mass of legislation on a single subject there must be a vast amount of superfluous matter. It would be tedious even to attempt enumerating instances to this effect. But let any one compare the Companies Clauses Acts with the Companies Acts, and he will see that Table A to the Companies Act, 1862, is little else than an amended abridgment of the greater part of the Companies Clauses Act, 1849,—that some of the sections of the former Act, as well as of those of the Companies Act, 1867, (compare s. 37 of the second with s. 97 of the Companies Clauses Act, 1849,) are virtually almost identical with sections of the latter, —and that consequently nearly the whole of the Companies Clauses Acts might be dispensed with by making the corresponding sections of the Companies Acts applicable to Parliamentary Companies, and Table A, which is now optional, compulsory, with some necessary modifications. Or take again the class of bodies with which the Registrar of Friendly Societies, in one capacity or another, is concerned. At p. 32 of the first Report of the Friendly Societies' Commissioners will be found a tabular statement of the clauses as to exemptions from stamps in the Acts relating to

* As this paper only proposes to deal with legal modes of association, this is not the place for considering illegal ones. I must, however, point out that in addition to bodies illegal through their purpose, statutory illegalities have been created by some of the enactments above referred to. Thus, under the Companies' Acts, every "company, association or partnership" of more than twenty members formed since the Act of 1861 for any purpose of gain, not registered under the Act or formed in pursuance of some other statute or of letters patent, and not being a mining company within the jurisdiction of the Stannaries, is made illegal, and it is to be feared that numberless instances of such bodies could be found.

Building Societies, Friendly Societies, Savings Banks, and Loan Societies (the first of these would be now somewhat different under the new Act), the substantial differences between which clauses will be seen to be exceedingly few. Another table in the second appendix to the Fourth Report of the same Commission exhibits five different forms in which one and the same purpose, that of vesting property in trustees for a society and enabling them to sue and be sued for it, has been carried out by the Legislature. The unnecessary differences in the wording are indicated by italics, and with these the page is scarred all over. Now, let it be remembered that it never can be held for certain that two slightly different forms of expression are exactly equivalent, until it has been authoritatively so decided by a court of justice; that every such difference means possible expense, possible litigation, and if established to be substantial, the certainty of both, and the growth of two systems of procedure *in pari materia* where one should have been enough.

But, again, there are other cases when differences of procedure are multiplied unnecessarily by legislation. Let any one cast a glance at the table in Appendix XI. to the Fourth Report of the Commissioners, by Mr. Brabrook, the Assistant Registrar of Friendly Societies for England, p. 123, being a comparative statement of the procedure for verifying rules, and ask himself what possible good is done, what mischief may not be done, by this perpetual variation in details between the eight different classes of societies referred to. By six out of the eight, two copies of rules have to be sent in, three by two. The rules of one class must be printed; those of all the others may be written. In four classes, the signatures of three members and the secretary are required, in one class those of seven, in another those of seven and the secretary. To one class the Registrar gives two certificates, to all others only one. For two

classes he has to advise with the secretary, in others not. Here he has to ascertain whether the rules are in conformity with law, there whether they are not repugnant with law, elsewhere whether they will also carry out the intention of the framers, elsewhere only whether certain regulations are complied with, and certain provisions adopted. Sometimes no fee is paid for registration, sometimes a guinea, sometimes a pound. The purport of the certificate, its effect, the authority which the Registrar exercises over certified societies, all differ in various classes of societies.

The Friendly Societies' Bill of 1874, in its original shape, was an attempt of a very humble description to put order into a portion of this chaos. The first step in this direction had been made by Mr. Lowe's "Registry of Societies Bill, 1870," (printed as Appendix III. to the Fourth Report of the Friendly Societies' Commissioners.) This had sought to bring within a common registration system at the Board of Trade all the different bodies (except savings banks), registered or certified by the Registrar of Friendly Societies or barrister to revise the rules of savings banks, and which did not then yet include trades' unions. The Bill of 1874 sought to bring all the same bodies, together with trades' unions, and together also with scientific and literary societies, which are certified only for a particular purpose (but excluding building societies, as provided for by an Act of the Session), not only into the same registration system, but into one law. So very slight, on examination, were found to be the necessary differences between them, that out of a Bill of 78 sections, six proved sufficient to deal with the specialties of all other classes of societies besides friendly ones. These six sections represented 100, or with the Scientific and Literary Societies' Act, (6 & 7 Vict. c. 36), 106, which could thus be swept away by making one general law with a few special clauses, instead of retaining half-a-dozen special laws. Let it be observed that when once a

process of generalization of this description has been satisfactorily commenced, it can be carried on all the more easily with benefit to every single class of bodies to which it applies. For whilst, on the one hand, it becomes more difficult to introduce any mischievous alteration into the law, on account of the greater variety of interests affected by it; on the other hand, its defects are more easily tested, and any amendment introduced for the sake of any one class of bodies may enure at once to the benefit of all; whilst a uniform course of procedure greatly diminishes the chances of error on the part of the registering or certifying authority.

Yet the attempt failed, through the short-sighted or selfish opposition of the classes concerned. That the great trading burial societies, pointedly condemned in the report of the Royal Commission, should have sought to defeat or mutilate the bill, was only to be expected. But, probably, no class of bodies affected by the bill would have derived such unmixed benefit from it as the Trade Unions. The bill was framed, as far as possible, on the lines of their own Act, as the latest and best model, so that of all the bodies affected they would have had the least to learn or to unlearn in point of procedure. And it so happened that various amendments, useful for Friendly or other societies, which had been introduced into the bill, precisely met the defects which experience had shown to exist in their own act. Yet their organ, the *Beehive*, was the first to raise an outcry against the bill, and carried on a persistent opposition to it. On the other hand the great friendly societies, although acknowledging, in the words of the Foresters' circular, that the bill was "evidently framed to supply friendly societies with practical information for their guidance, while interfering as little as possible, especially in the case of affiliated societies, with their voluntary action," took equally exception to the inclusion of other societies besides friendly societies in the bill, and the Parliamentary agent to the Foresters, in his

report, laid before the late High Court Meeting at Worcester, dated before the issue of the revised bill, declared that he thought friendly societies should "insist" upon separate legislation,—in other words, should insist that no attempt be made to codify a law which affects them, and that the statute-book should, to please them, remain cumbered with half-a-dozen separate Acts of Parliament where one is enough.

In the face of such opposition it was not deemed advisable to carry the bill further. The revised bill, except for the purpose of uniting the offices of registrar and barrister to revise the rules of friendly societies, only deals with the classes of bodies hitherto already dealt with by the Friendly Societies' Acts proper, together with the Cattle Insurance Societies' Act, which incorporates them as a whole with its own provisions. Nearly 100 superfluous sections are thus left upon the Statute Book.

I cannot help expressing the hope that when the subject is better understood, the advisability of legislation of at least as comprehensive a scope as the original Friendly Societies' Bill of the last session will be felt. There are, I am aware, those who believe that a more comprehensive measure still might be passed, and that all existing Parliamentary societies might be brought under the Companies' Acts. I am quite of opinion that those acts should be enlarged so as to enable any of the societies in question, if they think fit, to avail themselves of them. But I think the Companies' Acts, in their present shape, are quite unfitted for the bulk of the bodies in question. And I think there is a real distinction, not based upon etymology, not strictly carried out in practice, but yet easily recognised, and which a little reflection will show to be most convenient, if not absolutely necessary, between companies and societies—between undertakings in which capital is the leading element, and in which, given the requisite management, it matters little who the members are, and whether few or many, provided money

enough is at hand to carry on the business; and those in which capital is a subordinate, sometimes an altogether insignificant element—membership on the other hand, and in some cases the quality of membership, the dominant element. That there is such a distinction implicitly recognised will be easily felt. We should not like to call ourselves the National Company for the Amendment of the Law. The Royal Society would not like to call itself the Royal Company, nor the British Association the British Company. Though bodies may be formed under the Companies' Act for the most unselfish purposes, yet the term company at once conveys to our mind the idea of profit-seeking.

The great fault and mischief of the Companies' Acts is, that the system is based on subscribed capital—that is, on mere paper promises to pay, which may be worth anything or nothing—and not on paid-up capital—that is, on substantial value; and that they require no guarantee of the payment of capital when it does profess to be paid. The requiring of a definite amount of subscribed capital for the purpose of registration, on which fees are calculated, adds to this mischief. There is nothing to prevent a company being registered, with a capital of any number of millions, without a farthing paid up; nay, there is nothing even to prevent the whole capital from being declared as paid up when it is not. I am not exaggerating. In vol. xvii. of the Law Reports, Equity Cases, p. 534, will be found an account of a wonderful company called the Tumacacori Mining Company, registered in 1870—*i.e.*, since the date of both the existing Companies' Acts,—with a capital of £2,000,000 in 200,000 £10 shares, with a directorate comprising a nobleman, a baronet M.P., &c., with a solicitor, and all the requisite staff. All the 200,000 shares were subscribed, and if the certificates were to be credited, were all paid up. And yet not a shilling was ever paid up, and there was never such a thing as a banker's account, or cash-book. In this

case the public certainly did not suffer, as, if no money was ever received by the company, neither was any paid, and the directors were the sole creditors on winding up. But who does not see that it might have been as great a swindle as it was a sham?—that a company, "incorporated by Act of Parliament," with £2,000,000 of paid-up capital, and a nobleman and a baronet M.P. directors, might have victimised her Majesty's lieges to almost any extent?

I should, therefore, deeply regret to see forced into the grooves of the present Companies' Acts even bodies like Building Societies and Co-operative Societies, which are really formed for commercial purposes, but which, not being bound to register any definite amount of capital, are delivered from the snare of relying upon mere subscription, or deluding the public with it; still more bodies like Friendly Societies, which have so much more of the personal element in them. I am even strongly inclined to think that bodies formed for all purposes of life insurance, in which the personal element is always necessarily of weight, would be better detached from the Company system and connected with what I would call the Society system; and the exceptional treatment applied to them by the Life Insurance Companies' Act seems to me to afford evidence in support of such a view. And I should view the following as the bases of a rational English law of association:

1. The essential foundation of such a law in its lowest stages is the legal recognition and registration of the firm or title of the association. On the Continent, it is universally the case that for commercial purposes the adoption of a firm is not only recognized, but required; and this is registered in France at the Tribunal de Commerce, in Germany on the commercial register of the corresponding "Handelsgericht." I consider, therefore, that the right of associating for any lawful purpose, under a registered firm or title by which the members can sue and be sued, either as respects members or

inter se, the names and addresses of members, being also registered, should primarily be recognised. The liability of the members should, *prima facie*, be unlimited; but if limited liability be sought for any, then the conditions as to these should be similar to those required under the next head.

2. The right of associating, beyond a certain number, under the corporate form—*i.e.*, with limited liability for all—should be allowed under conditions sufficient to ensure that the capital can be reached when required, both by creditors and members.

3. In both the above cases, if the acquisition of gain be involved, the registration should be *prima facie* with a Board of Trade department (whose register might hereafter be enlarged into a general commercial register, analogous to those of France and Germany), or with some provincial branch of it.

4. The same department should carry through all formal stages bodies requiring Parliamentary powers, leaving, if possible, nothing for Parliament to determine but whether their objects are such as to justify the grant of such powers.

5. Where the objects of association involve certain personal conditions of membership, or exclude individual gain, or limit pretty narrowly the interests or benefits of members, and perhaps in all cases of human insurance (using the word as excluding insurance against damage to material objects or to merely animal life), recourse should be allowed to a board or officer answering to the Registrar of Friendly Societies, but endowed with more flexible powers, including that of discretional incorporation where the law should not make this imperative, or to some provincial branch of such board, or deputy of such officer.

6. The right of special incorporation by Parliament or by the Crown should remain untouched, but all enactments authorizing incorporation without limited liability should be repealed.

Under conditions such as those above described, no form of association need be illegal, or would stand outside the pale of the law, unless formed or used for an illegal purpose. Limited liability would be a privilege, granted only under certain conditions, but attached invariably to a certain form of constitution. And when the association was formed for an unselfish purpose, or was practically devised to develope the prudence and thrift of the poorer class, it might obtain assistance from the State to an extent which it would not otherwise.

Space would fail me for fully developing the grounds of these views, or the best methods of carrying them out, or for considering the objections which may be urged against them.

The following is the Law of Association in France and Germany :—

1. France. The Code Napoleon, adopted or followed by Belgium, Italy, &c., treats partnership primarily as a civil contract, in Arts. 1832-73 of the Code Civil ; then as a commercial contract, in Arts. 18-64 of the Code de Commerce. But whilst the provisions of the Code Civil have remained, I believe, unmodified, those of the Code de Commerce have been profoundly modified by subsequent legislation, and lastly, by the Law of the 24th July, 1867, *Sur les Sociétés*, supplemented by an Imperial decree of January 22nd, 1868, on Insurance Companies. The result is as follows :—

Association under the Civil Code *(la Société Civile)* resembles our ordinary partnership, except that the members have no right to contract debts on behalf of the partnership, and that the right is recognized of suing and being sued as between the association and its members ; but all the members must be parties to legal proceedings, and there is no legally recognized firm. In the first type of commercial association, *la société en nom collectif*, the responsibility is, on the other hand, unlimited, and the only practical difference from our private partnership lies in the requirement of a firm or style (*raison sociale*), under which the association sues and

is sued. The second type is that of ordinary commandite partnership (*société en commandite*), which can to a great extent be reproduced in England under the Partnership Law Amendment Act of 1865. The characteristic feature of this is the combination of limited and unlimited liability, the business being carried on under a firm which must consist of the names of one or more partners with unlimited liability, whilst the partners with limited liability are strictly excluded from any share in the management, under pain of being liable without limit. Then comes the Commandite Company (*société en commandite par actions,*) just mentioned as practiable in Article 28 of the Code de Commerce, but organized by subsequent legislation (laws of 23 July, 1856, and 24 July, 1867). This answers to the limited companies having directors with unlimited liability, which may be framed under our Companies' Act, 1867; but the French law requires a maximum amount of capital (£800,000), a minimum amount for the share (£4, or £20, where the capital exceeds £8,000), forbids the sale of a share until two-fifths are paid up, requires the whole capital to be subscribed and one-fourth paid up before the company can commence business, &c. The "Anonymous" company (*la société anonyme*) comes next, and answers to our limited company. This, which under the Code requires a special authorization, can be formed without any since the law of 1867. There is limited liability for all, but the company is subject to the like provisions as those above quoted for the Commandite Company, as to amount of capital, shares, and the subscription and payment of shares. A peculiar feature of both classes, as compared with our own law, is, that directors are required to have shares in their own names, incapable of transfer, which form a kind of caution-money for their proceedings. The fifth type of commercial association is that of societies with variable capital (*sociétés à capital variable*). This, as a general form of association, is entirely wanting in our own law, but

is exemplified in special groups by those societies which may be formed without fixed capital, and with or without withdrawable shares, under the Building Societies' Acts, the Industrial and Burial Societies' Acts, and the Loan Societies' Acts, whilst it may be observed, that it has nothing in common with the provisions of the Companies' Act, 1867, as to the reduction of capital and shares. The French law limits the maximum capital of such soeieties at starting (to £8,000), its annual increase (to the same sum), and the minimum amount of shares (£2); requires the rules to determine the minimum capital for carrying on the business (not to be less than one-tenth of the whole), and only allows the transfer of shares after this is paid up. Lastly, insurance companies and tontines remain subject to the previous authorization of the government, and to supervision by it. Their capital cannot be variable; there must be a minimum guarantee fund of £2,000 (compare the £20,000 of our law), and 20 per cent. of the nett profits must be put aside for a reserve fund, until this is equal to one-fifth of the capital. A list of investments is prescribed, including land (the purchase of which, is, however, strangely forbidden to mutual insurance companies), and certain particulars are required to be stated in policies.

Outside of these seven recognised forms of association we find, however, others answering to our friendly societies and savings banks. The general law on the former (*sociétés de secours mutuels*) is that of March-July, 1850, together with a decree of March-April, 1852. The organisation of these, and the constant interference with them of the public authorities, differ strangely from our own friendly society system. The mayor and the curé are to create one in every commune where it is ascertained that it would be useful; or the prefect is to do so, after taking the advice of the municipal council. A single society may be created for several communes where the population of each is under 1,000. The

president of every society is named by the head of the State; only the bureau, or committee of management, by the members. The rules have to be approved, for the department of the Seine, by the Minister of the Interior; in other departments by the prefect. Tables of sickness and mortality approved or confirmed by the Government must be adopted. There are to be (necessarily, it would seem) both honorary and participating members, and the number of the latter must not exceed 500 without the prefect's permission. (Fancy an Odd Fellows' Lodge, or Foresters' Court, asking a Lord Lieutenant's permission to admit its 501st member!) The objects are generally confined to the relief of sickness among the members, and the payment of funeral expenses, but they may contract for deferred annuities where there is "a sufficient number of honorary members"—*i.e.*, it is assumed to be impossible for members of friendly societies to provide for themselves in old age. All alterations of rules are void unless previously approved of by the prefect, and the same holds good of dissolution; but the prefect may himself suspend or dissolve a society for bad management, breach of rules, or transgression of the provisions of the law. Outside, it would seem, of these officially-formed societies, are those formed with approved rules, which enjoy much the same privileges. They are placed under the "protection et surveillance" of the municipal authority. The mayor, or an *adjoint* designated by him, may always be present at their meetings, and then takes the chair *ex officio*. Purely voluntary societies may also exist, but may at all times be dissolved by the Government for fraudulent management, or for exceeding their objects. Of savings banks, regulated principally by a law of June 5, 1835, it is perhaps sufficient to say that they require in each case the authority of a separate government ordinance.

I should also mention that form of agricultural partnership, so frequent throughout the continent, known generally

as the *Métayer* system, which does not appear in the French codes as a distinct contract, but which will be found referred to in certain articles as to the sharing of produce with tenants (Code Civil, 1763-64), or as to the obligations of *colons partiaires* (ib. 2,062); and again the application of the same principle to cattle, which conversely, under the name of "cheptel," fills a whole chapter of the Code (Arts. 1800-31). These are, indeed, treated as mere forms of agricultural tenancy, under the head of "Contract of Lease," but their place in the Code, immediately before the head of the "Contract of Partnership," shows that their affinity to the latter was felt by the codifiers.

Beyond the types of association above mentioned, freedom of association in France does not exist. The 291st article of the Penal Code forbids the formation of any association of more than twenty persons, in order to meet either daily, or on fixed days, for "religious, literary, political, or other purposes," unless with the consent of the Government, and "under the conditions which it may please the public authority to impose," under penalties for the chiefs, directors, or managers of the association, and for all who, without the permission of the municipal authorities, may grant or allow the use of their rooms for the meeting even of an authorised association. A law of the 10th April, 1834, applied the previous enactments to associations divided into sections of less than twenty members, and not meeting on special days; declared the government authorisation to be always revocable; and raised greatly the fine for members of a non-authorised association, adding to it imprisonment for not less than two months or more than a twelvemonth, with double penalties for a second offence. To cap the whole, a fiscal enactment of 1871 imposed a tax of 20 per cent. on all subscriptions to clubs, societies, and places of meeting, to be paid by the managers, secretaries, or treasurers in a lump in the month of February, or if the association be dissolved or

closed, forthwith. These provisions do not include the enactments against secret societies (see law of 28th July, 1848).

2. Germany. Of the German law of association I cannot give such full details. Indeed, Germany as a State is yet so young that her whole law must be considered to be still in the crucible. Thus, notwithstanding the existence of a commercial code (*Handelsgesetzbuch*), which regulates commercial partnerships and companies, a new law on the subject is, I am informed by a German friend, announced by the Government, which is also expected next session to bring in a bill for friendly societies (*Unterstützungs Kassen*), and one for banks of issue. There is no general mining law as yet, but as respects the Prussian states, a different law (applying to mining partnerships), exists for mines granted before October 1, 1865, and for those granted since. Some matters are regulated by imperial laws, others by North German ones, whilst in others the Prussian laws remain in force within extended limits.

The Commercial Code (as amended by a *Novelle* of June 11, 1870), divides the subject of commercial association under three heads: 1st. Public (*offene*), answering, however, to our private partnership; 2nd. Commandite Partnership, including commandite companies; 3rd, Joint Stock Companies (*Aktiengesellschaften*). But to these are added, in a separate book, heads on "secret" (*stille*) partnership, and the carrying on of separate businesses a common account. The peculiarity of the German "secret" partnership, as compared with anything resembling it in England, is that the secret (or as we should mostly call him, the sleeping) partner is not liable beyond his share. Otherwise, the forms of partnership are mainly the same as in France (the "public" partnership corresponding to the "société en nom collectif"), and it is only in details that they differ. Commandite companies cannot have shares payable to bearer, nor of less amount than 50 thalers; the shares of joint-stock companies, if nominative, cannot be of

less amount than 50 thalers, or 100 if to bearer. A peculiar institution in both German Commandite and Joint Stock Companies is the supervising council (*Aufsichtsrath*), acting as a check upon the management on behalf of shareholders, and replacing our auditors, with far more extensive powers and responsibilities. In joint-stock companies the capital must be fully subscribed, and at least 10 per cent., paid up on any share. Generally, the law goes much more into the details of the constitution of such bodies than our own.

It must now be observed that although the code I have been referring to is expressly a commercial code, it enacts that both commandite and joint-stock companies are to be deemed commercial associations, even where their objects are not commercial (Arts. 174, 208). But it would appear that as respects particular businesses, the provisions of the Code are controlled by special laws. Thus there are laws relating to railway companies (Prussian Law of 3rd Nov., 1838, &c.), which require the previous consent of the Minister of Commerce for their establishment, forbid the issue of shares till they are all paid up, bind the original subscribers to the payment of at least 40 per cent. of the amount of their shares, &c. Again, according to the opinion of a German counsel which I have had the opportunity of seeing, mining partnerships in Prussia are still subject to a law of 24th June, 1865, which is on several points at variance with the Code, and into the details of which I need not enter. It may, however, be observed, that under the name of *Knappschaftvereine*, the law in question recognizes and regulates certain friendly societies among miners and salt-workers, contribution to which is compulsory, both on masters and men. As respects friendly societies generally, indeed, it is very difficult to convey briefly an idea of German legislation. The old laws of most of the German States, apparently based upon a universal application of the guild system, rendered contribu-

tion compulsory on the part of all workmen, to local funds, for the relief of sickness or distress, or for the expenses of burial (*Kranken—Hilfs*—and *Sterbe-Kassen*), but the extent and conditions of the liability appear to have been determined only by local ordinances. A law (*Gewerbe-ordnung*) of 21st June, 1869, abolishes the obligation, but it would seem only in favour of members of voluntary societies approved of by the Government. Savings' Banks appear to be still regulated by a Prussian ordinance (*reglement*), of December 12, 1838. They are treated as parochial institutions, established by communes, or in certain cases by larger local circumscriptions, or for the establishment of which, at least, the approval of the communal or town authorities is indispensable, as is in all cases that of the Government.

A North German law of 4th July, 1868, regulates the various forms of co-operative associations known in Germany, including what we should term Building Societies. They are divided into five classes, foremost among which are those credit banks (*Vorschuss und Kreditvereine*) which have attained so remarkable a development in Germany, but which find as yet no field in our law, although the late Friendly Societies' Bill, in its original form, sought to supply one for them. Their organization resembles in most respects that of companies, except that they need have no definite amount of capital, and that all the members are liable to creditors after the society's funds are exhausted.

With reference to trade unions, I believe Germany has gone no further as yet than to abolish her combination laws (Art. 152 of the law of 21st June, 1869). Of late years, however, many such bodies have been established. But these, it would seem, as well as all societies not previously referred to (except those for religious purposes, or which possess corporate rights), are in Prussia subject to a law of March 11, 1850, which requires all associations for influencing the course of public affairs (*welche eine Einwirkung auf offentliche*

Angelegenheiten bezwecken), to communicate within five days to the local police authorities their rules and the list of their members, and any alteration therein, and, unless the time and place are fixed beforehand by rule or resolution, to give notice of every meeting. The police have the right to attend or send delegates to every meeting, and may dissolve it at will.

I must now observe that the main pivot, both of the French and German law of association, consists in the commercial organization of both countries, to which there is with us no parallel, that of the French *Tribunal de Commerce*, the German *Handelsgericht*, both with their registers. As this organization, though derived seemingly from France, appears to be most complete in Germany, I will mainly refer to it as regulated by the German Commercial Code (see particularly Arts., 12-27).

The German commercial register is public during business hours. Copies may be obtained of the entries in it at cost price. These entries, with certain exceptions, are advertised in certain newspapers, selected every December by the tribunal for the limits of its jurisdiction (*Bezirk*). Every trader must register his firm; every private partnership must register at least the name, condition, and residence of every partner, the firm, and place of business, and the date of commencement of the partnership. The dissolution of the partnership, except by bankruptcy, must be registered in like manner. For commandite partnerships and companies, and for joint stock companies, the details of registration are more complex. The same commercial register serves also for co-operative bodies regulated by the law of 4th July, 1868, but they are to be entered in a certain portion of it termed the *Genossenschafts Register*, which may be translated "register of societies."

Mines, on the other hand, under the Prussian law of 1865, appear to be treated as landed property, and are only entered

on the *Hypothekenbuch*, or land register. But if worked by commandite or joint stock companies, they come within the provisions of the Commercial Code, and have to be entered on the commercial register.

It will be seen at once that whatever advantages may be claimed for what I may term the continental system (since both the German and French laws are in the main framed on the same lines, and one or the other model may be said to be followed nearly all over the continent), it rests upon a wholly different base from our own. We have no commercial tribunals with their registers to start from. But even if we had, the field of association is wider than that of trade. No properly constituted tribunal of commerce could be a convenient resort for a scientific or literary body, for instance, an d i is at least doubtful whether it could be such for a genuine friendly society.

IV.—THE LAW TEACHING AT A GERMAN UNIVERSITY.

IT may not be out of place at the present time, when the attention of readers of the *Law Magazine* has been so recently and deservedly drawn to the deficient state of law teaching at the English Universities, if we supply from the "Revue de Législation" some particulars which we only alluded to incidentally, and by way of contrast, in the course of our remarks on the system pursued at the French Universities, in the January number of this journal. We observed that the deficiency of the French University Teaching of Jurisprudence had led to the formation of a promising Free School of Political Science in Paris, in which considerable

attention is to be paid to various branches of juridical knowledge, and we noted that M. Flach felt bound in honesty, however painful the admission, to point out the vastly superior teaching offered by the latest creation of the German University system. It may not be useless, perhaps to those who desire that our own Universities should do something more thorough in the way of providing a legal education, as well as examinations and degrees in law, if we place on record in these pages what Teutonic patience and Teutonic learning consider to be constituent portions of a university education in jurisprudence. In the German University, to which our present remarks have reference, and which we identified, from M. Flach's language, with the University of Strasburg, the following courses are given in the Law Faculty:—

I. Encyclopædia of Law, three lectures weekly.
II. Institutes and History of Roman Law, four lectures, of two hours each.
III. History of Roman Civil Procedure, two lectures.
IV. Pandects (except Law of Succession) five lectures of two hours.
V. Law of Succession according to the Pandects, four lectures.
VI. Do. do. according to German Legislation, four lectures.
VII. Exercises on Texts of Roman Law, one lecture.
VIII. Private Conferences (privatissima*) on Roman Law, and Penal Law.
IX. Exercises on Roman Law, and German, Private Law and Civil Procedure (privatissima).
X. Penal Law, six lectures.
XI. Civil Procedure, six lectures.

* Informal lectures, answering, we believe, to the French Conférences, and Répétitions, and the lectures "Sine ullâ solennitate" of our English University Professors.

XII. *History of German Private and Public Law, five* lectures.
XIII. Public Law of the Empire, and of the separate States of Germany, five lectures.
XIV. German Civil Law and French Law, seven lectures.
XV. Commercial and Maritime Law, six lectures.
XVI. French Civil Law, five lectures.
XVII. Penal Law,* three lectures.
XVIII. Law of Nations, four lectures.
XIX. Ecclesiastical Law, and Legislation on Marriage. five lectures.
XX. Politics, four lectures.
XXI. Social movements of the day in England, France, and Germany, two lectures.
XXII. Political Economy, five lectures.
XXIII. Practical Exercises on Civil Procedure, three lectures.
XXIV. Do. on Criminal Instruction, two lectures.
XXV. Do. on the Pandects, one lecture of two hours.
XXVI. Legal aspects of Commerce and Industry, one lecture of two hours.
XXVII. Statistics.

We have here, as noted in our previous article, no less than twenty-seven different courses of lectures and conferences, given by fourteen professors, and representing a minimum of one hundred and ten hours, devoted weekly during the University Session to the various branches of knowledge embraced by the Faculty of Law in a German University. Well may this pass for "the last expression of Higher Education in Germany," to use M. Flach's words. What have we to show, whether in the older Universities of Oxford and Cambridge, to which Mr. Robertson's article in

* We presume that Course XVII. is devoted to *French*, and Course X. to *German*, Penal Law.

this magazine chiefly referred, or in their younger rival, the University of London, that can be for one moment compared with the instruction offered by Strasburg? The difference is sufficiently startling to lead to the question whether our Universities are in earnest in their professions of desiring to make their Law Faculties a reality. We do not, of course, forget the distinguished names which have adorned and still adorn those Faculties in all three Universities.* But a Faculty, whether of Law, Physic, Divinity, or Arts, requires something more than great professorial names to subsist upon, and nothing but thorough, earnest, teaching by a staff large enough to cope with the increasing requirements of the day, together with greater university encouragement of juridical studies, will succeed in making Oxford and Cambridge adequate Schools of Law by the side of "the last expression of Higher Education in Germany."

V.—THE LABOUR LAWS COMMISSION.

By JOHN P. O'HARA.

IF wages had been last year lower than they really were, and if capitalists, nevertheless, received the same prices, profits undoubtedly would be greater than they were. Hence it is inferred that a rise of wages not only may, but usually does, involve a fall in profits, and conversely. Such a view of economical causation or dynamics is wholly erroneous, and has been the source of most of the paradoxes with which the science has become infested. Ricardo especially laboured hard to prove that in the progress of society

* The memory of John Austin alone would suffice to render the efforts of the University of London in this direction remarkable among our Law Faculties.

rent and wages rise, while profits fall. This is a fatal error; for wages follow every variation of profits. If, then, in the progress of society profits fall, wages must fall also. Neither can proportionate wages increase in the progress of society, if produce diminishes. The increasing scarcity* or cost of raw produce only prevents the natural rate of wages from falling below a certain amount, but it has no effect on actual wages. The case stands thus: Let us suppose that wages are £100 a-year, and that £50 are expended by labourers on necessaries, and £50 on luxuries. Suppose, further, that the rate of profit declines in the progress of society, so that wages also fall to £70 a-year, while the cost of the necessaries required to maintain the existing number of labourers rise to £70 a-year, the result is the labourers buy no luxuries, and the population cannot further increase. Let us suppose, however, for argument's sake, that it does increase, or that from some other cause the price of raw produce rises, so that the same amount of necessaries that previously was had for £70 now costs £80, why must the labourer's wages rise, or how can they rise if profits have not risen previously? Do labourers never die in years of want and famine? If they do, what is there but the poor law to prevent them dying at any time that the price of corn rises beyond their means of purchasing it? All they can do is to transfer their demand from luxuries to necessaries; but, to increase the total of their demand, wages must be increased. Why will the rise in the price of corn give this increase of wages? If not, it may be said, labourers will then, at all events, be thinned by sickness and increased mortality, and wages will then rise. Undoubtedly, if some labourers die, or emigrate, wages measured in corn will rise; in other words, corn will be cheaper, because less of bad land will be under cultivation. But this is the reverse of the economical position referred to. Economists say corn will continue high

* "Principles of Political Economy—Chapter on Wages," p. 86.

in price, and wages will rise in proportion. We assert that labourers will be thinned by sickness and death, and that the price of corn will fall, so that the whole hypothesis falls to the ground. It is impossible that proportionate wages can rise, unless the proportion of labour to the wages fund is lessened. This can only be brought about by a diminution of the number of labourers. This result must lessen production proportionately in every department of manufactures, but gives a slight increase of produce, compared with outlay, in agriculture, owing to the recession of the margin of cultivation. The only case, therefore, in which proportionate wages rise is that in which the demand for raw produce is diminished, and corn becomes cheap. But the economic hypothesis is that corn continues dear even after the rate of wages has fallen lower than the natural cost of labour—that is, than the price of the necessaries requisite to maintain the existing number of labourers,—and that their wages rise. It is, however, demonstrative that wages cannot rise unless profits rise first, or unless the number of labourers is diminished.

The effect of a sudden decrease of the labourers would be greatly to raise wages in the ensuing year, but not afterwarsd. For instance, let us suppose that half of the labouring population of England migrated to the United States in one year; the wages fund of the next year would be enormous, compared with the supply of labour. A good deal of capital would go abroad, no doubt; still, all that remained at home would, according to the usual law of demand and supply, be distributed by the competition of capitalists, among the remaining labourers. Wages would then be very high. Next year, however, the produce would be very different from what it was before the exodus of the labourers. No doubt it would be as large as it was the year before and larger, else there would be no profit, and there would have been no reproduction on a large scale. I say on a large scale, because

some kinds of capital are of such a perishable kind that it is absolutely necessary to reproduce them, even without a profit. At all events it is clear that production would fall off very much after the country suffered so great a loss of hands, and the rate of profit would be so low as to allow of but little increase of wages or of population. Where the labourers are thinned, therefore, the rate of profit rises only in agriculture and foreign trade. In manufactures the work done is always proportionate to the hands and the fixed capital. On the loss of hands there is a proportionate diminution of produce. Even as regards agriculture, when the margin of cultivation recedes, the returns of the last capital applied to the soil are not really profit, but the old rent. However, let us admit that on a decline of population agricultural profits increase. We shall admit, certainly, with all willingness, that profits in foreign trade will increase; for prices in foreign trade depend on demand and supply, and as, on a loss of hands, the supply of produce becomes diminished, the prices and profits of the actual stocks exported become the higher. Owing, however, to the export of capital, consequent on the difficulty of finding hands in England, and the loss that always attends a forced investment of capital, investors would, on the whole, be ruined by the decrease of population.

The results that follow from a loss of hands in consequence of increased mortality among the labouring classes, or their emigration, all follow in a certain degree from the enactment of factory laws that limit the hours of labour, unless the general result of such acts be to increase the efficiency of the labour during the hours in which it may be legally employed.

The following is the order in which wealth circulates—There is first of all produce or prices, then profits, finally wages. Such as the prices are, such are the profits and wages. When prices rise, profits and wages rise also; when prices fall, profits and wages must fall too. When wages rise, says Ricardo, profits fall; evidently meaning that it is

possible for wages to rise without profits rising first. But the alleged phenomenon is impossible: the assumption is untenable, except in the case of a decrease of population. But the consequent rise of wages lasts only for a year; for production, that is, in other words, prices and profits, are proportionately diminished. Income is made up of produce or price, and when this falls, the profits of the capitalist, and consequently the wages of the labourer are diminished.

Wages and profits, then, vary directly, and not inversely, with each other. If, indeed, wages had been higher last year than they actually were, profits would have been less. But, why use an *if*? The actual wages of last year were determined by a necessary law, and that law the scale of the profits of the preceding year. If necessary laws are to be left out of consideration, and untenable hypothesis are taken as the basis of reasoning, political economy becomes merely a phase of romance and not of deductive science.

Instead of the price of corn regulating actual wages as distinguished from the minimum rate, it is the actual rate of wages that is the main regulator of the price of grain. If there is no failure of crops, the price of raw produce never can exceed what the rate of wages would determine it to be; for wages constitute the main demand for raw produce; and so far as that demand declines, prices must decline. If the price of corn rises, in consequence of an increased foreign demand, as is happening now in America, the increased prices of corn accrue to the agriculturists, who pay their increased gains all away in wages. It would be greatly for the benefit of American labourers that the European demand for American corn were double or treble what it is; for if the price be double or treble its present scale, the profits of American agriculturists and exporters would be raised in proportion, and so would the wages of American labour in the next year. Whether we regard home or foreign trade, therefore, the price of corn (except on a failure of crops) cannot long exceed the labourer's ability to purchase.

The doctrine of wages and profits, varying inversely, is calculated to do much mischief. Labourers naturally must infer from such statements, that there is a conflict between their interests and those of capitalists. The contrary is the case. Wages rise when profits rise, and fall when they fall—There is consequently a community of interest between the two classes. To the question, What is the cause of high wages? Ricardo would say, low profits, because they vary inversely. So they would, if there was a division of the produce of any one year between the two in the same year. Ricardo does not put the cart before the horse, but he drives both together. Wages and profits, however, are not apportioned simultaneously. The true doctrine is that all profits are paid away in wages. Even the luxuries consumed by capitalists were produced by labourers, who got wages for doing so. However, deducting unproductive expenditure from the wages fund, the whole of the vast remaining wealth of the nation is paid away in wages.

Economists, however, uniformly assert, that if the productiveness of industry continues unchanged, there cannot be a rise of wages without a fall of profits. They ought rather to have said, that in the case put there cannot be a rise of wages at all. For whence is it to come? Oh! reply the economists, it may arise from a diminution of the number of labourers; if, for instance, some of the memigrate the remainder will get more wages. This, as we have seen, is wholly untrue, as regards manufactures; for every loss of hands involves a proportionate loss of produce, which is the wages fund. As regards agriculture, it is slightly true. But the ecohomists do not confine their views to agriculture; they lay down general hypotheses about increased wages involving a fall of profits, as if such increase could happen from some unknown cause, independently of an increase of profits.

It is supposed by some that, all produce being divisible into two portions, the share of the labouring class might be

increased by judicious legislation. The aim, however, of those who seek to raise wages without acting on profits, or on unproductive expenditure, is a futile one. The snows must fall on the mountains ere the valleys are watered. In order to increase wages, profits must be first increased; for the whole produce of the country is not divided, in the way Ricardo imagined, between the two classes of capitalists and labourers; for even most profits are expended in wages. All income flows, *minus* the value spent unproductively by capitalists, to the labouring class in one undiminished volume. Ricardo and his school, in apportioning the annual productions of the nation between capitalists and labourers, and in inferring that the greater the share of the one is, the less is the share of the other, act like a surgeon, who, when trying to explain the circulation of the blood, would naïvely suggest that the more blood there was in one half of the body the less was in the other.

Now as to the portion of truth in Ricardo's theory, it is very little. The wages of last year were not part of the produce of last year; they were the fruits of the preceding year. He has mixed up cause and effect in one synchronous division. One year with another a like observation must be made. The wages of every year are the produce of the preceding year; and the greater that produce and the profits of capitalists, the greater is the ensuing wages fund. But if capitalists laid out less on wages last year, would they not have more profit? Yes; they would. Statically considered, Ricardo's proportional wages are a truism. But political economy, to have any value itself, must be concerned with cause and effect; it is a system of social dynamics, and the portion of truth in Ricardo's statement is altogether misleading and irrelevant. No one wants to know that if he laid out less than he did on any speculation, he would have gained more. But what is wanted is information respecting the laws that determine the sum to be

laid out, and the gain; in other words, the rate of wages and the rate of profit. Now, these vary directly, and not inversely, as each other, and are related to each other, not as antagonist forces, but as effect and cause.

Profits measured in value do not decline in the progress of society. When population increases, the demand for raw produce increases, the price rises, the profits of the growers increase, and the unusual rate of agricultural profit then attracts capital and labour which increase the supply of corn until the price falls, though not to its old level, because worse soils must be cultivated. Capital is never attracted to a trade until its profits rise above the average. The diminished produce will sell for at least the sum which the same outlay used to fetch. All this Ricardo admits. Why, then, out of this diminished produce, must labourers get a greater proportion than previously? Because, forsooth, they want it. This is not a law of demand and supply. They will only get their old money wages, unless the money in the country is increased—a phenomenon which a rise in price of any commodity can never lead to; for the money in a country (leaving the discovery of new mines out of the question, since such discoveries similarly affect the currencies of all nations) cannot be increased except by a favourable balance of trade, to which a rise of prices by no means conduces.

Several interesting questions present themselves in connection with this inquiry. What, we may ask, is the wages fund? What would be its major limit under a socialist system? How far should legislation interfere in the matter; and can any system of customs duties increase either profits or wages, or both?

An increase of population adds to produce and profits, and so again adds to wages. What we wish to draw attention to, however, chiefly in this paper is that wages can only be increased by first raising profits, or else by sumptuary laws,

or heavy taxes on luxuries. All circulating capital, and all profits thereon, are paid away to labourers already. The wages of any particular trade may be raised by a strike until the rate of profit is seriously diminished in that line. But this process cannot be carried through all trades;* for all profits not laid out on luxuries are at present paid away in wages. Therefore, the portion at present not laid out on luxuries that would be abstracted by a strike would diminish the circulating capital employed in other trades in this way: —The capitalist who raised the wages in his line, in consequence of the strike, must diminish his demand for commodities in general by the amount of the rise in wages. The demand for certain commodities thus diminishing, the prices fall, the profits of the dealers fall in the same proportion, and therefore the general wages fund is diminished by the amount of the rise of wages effected by the strike, unless the labourers invest productively as much of the increased wages as the capitalist would have done.

The wages fund comprises all calculating capital plus all money paid directly to labour, but minus luxuries;† or it may be described as consisting of all the circulating wealth of the nation minus luxuries, or as the produce of last year's capital, minus all luxuries and the necessaries consumed by the rich. All these three phrases are equivalent expressions for the same portion of the national wealth.

The necessaries consumed by the rich, indeed, I am disposed to regard as productively consumed. The rich, so far as they merely consume necessaries, keep up the population of the State, and population is one element of wealth. They are not, indeed, actual, but only potential, labourers. Still,

* The writer of the able article on Trades Unions in the *Edinburgh Review* for October, 1867, No. 258, seems disposed to endorse the contrary opinion. He would be right, if labourers invested their increased wages.

† This is merely a mode of computing the wages fund, and is not intended to endorse the erroneous doctrine that a demand for commodities is not a demand for labour.

no one will grudge them necessaries, or repine at a limited credit of this kind being given to them, just as if they were so far productive labourers.

As all circulating capital is paid away in wages, if we adopt Ricardo's theory of a division of the produce of each year between capitalists and labourers, it would follow that capitalists retain only the rate of profit, and not even that, since much of it is paid away in wages. He does not distinguish between property and capital. The capitalists continue to enjoy their property, though they have paid it away in wages. It will be reproduced for them. It is merely lent, or deposited with labourers, like the seed committed to the ground in spring. It is impossible, indeed, to have one's loaf after eating it. But if another eats it for you, and is working all the while, you may get a new loaf, and a larger one, at the end. Production is circulation; wealth flows as capital from the employer to the employed. But the employers are none the poorer; on the contrary, their revenue is in proportion to the magnitude of their outlay. Their property and their wealth is not diminished; it only changes its form. There appears to be no return for it until the end of the cycle, because the nature of the product is not fully apparent. But, while the hand of the capitalist is giving one kind of wealth to the labourer, the hand of the labourer is simultaneously giving an equivalent to the capitalist. His wealth, therefore, is not during the process of production diminished; it is only hidden from view. The harvest rises in all its beauty and bloom at last. The bread thrown on the waters returns after many days. A system of socialism could not increase the wages fund by the amount owned at present by capitalists; for all that, including profits, is already to a great extent paid away in wages. Ricardo, however, does not seem to have attended sufficiently to this fact, nor to have observed that wages can only be increased by forcing the unproductive expenditure of the rich into a productive channel.

The briskness of trade consequent upon such an expenditure has caused it to be considered as favourable to the labouring classes. And so it is to the labouring class of the district where the expenditure takes place. For instance, balls in London circulate rents among the Londoners. Absenteeism from country districts, on the other hand, impoverishes them. But it is obvious that unproductive expenditure gives employment to labour only once. If the wealth thus spent were used as capital, the wages fund would be so far increased, although the successive accumulations on such a large scale would lower the rate of profit.

Excepting then unproductive expenditure, all circulating wealth is poured out on labourers. The way to raise the wages fund, therefore, is to raise, not to lower profits. Neither is there any other mode of raising wages. "If wages rise," say economists, "profits fall, unless produce is increased." The hypothesis shows much blindness to economic facts. Wages *never* rise permanently unless produce is increased. After produce is increased, profits, the intermediate link, must also be raised, then finally wages rise. Wages are profits in a course of reproduction, They are not different, in the main, but are the same body of wealth. Given the population of a country and the rate of wages reduced to an average denomination, and the annual produce of the country, minus its luxuries, (or even including these if a constant ratio be assumed,) can be calculated. Given the annual revenue, the proportion of income usually spent, unproductively, and the number of labouring inhabitants, and the rate of wages can also be calculated. Given the actual value of the property, excluding the land, houses and fixed capital of a country, the value of its annual unproductive consumption, and the number of labouring inhabitants, and the rate of wages can be calculated. It will appear from the foregoing, that though it is only a thriving country, that is, a country with a high rate of profit, that can keep pace

with population, yet, the actual rate of wages is determined by the actual proportion between circulating wealth, including money, but excluding luxuries, and the number of labouring inhabitants.

If La Commune hoisted her colours to-morrow on the Bank of England—a contingency, which, it is to be hoped, in the interests of all alike, is void for remoteness—the question arises, how far could wages be raised by the legislation that would ensue. Whatever that amount may be, it is clear that partial legislation under our present constitutional system can not do more. Both questions can be answered together. All income is at present devoted to paying wages; even luxuries are produced by labour. Can, then, wages be at all increased, if all revenue is even now devoted to hiring labour or to buying commodities which are produced by labour?

All revenue is certainly paid away to labour; but there are two distinct kinds of labour, namely, productive and unproductive. Wealth applied to producing luxuries or to hiring menial servants for display, gives employment to labour once, but once only. If such an employer did not derive his income from some other source than the labour of his employés, he could not afford to live in the same way two years consecutively. Let us suppose that A is a landlord who derives an income of £1,000 a year from land, all of which he is in the habit of spending unproductively on luxuries and menial servants; still, as his income of £1,000 is assured to him, as long as his annual expenses are less than that amount, and that he does not encroach on his property, he can always afford to expend £1,000 a year unproductively. Let us now suppose that he becomes a manufacturer, and that the rate of profit is 15 per cent.; at the end of the first year he has £1,150, *plus*, £1,000 a year from his land. It is clear that the next year he employs twice as much labour as he did before he became a manufacturer.

All change of wealth from unproductive to productive purposes, therefore, adds to the wages fund. If La Commune, accordingly, enacted that there should be no unproductive consumption, wages would be considerably increased. Wages, in short, can be increased by the whole amount at present devoted to unproductive consumption. All taxes, therefore, it would seem, ought to be levied on such consumption, on champagne, cigars, and other luxuries that cannot be used for purposes of further production. Such a a rule would, doubtless, deprive life of some of its sweets; nor, as labourers would not be allowed, under La Commune, to live luxuriously, would they derive any benefit from the change, assuming that at present their wages supply them with necessaries.

The rate of wages depends in all cases on demand and supply. The demand for labour we have already described. All capital and the rate of profit are at present devoted to hiring labour or to buying commodities which are the fruits of labour. It will be shown, *demonstratively*, at the conclusion of this article, that a demand for commodities is a demand for labour. Let us assume this proposition for the purposes of our immediate inquiry, which is, how far can wages be raised by legislation? Wages can be raised by the whole amount devoted both by rich and poor to unproductive consumption, and can only be raised generally as distinguished from a rise in a particular trade by forcing consumption from an unproductive into a productive channel.

All capital and all profits thereon, in other words, all the produce of last year will, this year necessarily be paid away in hiring labour. Unproductive expenditure, however, as already shown, causes an ultimate deficit in the wages fund. Therefore, the wages fund is best described as consisting of all circulating wealth, *minus* the articles unproductively consumed by rich and poor. The poor, therefore, when consuming luxuries, take from the wages fund as much as the rich

do when they indulge in costly living. There is no possible mode of adding to the wages fund, but by lessening this unproductive consumption by means of sumptuous laws, or taxes on luxuries, or else by gaining some fresh advantage in the foreign markets. But could not capital be confiscated for the benefit of labour? It is already so complicated. Every penny of capital is already paid away to labour; otherwise it would not be capital. Even profits on capital, say the profits of last year, are part of the wages fund of this year. For, when added to capital, they are undistinguishable therefrom. Therefore capital and profits being already paid away to labourers, all that is possible for legislation to do is to change unproductive consumption more or less into productive consumption, or else to increase the whole production of the country by a judicious system of import duties.

Legislation, then, cannot possibly permanently raise wages unless it be applied in these ways. If it raises wages in one class of trades, this can only be to the detriment of some other class of labourers. The wages fund is a fixed quantity any one year. The more of it that is given to class A, the less necessarily remains to class B. When wages are raised by a strike, the result, indeed, is not necessarily an injury to any other class of labourers. Because the capitalists who suffer by the strike may diminish their unproductive expenditure on the demand for foreign commodities to the amount of the rise of wages. If this is the case, the strikers are clear gainers, while no other class of labourers in this country suffers any loss. If the capitalists, who suffer by the strike diminish their demand for foreign commodities, there in proportion to this decrease of demand, foreign labour suffers. But no class of labourers here suffers any loss. A rise of wages effected by a strike is like a tax; it may lead to increased economy, and so not really diminish the wages fund. In proportion as it has this result, it remedies the deficit made in the general wages fund. That fund, we repeat, is

the whole produce of last year's fixed and circulating capital *minus* the luxuries consumed by rich and poor. That a rise of wages effected by a strike or pressure lowers profits there can be no doubt.* The efforts of masters to raise prices, it appears are not equally successful.† As long, however, as masters are allowed to settle prices there will be a difficulty in repressing trades unions. It really seems desirable to prohibit by statute all combinations of masters for fixing prices. Let them do so by letter if they wish without setting to others an example of interested bereaucratic legislation.

The general effects of trade societies have been considered both to increase the rate of wages and to limit the hours of labour.‡ Owing to the depreciation of the currency, however, since 1850 the supposed rise in the rate of wages is partly nominal. No one will regret that trades' unions can elevate the rates of wages. The legislative question is how far to admit of combinations for this purpose. The loss of produce to masters, and the outlay entailed on workmen by strikes and lock-outs, seems to be very considerable. In the first six months of 1872 the Society of Amalgamated Engineers expended £40,000 during a lock-out.§ This society, however, appears to act prudently. For "before a strike can take place the grievance must be brought before a branch committee, or before a district committee, if one exists, and then before the executive council, and the consent of each body obtained." Much of the outcry against unions exemplifies the logical fallacy of *non causa pro causa*. The outrages might have occurred if no union ever existed. It is

* As to strikes in the building trade, see evidence of Mr. A. Mault, 3rd Rep. Trades Union Commission, 1867, p. 13.

† Mr. A. Hood's evidence, 7th Rep. Trades Union Commission, 1868, p. 13.

‡ See evidence of Mr. William Allen, "Appendix to eleventh and final report of Trades' Union Commission, 1869," p. 31.

§ Evidence of Mr. William Allan, secretary, "Final report of Trades' Union Commission, 1869," p. 25.

clear, from the case of Thomas Wilde, as described in the report of the Manchester Outrages Inquiry,* that persons may be concerned in trades' outrages, who are otherwise estimable and deserving. The persons who assaulted Wilde were sentenced to twenty years' penal servitude by Mr. Justice Blackburn, but afterwards, on Wilde's interceding for them, received a free pardon. We refer to this case as illustrating the extremes of treatment which all legislation on the matter should avoid. Penal servitude seems a hard penalty for any offence of this kind not involving loss of life. On the other hand, of course the law ought never to connive at any breach of the peace. The truth, perhaps, is, as we have suggested, that the victims of trades' unions are not unfrequently persons who would have received and provoked the very same treatment if unions never existed.

(To be continued.)

VI.—OUR COMMON LAW RECORDS.

IT was suggested last December in these columns, in the course of a review of the writer's book on Early English History, that his proposal to index the "Common Law Records" ought to be carried out at once, and that he was the proper person to be selected to direct the task. It is worth while to enquire whether it be a feasible one, and whether the attention of the Master of the Rolls, or one of Her Majesty's Secretaries of State ought not in the public interest to be devoted to it.

It may be asked, for what good should so much trouble and so much expense be incurred; can we at this date have

* P. 8.

any real and practical interest in it, in other words, if it was done would it pay? This is a low shop-keeping view of it; but even in this light, the question ought to be fairly considered. Its importance may be imagined from the following "scene in court," which occurred only the other day in the presence of the writer. The Chief Justice had mooted a real point of law. The case is a trumpery one, but the point is a large one. The powers of the Court of Queen's Bench to regulate the proceedings of a court of Petty Sessions, counsel, in the innocence of his heart, had never dreamt of looking for an authority, and he is silent when asked by the Chief of the Court for one. Failing to find it in a hurried glance at some book, he breaks out into laughter at his own ignorance, which is joined in cordially by the whole court—bench, bar, and audience.

But the funny part was to come, though possibly few there saw its comicality.

The Chief Justice gravely asked the counsel aforesaid, who of course could not tell, if there was any authority for saying that the Court could control, by prohibition, the Court of Assizes, forgetful that these courts are simply travelling portions of the Court itself, and that in theory at least the Court of Queen's Bench can control the proceedings of every court in the kingdom, simply because, as our old records shew, it is the *Curia Regis*.

Not one of the judges saw the absurdity of the remark, and counsel ignorantly reasoned, "Oh, but an Assize Court is a Superior Court."

"No," said one of the puisne judges. "No, it is not."

"Of course not," says obsequious counsel, "but it is not an inferior court." It was painful to see the effort of the Chief of the Court, vainly endeavouring to catch at something, but counsel was not sufficiently suggestive, and the general dead-lock became so complete, that, to the relief of everybody, he was allowed to mention the case when he was better

instructed. Whereupon the importance of the Common Law Records can hardly be over-estimated, yet they are a dead letter, and utterly unknown to our generation, they have not been properly arranged, they have no indices, and except where their dates appear upon them they are undated, though with a little research, investigation, and comparison, the dates of many of them might be accurately determined to their credit, and to this only are their custodians entitled. They have safely preserved them, thanks probably to the dryness of their resting place, and not to any vigilance on the part of their keepers, they are as clean and fresh as upon the day when they were originally deposited in the Old Chapter House at Westminster. There they have been, probably, for many centuries, proof that no one has cared to enquire whether they contained anything worth record, and if they did whether it was possible and feasible to record it. Two scholars only are known to have paid much attention to them: one Arthur Argarde, a Garter King at Arms, and the late Sir Francis Palgrave; the former, who wrote in the reign of James I, and the latter, 40 years ago. To the Garter King we owe a volume which was printed some 40 or 50 years since, containing such extracts as best suited the taste and genius of the extractor; as we should expect to find, these extracts are chiefly genealogical: many also are of value to the historian and the lawyers, but it is not to be expected (and if expected, disappointment would only result) that a mere genealogist should have laboured for the learned of to-day who at last are beginning to open their eyes to the fact that to British Institutions chiefly do we owe the greater part of our Common Law, and that not solely to the Romans, and most assuredly not to any Frankish or Saxon invaders are we so indebted; hence it becomes of vital importance that these Rolls should be studied by those who are capable of tracing law to its foundation. Besides, Agardes's labours are only brought down to the end of the reign of Edward II; and

subsequently to that period we may hope for much and very valuable information.

In the work of Sir Francis Palgrave we discern an ambitious project, a project which had for its aim the complete publication of this storehouse of learning, a work which should be of value for all time to the lawyer and to the histriographer not only of this country, but of every other, for very true it is that the interest embraced in those rolls is not confined to Englishmen alone, but is also the property of other nations, of our kinsmen the French especially, and partially, though not really so greatly, to the Teutonic tribes, who many of them when in their savage state borrowed the customs of their polished neighbours, but, alas! this work, from its omissions and imperfections, is practically of little value, and the whole work must be commenced *de novo*. The fact is Sir Francis adopted Agardes's arrangement of the Rolls, and he has frequently dated then wrongly.

If we find such confusion in the work, a work published with great care by the Chief of the Record Office, a man of great learning, we must be prepared to find other errors, and the writer suggests another and a greater difficulty still, and that is, whether the bundles of membranes are properly fastened together, on what principle, and by whom and when were they so arranged and tied up. It is clear that their present combination is quite recent, probably not half a century old. Why were they so united, and was the connection similar in all respects to the older one? We may assume, perhaps, that it was; but on what principle was that made, and when? Not according to any periodical intervals of time or to any particular quantity, for the bundles, some of them, run into several terms, others in only several days, and some contain forty times the amount of matter which is to be found in others. They do not appear to have been numbered until Arthur Agarde took them in hand, and in all probability it is owing to his labours that they have any arrange-

ment at all; but however this may be, this fact is apparent that up to the present time only two attempts have been made to reduce this invaluable collection of documents into order, and to publish their contents is a very old attempt, which was manifestly a failure, though doubtless it answered the purpose of its originator, and the other of the last generation, which does not even publish the oldest documents, and which omits from its place matter sufficient to form another volume equal in bulk to itself.

Another great omission in Sir F. Palgrave's work, in the second volume, is the omission of the essoins, which are invaluable to fix the date of the Rolls. But the work of Sir F. Palgrave was never completed; and though he published two volumes, and fully intended to proceed with it, the writer was laid aside when the commission expired, but in the work he has done he failed utterly, indeed, so dismal was his failure, that he has not managed even to commence his work with accuracy or correctness. The writer has collated his two volumes with the Records themselves. His first volume contains 59 membranes, which are represented by the Rolls, numbered 2, 3, 5, and 6 of those labelled at the Record Office as forming the reign of Richard I., and 7 for that of King John; and for vol. 2 about 42 membranes, numbers 7, 8, and 10, of the 1st year of the reign of King John.

But these membranes do not nearly comprise the whole of the Records for these years. It is computed, in the calculation given by Sir Thomas Hardy to the writer, that there are 80 membranes for the reign of King Richard, and 280 for that of King John; so that about one-fourth only of the Rolls for these two reigns have as yet been printed. But this calculation errs in attributing 30 of them to Richard, which properly belongs to John's reign. Sir F. Palgrave starts with a Roll of 6 Richard I. as the first of the series, but this is not so. Roll No. 8, which had been supposed to

be of a much later date, as of the reign of King John, or part of it, is clearly older, and should commence the series, as appears from an entry at Mem. 3, and other Rolls may be earlier even than this, possibly as early as 1 Richard I. Indeed, the internal evidence of these rolls shows that they were only the successors of a series of, at any rate, the reign of Henry I., if not of an earlier date. At Mem 3 of No. 8 is the following entry:—"*Ebor Robert de Nortorp appellvs Hug de Verli et Ric et Philipp fil q, &c., eam assultavert et combusset es rob.*" The date is three weeks after Easter Day—that day in 1194 was on the 10th April. At page 132 of Sir F. Palgrave's book is the following, under the date of 1st December, 1194 (on the Morrow of St. Andrew), a date which is apparent on the Roll itself. Ebor, Hugh. Richard, and Philip de Verle all made excuses in a plea "robie" upon the appeal of Rob de Northorp. This valuable Roll, the oldest yet found, is wholly omitted by Sir F. Palgrave. Again, at p. 93 of Sir F. Palgrave's book we read: "*Sumst Dorset Galfr de Mandeville v. Henri de Tilli de plac Baron de Mershwood.*"

At Mem. 1 of No. 1 Richard I. we find the following entry: "*Dorset Gauf de Mandeville pon locoguo Andr fil Wm. vsus Henri de Tilly de pl ter ad luc el pd auderind jud,*" clearly showing as judgment necessarily follows the institution of a suit, that the Roll No. 1 properly succeeds No. 2. So No. 9, Richard 1, does not belong to this reign at all, but is clearly referable from its contents to a Roll succeeding that for Michaelmas Term, 5 John, as an appeal between Henry Engaine and Robert de Waterville, as membranes 5 and 7 respectively proves, and the same may be said of Rolls No. 7, Richard I., and No. 10, Richard I., both of which belong to the following reign, the first to 1 John and the last probably to 6 John.

Again, at page 313 of Palgrave we read, under date assigned to 10 Richard I., *Devon Dies dat est Alan. de Bocl. et Priori de Printon de pl ter in oct St. Trin pce ptiu.* In

No. 4 Rich. I. (4 in indorso), we find *Devon Alanus de Bocland petit vs Priore de Plumpton de pl de ter.*

Now, as the settlement of a suit is its termination, it is clear that No. 4 precedes No. 7. The same fact appears from another entry in the same Roll at No. 7, Sussex—*Nic de Trubvic appallat Hugo Esturmi*, for certain wounding by his sons John and Hugo; and a day is given in next Pasche: at page 230 of Palgrave, under the date of Pasche, 1 John, and county Sussex, we find a reference to the dispute between Hugo Esturmi and Nic de Trubvic, in which John and Hugo Estrumi also appear by certain persons, an entry which clearly follows the entering the appeal mentioned in Roll No. 4; so that No. 4 is clearly referred to Hilary Term of the last year of Richard I.—but again in Palgrave is it wholly omitted. The general result of the examination is that out of about 80 Rolls supposed to be of the reign of Richard I., only 50 are really referable to it; but only 30 of these have as yet been printed, and the five earliest membranes are amongst the omitted membranes. The 20 unprinted are taken from the Rolls hitherto supposed to belong to John's reign, and in their place the same number supposed to be of the date of King Richard, have to be given up. So that we possess 30 membranes less of Richard's reign than was commonly supposed, but though it is very possible that the number may be made up out of the Rolls for John's reign which have not yet been properly examined by the writer.

In order to arrive at a clear understanding of the real difficulties to be met with in the execution of this work, it would be useful to ascertain the quantity of these documents.

Sir Thomas Hardy has generously placed at the disposal of the writer, for the purpose of enlightening the public mind upon the question, certain statistics, which, at great labour, he has had compiled for the writer's information; and they exhibit these startling facts, that from the commencement of the series of the Common Law Records, including the

Coram Rege de Banco Exchequer, Assize Quo Warranto, and Gaol Delivery, and Recovery Rolls, down only to the period of the end of James I. There are approximately no less than 1,347,680 sheets of parchment, certainly over a million and a quarter; most of them are written on both sides, and, perhaps, each contain on the average the entry of some 25 cases or actions, so that we have, down to this period, a record of some 60 or 70 millions of cases. In this collection, how many unknown surnames would appear, and how many names of places more diamonds and rubies for philologists and topographers than even the credulous shareholders of the Pyramid Range Company hoped to obtain.

We can form some estimate of the total number of names from a computation of the number in the works already published. In Agardes's work, which only goes down to the end of Edward I, and which only contains extracts, not indeed a tithe of the true number, from 11,460 membranes, we find about 7,000 names of places, and about 12,000 names of persons, the Rolls themselves containing fully 20 times as many of the latter, and many more of the former. We can obtain a much more exact measure from the few rolls Sir Francis Palgrave has published. He gives in 59 Rolls about 13,300 names of persons and places mixed together, the latter much the smallest number. These 59 Rolls are contained in about twelve pages of Agardes's work, whilst they occupy 453 of Sir F. Palgrave's; so that it is seen at once how very imperfect is the former.

It will be said, that it is impossible to do any good with such an enormous mass of documents, that they are too numerous even to be indexed. Space will not allow a full consideration of the subject in this article, but it may be suggested that, at any rate some portion may be dealt with, and that it would be a grand thing if the Rolls for the reigns of the Plantagenets were at any rate indexed, and most of them printed verbatim; indeed, the early portion of them might almost as cheaply be printed in full.

There are about 370,500 membranes for the Plantagenet period, of which, perhaps the least valuable, some 285,000, are Common Pleas. The Queen's Bench gives about 55,000 during this period, which certainly ought to be indexed, and the greater part printed in full? What other records have we except fines, which indeed are supplementary to them, of their date and value? At any rate, then, the whole of the Queen's Bench records for the reigns of Richard and John ought to be printed in full. The other courts have no records till the reign of Henry III., when the Parliamentary Rolls commence, and no other country in the world can produce its rolls of legal records till long after. The French only begin their series about 1254, and Germany not probably for several centuries afterwards. Is it not a disgrace to us that we do not publish these noble monuments of antiquity? Oh, but there is the cost. Why, the cost would be a trifle, for copies might well be disposed of nearly sufficient to pay for the expense. Poor John Bull would only be required to lay out the money in the first instance; it would soon flow back into his coffers, and his sons would more than repay it by the knowledge they would thus attain of their country's greatness and their own inheritance. The two reigns above mentioned might be printed in three volumes, and the whole period of the Plantagenet series in about twenty-five. They must be good stout volumes, of course, full of matter, and not made up for sale. Who will venture to start the work, and how is it to be done?

PYM YEATMAN.

VII.—EARLY HISTORY OF INSTITUTIONS.*

A WORK from the pen of Sir Henry Maine will be hailed with pleasure by all lovers of archaic lore. He has a peculiar facility for expounding matters of this kind. His language is light and refreshing—"It droppeth as the gentle dew, &c."—and the reader closes the book in doubt whether to class it as a literary romance, or as an elegant treatise on early jurisprudence. We readily do homage at the shrine of so popular a deity; yet, although the leading doctrines of our author long since received ample acceptance and reverence in the pages of the *Law Magazine and Review*, yet, on the present occasion, not feeling bound by the precedent, we are constrained to express doubt as to the soundness of some of the author's general principles of antiquarian investigation.

The school in which he has been educated, or rather of which he has been *magna pars*, are strict followers of Locke, or rather of Condillac; for Locke really did not curtail the human mind of any portion of its just prerogatives. His philosophic successors, however, have greatly narrowed the lines he laid down. This is perceptible in Austin, but is eminently conspicuous in the works of Sir H. Maine. For instance, the notion that a contract could not be readily excogitated by the savage or half-civilised mind, until experiment, or rather accident, suggested the idea, seems to imply that the mind is so exceedingly blank of ideas prior to actual experience, as to indicate that man is but a superior order of brute. What Condillac and his followers have done directly Sir H. Maine and his followers are doing indirectly. They limit unduly the faculties of the mind, and accordingly they attach much importance to the historic method of in-

* Lectures on the Early History of Institutions, by Sir Henry Sumner Maine, K.C.S.I., LL.D., F.R.S., author of "Ancient Law and Village Communities in the East and West." London: John Murray, 1875.

vestigating jural rights. The primary ideals of these rights, however, are indicated by reason and conscience, or *à priori*, much better than they are by any system of ancient law, not even excepting that of Rome. A system of law, such as exists now in most civilised states, could readily be invented by a Solon, a Justinian, or an Edward the First. The human mind, even in the savage, is endowed with all the faculties for good or evil which the European enjoys. This is a truth which the President of the United States would readily endorse. Why, then, should we have recourse to roundabout methods for showing how property, contract, and individual rights first became recognised among communities. It is interesting, indeed, to trace the progress of jural civilisation. But the development has been owing more to the action of the human mind itself, and its drawing on the precious reserve stored in its own inner consciousness, rather than to any notes of hand presented to it by the course of events. We are at issue, then, with Sir Henry Maine as regards the stability of his first foundation. He rests it on experience or accident; we ascribe it to the action of the human mind—to the Olympian reason to which Sophockles refers in the Œdipus Rex as the original oracle that issued its rules to States and individuals. The difficulty, therefore, according to our view, is not to account for the institution of property at a certain date or era in the natural history of a State, but rather to account for its absence until then. If all ancient societies possess their land in common, political economy suggests the answer. When good land is plentiful in proportion to the population, there is no appropriation of it. But is there no several property in oxen and other stock? Is not the history of Abraham and Lot, of Jacob and Esau, as ancient as any which our author has investigated? But in those days there was private property in goods and chattels, aye, and in persons too. If, then, there was property in one description of wealth, why not in another, if the

circumstances of the country required such an institution? To a Darwinian it must be highly interesting to trace the gradual growth of a jural system by successive accretions; but to those who have a higher opinion of the human faculties, the chief difficulty respecting the point under inquiry—the rise of institutions suited to a particular time and place—is to account for their absence one year after their expediency should have become manifest to all concerned.

But, though differing from Sir Henry Maine, as regards his primary, though usually implied, postulates, yet we willingly give him credit for the general success with which he has treated details. The style of the building is romantic, while we should prefer the classic, but the profusion of ornament, the delicateness of the tracery, and the homage paid to nature if not to a higher legislation, almost compensate for the original defect. Indeed, to most students of jurisprudence our author's opinions will appear mere truisms. His are the received doctrines; nor while evolution is paraded as the teaching of science is there any probability that any theories founded upon what is known as the sensual philosophy will suffer in popularity. This criticism of ours on so eminent a writer is offered with reluctance, and only through a sense of duty. However his eloquence and sometimes the novelty of his views and correlations, it must be admitted by all, arrest attention and command a certain degree of admiration or awe, if not of approbation or assent. Fascination is the characteristic result of a perusal of any of Sir Henry Maine's works, and the present one may be found quite as effective in this respect as the very philosophic and elaborate treatise on "Ancient Law."

That village communities have existed from the earliest times down to the present, does not appear to be a fact of very great importance. What inference of value can be drawn from it? That a village community in its corporate capacity, and not in its individual members, possesses property in land

at the present time in Russia and India, merely indicates that those tribes are nomadic, and have no real property in the soil. We learn from the Œdipus Rex of Sophockles, that at the period when the oracular monarch was born, the shepherds of the district removed their flocks to various districts, according to the changes of the seasons. There is nothing strange in this. The author and other jurists, however, of the highest eminence, dwell upon the fact as if it could possibly lead to the solution of any jural difficulty of the present day. The principles which they advocate, it seems, have actually received a judicial sanction in the case of *Warwick* v. *Queen's College, Oxford*, 6 Law Rep., Ch. App. 716. "It appears to me," says the author, "to recognise the traces of a state of things older than the theoretical basis of English Real Property Law." It is unwise to plough too deeply. The soil turned up, though venerable for its antiquity, will not produce much fruit. Our Common Law is Norman, and any Saxon custom, not prescriptive in the district, will only confuse the English lawyer if he attends to it. *A fortiori* nomadic regulations of society may possess interest for the antiquary, but for the judge or practitioner, they cannot have much use. Granting that an association of villeins may have been organized, not so often "on the ordinary type of the village community, as on that of the house community," and so not to be subject to the rules of escheat, yet to deduce any general principle of law from that circumstance, would be to build on a very narrow and accidental foundation.

The ancient laws of Ireland have furnished our author with a copious number of texts. Yet it is doubtful whether the utility of his conclusions, is—to use an economic phrase—worth the cost of their production. "The laws, I need scarcely say, are full of technical expressions; and the greatest scholar who has not had a legal training—and indeed, up to a certain point, when he has had a legal training—may fail to catch the exact excess or defect of meaning

which distinguishes a word in popular use from the same word employed technically. Such considerations suggest the greatest possible caution in dealing with this body of rules." Now we here wish to make a practical observation with respect to the study of those writings of the author, and of other investigators of antiquity, that have endeavoured to ascend high in the stream of time. Are candidates for admission to the bar to be induced, by means of studentships, to devote the best years of their lives to learning antiquarian matters of this kind? The Roman Civil Law has furnished many of the rules of our equity jurisprudence, and even of our Common Law. That body of law, therefore, is properly enough placed before the student as deserving of investigation. But if he is plunged into a labyrinth of metaphysical speculation, respecting the origin of the ideas of property and contract, as described in very ancient laws, when, we may ask, will he be able to argue a point arising under the High Court of Justice Act, 1873?

It is not at all to be regretted that the writer has skipped over some difficult leaves in the Brehon collection, and thus "avoided some promising lines of enquiry which would lead us through passages of doubtful signification," even though "this ancient Irish code would correspond historically to the Twelve Tables of Rome, and to many similar bodies of written rules which appear in the early history of Aryan societies." Sir H. Maine, however, favours this code with a character which ought to be the more highly esteemed for the judicial reserve, with which the panegyric is pronounced. There is, it appears, uncertainty even in ancient Irish law, and it may not, after all, "correspond historically to the Twelve Tables of Rome." For "there is reason to think that its claims to antiquity cannot be sustained to their full extent, and that the code itself is an accretion of rules which clustered round an older nucleus." This discovery must have affected the author as much as if a geologist found sea-

shells in a stratum that, according to his theory, was never washed by ocean. Juridical interpretation or equity is a means used by every society to amplify its legal system. What wonder, therefore, is it if the Brehon code is largely of a judge-made character, and that, on the other hand, it never was much encrusted by positive legislation? The author thinks that these laws were essentially Aryan and savoured but little of Roman jurisprudence. That, however, is not likely, if they were not older than the eleventh century, as he suggests, since Ireland was in communion with the see of Rome long before that time. The Senchus Mor, one of the chief of the Brehon law tracts, professes to have been compiled under the auspices of Saint Patrick in the fifth century. Sir F. Maine rejects this date, though it is perhaps as probable as any other. However, we certainly defer to him wholly on this question, as also on the ethnological one that the Irish, English, and Hindoos are all descended from a common Aryan stock. We ourselves never doubted that they were all the progeny of Noah, whether his family be termed Aryan or not.

It is impossible not to be fascinated with the charms of a writer that can attach interest to so impractical a system of law as the Brehon code. It was developed, it seems, through a process, not unknown to modern Indian codes, not by "the decisions of courts, but by the opinions of lawyers on hypothetical states of fact." Its utility to the student of comparative jurisprudence may be inferred from the facts that "it has some analogies with the Roman law of the earliest times, some with Scandinavian law, some with the law of the Sclavonic races, so far as it is known, some (and these particularly strong) with the Hindoo law, and quite enough with old German law of all kinds, to render valueless, for scientific purposes, the comparison which the English observers so constantly institute with the laws of England." As "the government of India, by the English,

has been rendered appreciably easier by the discoveries which have brought home to the educated of both races the common Aryan parentage of Englishman and Hindoo," so it is to be hoped that the government of all the British isles will for similar reasons be the more facile in future. We should not like, however, to estimate the probability—to use the language of the late Mr. Mill—of such an event. There is, nevertheless, much truth in the author's remark that the laws of those, nations untouched by Roman legislation, will show more features of mutual resemblance than the States of central Europe whose primitive jural strata were turned upside down by the edicts and constitutions of Imperial Rome. Unfortunately, however, the Senchus Mor is professedly founded on the canon law, so that even here a pure Archaic type is not had.

The confusion of legislative and judicial functions in early times is well pointed out by the author. Indeed, the phrase, High Court of Parliament, shows that even the Norman legislature was at first largely of a judicial character. As regards the Druids, "there has been so much wild speculation and assertion about Druids and Druidical antiquities, that the whole subject seems to be considered as almost beyond the pale of serious discussion." The Brehon laws, indeed, owing to their humane and Christian character, certainly are worth some study; the author's labours accordingly, are not unattended with useful results, even in this remote region of enquiry. What must strike the reader, however, with surprise, is, that such acute discernment, or rather such splendid genius, could be devoted to the investigation of the analogies and resemblances of various bodies of Aryan laws, which really can prove nothing but that their authors had reason and speech.

The Brehons, it seems, were hereditary juris-consults, who, nevertheless, readily communicated their knowledge. Indeed, they anticipated c ases by giving judgments on hypothetical

statements of facts—a practice which Sir H. Maine thinks might have been formerly adopted to good purpose by the English courts. The complaint of the present day, however, is the voluminousness of our reports. This objection, indeed, takes an erroneous estimate of the importance of case-law; it is the only certain kind of law, since every statute must be expounded with reference to extraneous general rules, as well as according to its subject matter, remedial or penal character, &c. The Brehons do not appear to have had force at their command; they, therefore, appealed to supernatural sanctions. One of their modes of procedure was to direct a creditor to fast on his debtor, in other words, to go near the debtor's house and remain there fasting until death terminated the ordeal. This practice still prevails in India. The person fasted against is supposed to be doomed to a supernatural infliction. In India, a Brahmin is paid to fast, which, of course, facilitates a compromise.

The Brehon code, besides its supernatural penalties, contains, it appears, some rules regarding civil wrongs with the measures of damages, and even for estimating contributory negligence. It does not even disdain to take notice of tricks of the fancy—"Four pages of the 'Book of Aichill' (a very large proportion of an ancient body of law), are concerned with injuries received from dogs in dog fights; and they set forth in the most elaborate way, the modification of the governing rule required in the case of the owners—in the case of the spectators—in the case of the 'impartial interposer.'" &c.

Sir Henry Maine observes that in ancient law the facts are usually assumed by the judges to be easily discoverable. The contrary, we think, is indicated by their having recourse to ordeals and supernatural machinery. Our difficulties are, at all events, facts or their evidence, and though Bentham's suggestions on this head have been freely adopted by our legislature, yet a just verdict is as hard to be arrived at as ever.

The Brehons, like the Brahmins and Druids, had occasionally an eye to business, and wrote out a chapter, it may be, or two, on their own rights and dignity. They doubtless had several affinities with ourselves. "The fines payable for injury to them, and their rights of feasting at the expense of other classes (a form of right which will demand much attention from us hereafter), are adjusted to those of bishops and kings." Their rights of fasting at the expense of other classes, doubtless, have passed to King's Inn, Dublin, though whether there is any more remarkable similarity between the Irish laws of 1875, and the Brehon code, than there is between the feasts of those times, and the eating of dinners during term at present, is a question we should not like to be required to solve.

Modern jurists seem surprised at finding "the conception of a contract" or "the conception of a will" in early jural strata. To our mind these conceptions are as natural as conveyances or as speech. The Brehons, indeed, do not appear to have applied the rules of logic to their classification of contracts. "How many kinds of contract are there?" asks the Brehon text-writer. "Two," is the answer; "a valid contract and an invalid contract."

That kinship is the first and earliest basis of society there is no doubt. The substitution of territory for race as the basis of national union is even slow. The relation of Brehon law to these and other similar points are doubtless interesting subjects of inquiry. Our author suggests with some humour that the neglect of the Brehon laws by the English may be one of the Celtic grievances. If so, the author has more than discharged that national debt. His work has disentombed the Brehon code, and every one that reads this book will doubtless take a new intereet in laws that received so much attention from so learned and charming a writer. His philosophy is certainly calculated to impress his readers with low ideas of the human intelligence in early times. But, waiving this tendency, the moral tone of the work is in

keeping with the elevation of thought and expression that marks it throughout.

The tribal origin of guilds is a question we wish to avoid discussing. Dr. Sullivan, it appears, "claims for the word itself a Celtic etymology, and he traces the institution to the grazing partnerships common among the ancient Irish. Our opinion on an antiquarian question may not be as valuable as Dr. Sullivan's or the author's, yet we cannot readily think that brethren of the same craft so call themselves because originally craftsmen were really relatives. Poverty of language is the reason why terms denoting relationships are used to mark other species of affinity.

Our author thinks that Blackstone could not have read Gaius, and consequently that the cast-iron rules which governed the *legis actiones* and our law of distress arose logically from similar states of facts. This is likely enough. But it is equally certain that Blackstone commented upon laws which were thoroughly known to his predecessors, the Glanvils and Bractons of the early Norman period. Comparative jurisprudence, however, is not a subject that the practitioner can study very deeply, since the difficulties peculiar to his own system are sufficiently troublesome. The author's criticisms on Austin and Bentham, indeed, will be read with pleasure in connection with this question. He adds that "the historical theories commonly received among English lawyers have done so much harm not only to the study of law, but to the study of history, that an account of the origin and growth of our legal system founded on the examination of new materials and the re-examination of old ones, is perhaps the most urgently needed of all additions to English knowledge. But next to a new history of law, what we most require is a new philosophy of law." We fear that the brevity of life is incompatible with the magnitude of such researches. As to new philosophies and new codes, we think the old ones are more than sufficiently copious.

Claudite jam rivos pueri sat prata biberunt.

Owing to pressure on our space, we are compelled to pass over several passages in Sir Henry Maine's work that would deserve extended annotation. Every page, nay, every sentence, deserves attention, and commands interest. It must enchant the antiquary with delight, though to those who regard antiquity in its mental characteristics, its poetry, literature, science, philosophy, and law, as essentially like what the 16th century is producing, an elaborate disquisition on real or seeming analogies seems so much labour lost. As, however, the author might not work at all, or at least not so much in less devious paths, all will rejoice that he is having his way, and throwing up fireworks that shed a halo of intelligence around the jurisconsult of the olden time.

The philosophy of jural romance is cultivated in these pages with an eloquence and felicity of illustration unknown, perhaps, to any other law book of ancient or modern times. We do not concur with Sir Henry Maine's views: even were they all true, they do not appear to us to have the slightest practical value. Shall we willingly do homage to the success with which he has executed his task? Never were there so many pages of a legal treatise fraught with so much interesting matter. The language, the prevading sentiment, the breadth of view continually displayed, the variety of remote images all grouped together amid an ever varying play of colours, all indicate this book to be the production of a philosopher and poet of a very high order. There is, however, an almost impassible gulph between the intellectual treasures here unfolded to view, and the jural wants of the present age. Sir Henry Maine may have the faculty of re-arranging and codifying laws; he certainly has a taste for perceiving their mutual analogies, even under the most untoward circumstances. But what is wanted at the present time is the surgical knife to cut off useless adornments, and to amputate without hesitation. The critical, not the poetic faculty, is what is best calculated to re-arrange the practical rules of English law.

BOOK REVIEWS.

De Laudibus Legum Angliae. By Thomas (Fortescue) Lord Clermont. Cincinnati: Robert Clark and Co. London: Lockwood and Co. 1874.—This is a reprint of a very celebrated English legal classic. We had occasion, some few months ago, to refer in the terms of praise and encouragement to some other similar reprints by the same publishers, namely, Montesquieu's *Spirit of Laws* and St. Germain's *Doctor and Student;* and the reprint which is now before us is equally deserving of being spoken of in the like terms of commendation. But the present reprint is even more deserving than any of the others; for it is possessed of merits of a singular character. The English edition, which was brought out by Mr. Amos, of the Temple, in 1825, has been hitherto the only translation of the work available for the general reader; but the present edition is founded upon not Mr. Amos's translation, but upon a very rare and accurate edition which was brought out some years ago by Lord Clermont, himself a lineal descendant of the illustrious author. The publishers have also carefully examined and compared that edition with the better known translation of Mr. Amos, and they have retained and re-produced all the notes of Mr. Amos. They have also prefixed Lord Clermont's life of the author—a more complete biography than any heretofore published. The American reprint has thus endeavoured to combine, and, in our own opinion, based upon a careful examination of the volume, has succeeded in combining, as well all that can possess an antiquarian interest, as also all that is likely to be valuable in the translation and commentary of a professional lawyer. It is a happy combination of the *dulce* with the *utile*, and cannot fail to be welcome alike in the library of the drawing room or of the club, and in the office of the lawyer. The exterior and general get-up of the book are all that can be desired.

It is of course well known that the illustrious author was Chancellor to King Henry the Sixth, and that while that prince was in exile during the unhappy distractions of the period the author occupied his enforced leisure in the tuition of his royal master. He instils into his pupil's mind the celebrated distinction between governments "regal and political," to wit, between

absolute and limited monarchies; he discourses also of the law of nature and of the relation thereto of the law of England, customary and statutory; he descends into the numerous details of the English jurisprudence, as well in its procedure as in its principles or maxims, *e.g.*, the division into counties and the functions of the sheriffs therein, the constitution of the various courts with the officers thereof, the principle of the non-legitimation of children by the subsequent intermarriage of their parents, the maxim, "partus sequitur ventrem," and such like matters. Now, the discussion of such matters is beneficial in many ways. For although, it is true, that philosophical jurisprudence has largely developed and almost undergone a new birth since the period when Fortescue wrote, and that many of our author's reflections must, therefore, of necessity appear puerile if not sometimes ridiculous to our understandings, nevertheless the opinions of antiquity possess an instructiveness that is peculiarly their own, to all those who study to acquire an intimate knowledge of our laws. The treatise *de laudibus* possesses this merit in a high degree, presenting, as it does, and in an interesting and sympathetic manner, a picture of the then condition of the country in its political, religious, moral, and even physical aspects as bearing upon jurisprudence. It is from works of this kind that the origin and true significance of our national laws is to be discovered; and such is the agreeable character of our author's style that it attracts to the study of jurisprudence the minds of all reflecting men who are in any way concerned either with politics or with law. It cannot well be called a useless or unimportant task to have laboured for the preservation of those simple and intelligible truths which lie at the basis of every national system of government or of jurisprudence. And it speaks well, and augurs hopefully, for the greatness and the stability of the Republic of the West, that the enterprise of its publishers should find encouragement from its people in the reproduction of the infant traces of its civilization as they lie embodied in the well-nigh forgotten works of our own early jurists. American institutions, when corrected by the past, can hardly fail of that moderate progression which is the guarantee of permanence; and the community between American and English feeling is perpetuated more surely, or at all events not less, by reprints like the present than by the intimate commercial relations of modern intercourse and commerce, We commend this reprint very heartily to every one possessed of a refined or curious taste.

THE LAW OF BUILDING SOCIETIES, comprising Societies under the Act of 1874; Societies under the Act of 1836 (6 & 7 Will. IV. cap. 32); Societies under the Act of 1871 (Industrial and Provident Land Societies); and Societies not registered: with model rules, a practical introduction, a digest of the statutes and cases, and a copious index. By Arthur Scratchley, M.A., barrister-at-law, and E. Brabrook, Assistant Registrar of Friendly Societies in England. (London: Shaw and Sons, Fetter-lane and Crane-court. 1875).—A work upon this subject, attested with these names, ought to be one of the safest guides through the intricacies of this branch of law. The Legislature, in dealing with the law of Building Societies, refrained from consolidating it in the new Act (37 & 38 Vict. c. 42), as we always maintained, should have been done; and in consequence of this omission to effect the readiest means of simplifying the law, the various statutes are in many cases very difficult of reconciliation, if not contradictory. To all persons interested in Building Societies, whether as members or their advisers, this handy and complete text-book will prove itself invaluable. It contains, besides the whole of the unrepealed statute law on Building Societies, with explanatory foot-notes, an alphabetical digest of the law as it now stands, including all those cases which are applicable to it in its altered state. There are also included model rules and regulations for Permanent and other Building Societies. One of the most important recent cases affecting Buildiug Societies is that *Re Goldsmith, ex parte Osborne*, which decided that a condition that on a sale all moneys which would afterwards become due "shall immediately become due and payable," was held not to include prospective interest. This case is treated of in the Digest under "Power of sale moneys immediately due and payable." It will be remembered that this was the case of a member of a Building Society who, having received an advance repayable by monthly instalments, within a certain period, was adjudicated bankrupt, and whose property was sold upon making default in the payment of his instalments. The Society claimed to retain their costs and all fines due before the sale, and also all the instalments which would become due in respect of the money advanced, if repayment had been made in the natural course over the whole period, and this the registrar decided that they were entitled to do. The trustee under the bankruptcy appealed, and the Court held that upon the sale the costs and everything then due in respect of past instalments and

fines must be paid to the Society, and then it must be ascertained how much of the monthly payments represented principal and how much interest, and the balance of the principal which, upon that footing remained unpaid, must then be paid out of the sale moneys to the Society.

Mention is made in the introduction of the work to a specimen of the curious accidents which sometimes occur in the progress of legislation. While the bill was in progress in the House of Lords an inversion of the words in section 8 was unintentionally made, which has been, and will continue to be, unless a special Act of Parliament is passed to remove it, a source of considerable difficulty. The clause, as prepared by the draftsman, read—"Every Society, the rules of which have been certified under the said repealed Act, may obtain a certificate of incorporation under this Act, and thereupon shall be deemed to be a Society under this Act, and its rules shall," &c. The clause in the Act reads—"Every Society, the rules of which have been certified under the said repealed Act, shall be deemed to be a Society under this Act, and may obtain a certificate of incorporation under this Act, and thereupon its rules," &c.

Another of the difficulties which have arisen since the passing of the Act, which is entitled, "An Act to Consolidate and Amend the Laws relating to Building Societies," is that with reference to stamps upon mortgages. In the case of existing Societies, which remain unincorporated, an official opinion obtains "that a subsisting Society, certified under 6 & 7 Will. IV., c. 32, will, until it shall have obtained a certificate of incorporation under the Building Societies' Act, 1874, be entitled to exemption from stamp duty according to the law now in force." So that it becomes a matter of election with a Society certified under the old Act whether its mortgages shall continue exempt from stamp duty, or give up the exemption and become incorporated under the new Act. For a complete exposition of the law upon the subject, and valuable opinions upon disputed points, we refer inquirers to the work of Messrs. Scratchley and Brabrook.

CHRONOLOGICAL TABLE AND INDEX OF THE STATUTES, third Edition, to the end of the Session 1874, 37 & 38 Victoria. To which is appended a Table showing the extent to which the public Acts of the period comprised in Vols. I. to V. (inclusive) of the revised edition of the Statutes have been repealed by Acts passed subsequently to the publication of those volumes. By

Authority. (London: Eyre and Spottiswoode. 1874.) This is a new edition of the Index to the Statutes, being the third that has appeared since the first publication of the Revision, in 1870. The volume, like its predecessors, contain two works which, though separate, are arranged for combined use. The first is the table, arranged in the order of date, and includes the statutes to the end of last Session, and embodies all the alterations rendered necessary by legislation subsequent to the date of the second edition. The second edition was published in the beginning of 1873, and the present at the end of 1874, each about two years apart. For the future we are to have a new edition every year, which will be a great boon to practical lawyers who have to work up the law upon a variety of subjects. To the present edition is appended a title, showing the extent to which the public Acts of the period, comprised in previous volumes, have been repealed by Acts passed subsequently, and a similar table will be published each year. The work is one of great practical utility, and no law library could be anything like complete without it.

THE LAW OF ADULTERATIONS. Being a practical treatise on the Acts for the prevention of Adulteration of Food, Drink, and Drugs. With an Appendix containing the Adulteration of Food Acts, 1860 and 1872, (23 & 24 Vict. c. 84, and 35 & 36 Vict. c. 74,) by Sidney Woolfe, Esq., of the Middle Temple, barrister at law. (London: Stevens & Sons, 119, Chancery Lane, Law Booksellers and Publishers. 1874.) This is a small volume of 70 pages, which, pending legislation, the author hopes will indicate, in the form of a practical treatise, the law of adulteration as it now exists, by contributing in some small degree to its better appreciation and speedy amendment. To Medical Officers of Health, Public Analysts, and others concerned in carrying out the adulteration Acts, the work will be most useful, as it is confined exclusively to the subject of adulteration, and cites the various statutes and precedents bearing on particular points. Till the present law is better defined by further legislation, it may be well to hold on till a better opportunity is afforded of dealing more fully with the subject. There is a good deal of magisterial law that could be brought to bear upon the subject, which would be invaluable to the class of readers referred to, many of whom are deterred from bringing notorious cases of fraud forward, on account of the indefinite state of the law, and the diversity of opinion on the bench.

EXAMINATIONS AT THE INCORPORATED LAW SOCIETY.

Michaelmas Term, 1874.—At the final examination of candidates for admission on the roll of attorneys and solicitors of the Superior Courts, the examiners recommend the following gentlemen, under the age of 26, as being entitled to honorary distinction:—Alfred Wallis,; Roger Eustace Perry; Joseph Brough; John Hands. The Council of the Incorporated Law Society have accordingly awarded the following prizes of books:—To Mr. Wallis, the prize of the Honourable Society of Clifford's Inn; to Mr. Perry, the prize of the Honourable Society of Clement's Inn; to Mr. Brough and Mr. Hands, prizes of the Incorporated Law Society. The examiners have also certified that the candidates, under the age of 26, passed examinations which entitle them to commendation:—Francis Henry Bruges; Percy Holmes; Edwin Peed James; John Edwin Lees; Reginald Carter Nelson; George Henry Norris; Edward Shaw; George Henry Woolley. The Council have accordingly awarded them certificates of merit. The examiners have also announced to the following candidates that their answers to the questions at the examination were highly satisfactory, and would have entitled them to prizes if they had not been above the age of 26:—George William Haines; John Vernon. The number of candidates examined in this term was 170; of these, 139 passed, and 31 were postponed.

BAR EXAMINATION.

At a general examination of the students of the Inns of Court held at Lincoln's Inn Hall on the 1st, 2nd, 4th, 5th, and 6th inst., the Council of Legal Education awarded to Messrs. Edward Cuming, of the Middle Temple, and Walter Ross Phillips, of the Inner Temple, Studentships in Jurisprudence and Roman Civil Law, of 100 guineas, to continue for a period of two years; to Messrs. David Brynmôr Jones, of the Middle Temple, and Arthur Hewett Spokes, of the Middle Temple, Studentships in Jurisprudence and Roman Civil Law, of 100 guineas, for one year. The Council also awarded to Messrs. John Coussmaker Anderson, of the Inner Temple; Ponambalam Arunasalam, of Lincoln's Inn; Llewellyn Archer, Atherley-Jones, Horace Edmund Avory,

William Baker, Henry Dawes Bonsey, and Henry Cooke, of the Inner Temple; James Henry Deakin, of the Middle Temple; William Henry Dyer, of Lincoln's Inn; Arthur Becher Ellicott, of the Middle Temple; James Herbert Fellowes, of the Inner Temple; John Alderson Foote, of Lincoln's Inn; Athelstane Braxton Hicks, of the Middle Temple; Leigh Hoskyns, of Lincoln's Inn; William Blake Johnson, of the Inner Temple; George Wellington Langdon, of Lincoln's Inn; Edward Legge, of the Middle Temple; William Harry Barber Lindsell, of Lincoln's Inn; Pramatha Natha Mittra, of the Middle Temple; Robert Gray Cornish Mowbray, of the Inner Temple; John Allen Mylrea, of Lincoln's Inn; Ebenezer Nash, of the Middle Temple; Emilius St. Clare O'Malley, of Lincoln's Inn; Alfred Edmund Packe, of Lincoln's Inn; Henry Frederick Punkett, of Lincoln's Inn; Henry Priestley, of the Middle Temple; John Foster Reed, of Gray's Inn; Harry Inglis Richmond, of Lincoln's Inn; and Charles Henry Witts Woodroffe, of Lincoln's Inn, certificates that they have satisfactorily passed a public examination.

APPOINTMENTS.

The Queen has been pleased to confer the honour of Knighthood on Mr. J. G. Innes, Attorney-General of New South Wales, for his services in connection with the cession of the Fiji Islands; Sir William Pollock, senior Master of the Court of Exchequer has been appointed Queen's Remembrancer; Mr. T. Campbell Foster, Recorder of Warwick; Mr. William Cooper, Recorder of Ipswich; Mr. Robert Pryor, barrister-at-law, Deputy Chairman of Quarter Sessions for the St. Alban's division, Hertfordshire; Mr. Herbert Monckton, Town Clerk of Maidstone. *Ireland.*—The Right Hon. John Thomas Ball has been sworn in as Lord High Chancellor of Ireland. *India.*—Mr. John Marriott, barrister-at-law, has been appointed to act as Judge of the High Court of Bombay; the Hon. Sir Charles Sargent, senior puisne Judge of the High Court of Judicature at Bombay, as acting chief justice of that court, in the absence of Sir M. R. Westropp. *Egypt.*—Mr. Charles Alfred Cookson, barrister-at-law, has been appointed Her Majesty's Consul at Alexandria and Judge of Her Majesty's Chief Consular Court for Egypt. *Leeward Islands.*—Mr. R. F, Sheriff has been appointed Attorney-General; and Mr. J. Bengall Martin, one of Her Majesty's Counsel for the Islands.

MUNICIPALITY of LONDON.—Creation of Municipality and County of London—Extension of the Jurisdiction and Limits of the Corporation of the City of London and of the Limits of the County of the City of London—Alteration and Consolidation of Institutions—Dissolution or Alteration of the Constitution and Name of existing Public Bodies within the Metropolis—Amendment of Acts, and other purposes.

NOTICE IS HEREBY GIVEN, that APPLICATION is intended to be made to PARLIAMENT in the ensuing Session for leave to bring in a BILL and to pass an Act for the following (amongst other) objects or purposes, that is to say:

To extend the jurisdiction of the Corporation of the City of London to the Metropolis, as defined by an Act passed in the 18th and 19th years of the reign of her present Majesty, cap. 120, for the better local management of the metropolis (hereinafter called "The Metropolis Local Management Act, 1855), or to such other limits as Parliament may fix, and to create a county of London, and to enact that the area within such extended limits shall be governed by one municipal body, or by such body or bodies as Parliament shall approve, who shall be incorporated under the name or designation of "The Municipality of London," or such other name or designation as Parliament shall think fit.

To vest in the new Corporation all rates, duties, tolls, revenues, real and personal estate, charters, and customs of the City of London, and all rights, gifts, grants, liberties, and privileges, franchises, usages, constitutions, prescriptions, immunities, Acts, bye-laws, and standing orders which at the commencement of the intended Act shall be vested in the mayor, aldermen, and commonalty, or the mayor, commonalty, and citizens of the City of London, or in the Common Council, or in the Court of Alderman of the City of London, or any committees, trustees, or persons acting under the direction of or in connection with the said mayor, aldermen, and commons, and to constitute a council, committee, or other separate body, for any purpose to be mentioned in the intended Act.

To transfer to and vest in the New Corporation all or some of the functions, powers, authorities, rates and tolls, duties, revenues, and real and personal estates whatsoever, which at the commencement of the intended Act shall be vested in the Corporation of the city of Westminster, the Metropolitan Board of Works, vestries, district boards, and other public bodies, within the limits aforesaid, and to enable the new Corporation to use, exercise, and enjoy, and be liable for the rates, tolls, duties, revenues, real and personal estates, debts, and obligations of the said Corporation of the city of Westminster, Metropolitan Board of Works, vestries, district boards, and other public bodies, and to enable the new Corporation to levy tolls, rates, duties, and charges, and to repeal, alter, or extinguish existing tolls, rates, duties, and charges.

To define the rights, duties, and privileges of the members of the new Corporation, and of the officers and servants thereof, and to confer on them the duties, and privileges, and to alter and extinguish any existing rights duties and privileges, and to alter the style or title of the officers of the Corporation, to remove officers, and to pay them compensation by way of annuity or otherwise, and to appoint other officers and servants.

To extinguish and annul all rights, powers, privileges, jurisdictions, laws, usages, and customs now or heretofore used, exercised, or enjoyed, or in force within such extended limits or any part of the metropolis and the cities of London and Westminster, and of any extra-parochial and other place within the proposed limits, at the time of the passing of the intended Act, so far as the same shall at all obstruct or interfere with the objects and purposes of the said intended Act.

To reduce the number of councillors elected to the Common Council of the City of London, and to make such other alterations in the constitution of the present governing body within the City of London as Parliament shall think fit.

To extend the limits of the county of the City of London to the limits of the metropolis, as defined by the Metropolis Local Management Act, 1855, or to such other limits as Parliament shall fix, and to declare that the area within such extended limits shall constitute a county of itself, and shall bear the name of the County of London, or such other name as shall be determined by Parliament, and to alter the limits of the counties forming any part of the metropolis, by excluding from such counties respectively such portions as are within the metropolis, and, so far as may be necessary, to repeal, alter, or amend any Act which would interfere with the carrying out of such last-mentioned object.

To transfer to and vest in the new Corporation any hereditaments or personal estate vested in churchwarden or churchwardens, vestries, and district boards, as defined by the Metropolis Local Management Act, 1855, of any parish, or in any person or persons appointed by or on behalf of the said parishioners of the same in trust, or for the benefit of any charitable uses or trust whatever.

To vest in the Corporation and to enable it to exercise all or any of the duties, powers, and authorities vested in the vestry of any parish, or the district board, commissioners, corporations, or body, or in any officer exercising any powers in any district which may be wholly or in part comprised within the limits of the metropolis, and to extinguish the rights and powers of the officers, of vestrymen, and members of district boards, commissioners, corporations, and officers, and of all auditors of accounts, and other public officers exercising any powers within any part of the metropolis.

To appoint justices of the peace, salaried, police, magistrates, and other public officers, and to define their duties and privileges, and to authorise the exercise of police courts and other public buildings, with all necessary conveniences, and incorporate with proposed Act any Acts or Act relating to the government of counties and boroughs, particularly the Acts following, as far as the same are applicable, that is to say:

The Acts of the 5th and 6th year of the reign of his late Majesty King William the 4th, cap. 76, to provide for the regulation of Municipal Corporations in England and Wales, and of all Acts amending the same, and of all other Acts or part of Acts in force for the regulation of Municipal Corporations in England and Wales:

The Metropolis Local Management Act, 1855, and all Acts amending the same, or relating to the Metropolitan Board of Works:

The Act of the 10th year of the reign of his late Majesty King George the 4th, cap. 41, for improving the police in and near the metropolis, and all Acts amending the same, and all other Acts or part of Acts in force for the regulation of the Metropolitan Police Courts, or in relation thereto respectively:

The Towns Improvement Clauses Act, 1847;

The Town Police Clauses Act, 1847;

The Local Government Act, 1858, and all Acts amending the same respectively:

The Lands Clauses Consolidation Act, 1845, and the Lands Clauses Act Amendment Act, 1860; and particularly the Acts following, relating to the City of Westminster:—27th Elizabeth, 24 and 25 Vic., cap. 78; 1st James 2nd, 30th Chas. 2nd, 31st George 2, c. 18, 9th Geo. 4, c. 61, 7th and 8th Geo. 4 cap. 31. and all other Acts altering or amending such last-mentioned Acts.

And the provisions of any other Act which it may be necessary or convenient to incorporate for carrying into complete effect the subjects and purposes of the intended Act, or any of them.

So far as may be necessary for all or any of the subject purposes of the intended Act it is proposed to repeal, alter, amend, extend, and enlarge the powers and provisions of all Acts, charters, grants, licences, powers, and usage within the metropolis, or the limits of the several boundaries proposed and established under the powers of the intended Act, and particularly the Acts following:

Relating to the City of London:—43 Eliz., c. 2, 13 Edwd. 1, c. 5; 11 Geo. 4, c. 18; 24 Geo. 2, c. 48; 25 Geo. 2, c. 30; 12 and 13 Vic., c. 94; 11 and 12 Vic., c. 163; 14 and 15 Vic., c. 91; 1 James 1, c. 21; 8 and 9 Will. 4, c. 32; 6 Anne, c. 16; 57 Geo. 3rd. c. 60; 2 and 3 Vic., c. 94; 29 Geo. 4, c. 6; 20 and 21 Vic., c. 157; 22 and 23 Vic., c. 21; 11 and 12 Vic., c. 116; 27 and 28 Vic., c. 113; 20 and 21 Vic., c. 157; 4 and 5 Will. 4 c. 36; 10 and 11 Vic., c. 51; 15 and 16 Vic., c. 77; and all Acts amending the same, or relating to the Corporation of the City of London.

And Notice is Hereby further Given that in the event of the proposed Act being introduced on petition, printed copies of the said Bill will be deposited in the Private Bill Office of the House of Commons on or before the 21st day of December next. Dated this 16th day of November 1874.

WYATT, HOPKINS, and HOOKER,

23, Parliament street, Westminster.

Parliamentary Agents.

THE

LAW MAGAZINE AND REVIEW.

No. III.—Vol. IV.—March, 1875.

I.—THE LABOUR LAWS COMMISSION.

By John P. O'Hara.

[*Continued.*]

EVERY increase of demand for commodities is an increase of demand for labour. If the commodities are imported, the demand is for foreign labour; but if the demand is for English productions, English prices will rise. Let us suppose that prices in the foreign market for English commodities were doubled; profits here would be more than doubled, and wages would be about doubled; for what would the exporters do with their increased profits but hire fresh labourers? The increased funds in their possession add to the wages fund and the demand for labour. If they lay out their increased gains, which, let us suppose, are a million sterling, in their own trade, wages rise at once in that trade in the proportion which a million bears to the old circulating capital employed in the line, which is assumed to be a million. Wages, therefore, are doubled in the trade. Wages also will finally rise throughout all trades, in the proportion which a million bears to the whole wages fund. The rise of wages in the export trade will attract labour to it. The supply of labour to other trades must then fall off, while the demand for it is as before. Therefore wages rise in all other trades.

Let us suppose the exporters, instead of investing their increased profits in their own trade, embark £500,000 in buying commodities; they raise the prices of these commodities by £500,000. The profits of the dealers in these latter commodities are raised in the proportion which £500,000 bears to the profits previously realised by them. If they buy commodities in turn, the profits of the dealers in this last kind of commodities rise in the proportion which the amount of the new profits bears to the old ones, which will depend on the amount of capital laid out by them on their trade. Their increased profits are laid out by them in hiring labour. The wages fund, therefore, is increased finally by the whole amount of a million sterling, no matter whether the first recipients of that sum buy labour or commodities; for to labour the million will at last come.

A part of increased profits is usually spent unproductively. That amount, of course, is ever afterwards lost to labour. But as the wasteful tendencies of thriving merchants are as much checked in some as they are stimulated in others, by increased profits, the amount spent unproductively may be regarded as bearing a constant proportion to profits, and may, therefore be always eliminated from our inquiry.

This portion, indeed, is to be deducted from the *permanent* additions made to the wages fund by merchants; yet Ricardo, and his school, assert this is the only portion of the million—namely, the portion paid away immediately and directly for labour, even when unproductive—that adds to the wages fund. They are wrong, therefore, even on this point.

So far as increased or any gains or wealth is devoted to buying foreign commodities or luxuries, so far is the wages fund of the nation lessened, though possibly the demand for foreign commodities may, in the respect mentioned, that is, in its effect on the wages fund, be counteracted by an ulterior increase of the foreign demand for English commodities.

When investors in 1845 took shares in railway companies, all the capital exported to Sweden for iron was added to the wages fund for Swedish labour, and diminished the wages fund for English labourers. But every rise in the price of English iron was not an abstraction from the English wages fund, even though the iron was turned into fixed capital; for the iron merchants laid out all their receipts in employing labour or *ex hypothesi*, in buying commodities which were produced by English labour. To call the iron fixed capital is a mere change of nomenclature. Indeed, so far as the funds applied to the purchase of railway shares, that is to say, of iron, were diverted from an unproductive channel, so far did the change of demand add to the permanent wages fund. The question in every case is, whether the purchase is for productive or unproductive purposes, not whether it is of commodities or of labour.

This point requires further elucidation, on account of its intrinsic importance, as also because Ricardo's paradox on the point has been generally accepted. A, let us suppose, is a landlord, who devoted in 1873 £1,000 to the purchase of English-made velvets and lace. In 1874 he changes his demand from buying these luxuries to hiring labour. If the change in his demand is not foreseen, nothing can be more clear than that the prices of velvet and lace fall in the proportion which £1,000 bears to the value of the existing supply of these commodities, or to the amount laid out by other demanders in purchasing them. Prices having fallen so much, the profits of the dealers suffer in the same degree, and they accordingly have £1,000 less the next year to hire labour. Here the demand for labour represented by the landlord's £1,000, is exactly met by a decrease of demand by lace manufacturers to the same amount.

Let us now suppose that the landlord's change of demand is foreseen by the manufacturers of velvet and lace. The question now is slightly more difficult, but admits of an equally demonstrative solution. The manufacturer cannot

hire as much labour as before. There is an abstraction of so much labour from the labour market by the landlord. Consequently the production of velvet and lace, or at least of all commodities together, is necessarily less than it was the preceding year in proportion to the number of labourers abstracted by the landlord. Production being less than it was the preceding year, the wages fund is diminished accordingly in that proportion.

Nor let us suppose that any interval of time elapses in the cases put between the date when the labourers would get the benefit of the landlord's thousand when he bought the commodities and when he hired the labourers directly himself. He could not buy the commodities, indeed, until they were furnished, that is to say, at the end of the year. But neither has he the money to lay out *ex hypothesi* until that date; for we are to assume that he has no money idle or hoarded, but lays it out when it comes in to him. Accordingly as soon as it reaches him, it is paid away to the dealers, who *pari ratione* at once transmit it to the manufacturers, who lay it out immediately on wages, that is, in hiring labour. When the landlord hires the labourers himself directly, he only hires at the end of the year, that is at the time when the commodities in question used to be finished. It is very common for Ricardo and those who adopt all his fancies without any adequate acknowledgment of their authorship to compare the demand of one year with the demand of another. It is true it is not the demand of the landlord that set to work labourers to make the luxurious articles referred to, but neither *ex hypothesi* can he hire labour directly until the date when the manufacture of the lace would be complete. Did he buy these luxuries, then, the delay would be only one of hours, (and not of a whole cycle of production or of a year), until his £1000 fell into the wages fund.

Ricardo's fallacy is founded on the doctrine that industry is limited by capital and not by labour. When men are

withdrawn from producing lace by the landlords' demand, Ricardo imagined that the production of all commodities and of values, and consequently the wages fund, could be as great as before. It is Mr. Mill, indeed, that broadly announced that industry is limited by capital. But Ricardo is the original author of the paradox that a demand for commodities is not a demand for labour, and this fallacy is built on the erroneous assumption that industry is limited by capital and not by labour.

Mr. Mill finally takes the case of A expending all his income in alms, and his successor in the estate expending all his income in consuming luxuries; or, in other words, A directs his tenants to pay their rents in kind and in the shape of corn and provisions for labourers, but B requires the rent, though in kind, yet to consist of luxuries, all of which he consumes himself. Here, says Mr. Mill, is a loss to the recipients of the alms. The case seems like the conversion of circulating capital into fixed. But there is this difference, that the latter cases are both ones of production. But in the case put by Mr. Mill, there is merely a substraction of charity, and no change of the demand for labour to any other demand whatever. It may seem like a change of capital from a productive to an unproductive employment, because the alms-takers virtually employed their incomes in setting persons to work in raising food for them, while that income is now spent unproductively. But the case put by Mr. Mill is not analagous to any change of demand or any purchase or hiring by B. If B gets his rent either in money or kind, and *afterwards* goes into the market for commodities, then indeed there is a case to fit Mr. Mill's doctrine; but if B does so, it is just the same as if he went into the market for labour. He increases the demand for commodities, the prices and profits of the dealers, and the whole amount of the wages fund, by the amount of his purchases. Mr. Mill, however, supposed that in the one case the landlord makes a demand

for labour, and in the other makes a demand for nothing. His argument is a sophism, not at all analagous to the case in which the landlord A hires labour—that is, increases the demand for it; and his successor B buys commodities—that is, increases the demand for them. Mr. Mill, as usual, argues backwards in a way to suit his theory. It is as if one compared not a brother with a brother, or a cousin with a cousin—*pares cum paribus*—but an uncle with a nephew, or a father with a childless person.

A demand for labour, he says, in effect, is better for labourers than a demand—for nothing. Of course it is, and charity, therefore, is always better for them than if the landlord buried his rent, or directed his tenants to pay in kind, and consumed or wasted all the provisions himself. But assume that the tenants employed an equal quantity of labour in both cases prior to their render of the rent, and then assume that, *cæteris paribus*, A hires or demands labour, and B buys commodities. Let us take one step further in both cases, and not merely in one case like Mr. Mill—and it is demonstrative that a demand for commodities is a demand for labour, and that B hires through the agency of his merchants exactly the same number of labourers as A.

There is a vast number of fallacies both of economic doctrine and fact in the following statement of Ricardo:—* "In America and many other countries, where the food of man is easily provided, there is not nearly such great temptation to employ machinery as in England, where food is high, and costs much labour for its production." Now, machinery is used much more extensively in America than in England on account of the dearness of labour, that is the high wages that must be paid to labourers in America. Accordingly in private houses there many services are performed by means of machinery which are in England done by servants. The

* P. 24, ed. 1864.

price of food has nothing to do with wages except where they are at the minimum. Indeed, in the United States the cheapness of raw produce in the wholesale trades, in which wages form but a slight element of cost, is the cause of the general high wages and high profits. For the cheapness of American corn gives it a monopoly in the English market. This gives great profits to the growers, which profits are paid away in wages the next year. As Ricardo's leading position is that wages and profits vary inversely—on which account he strove to cheapen the price of corn by a repeal of the corn laws, even though this led to a diminution of the total national produce—his clumsy system could not help him to perceive the true relations of both wages and profits to prices and the foreign demand, of which profits and wages are the conjoint resultants. He also asserts that "a tax which is supported out of the revenue, and not from the capital of a country, is favourable to the increase of population." Suppose, he says, in effect, the £500 I contribute in taxation is laid out by Government in hiring soldiers, then, if I had not been so taxed, I would have laid out the £500 on books, furniture, &c.; the demand by the soldiers for food, &c., balances my demand for books and furniture. But, he adds, there is over and above this a demand by Government for soldiers. He forgets that the dealers in books and furniture sustain a fall of prices and profits equal in the aggregate to £500, and consequently their demand for labour or the demand of those from whom they buy books and furniture is less exactly by £500, which £500 would be laid out by their labourers in buying food. Owing to Ricardo's view of the antagonist relations of labour and capital, he was even led into the paradox of supposing that improvements in machinery, though beneficial to landlords and capitalists, might prove injurious to labourers. His fallacy is that net revenue can increase without gross income increasing also. This position requires to be fully discussed.

Every industrial improvement increases riches at home, as also values in international trade, and, by cheapening commodities, enables a nation to enjoy more luxuries and to add more to its wealth than it could have done before. The improvement is thus alike beneficial to landlords, capitalists, and labourers; nor can such improvement ever diminish gross produce. A like remark is attributable to the substitution of cattle for men in agriculture or other work. Labour always can command its price, and consequently will constitute an effective demand for gross produce, no matter whether fixed capital or animals used for work consume commodities or not that are also consumed by labourers.

As the whole revenue of a nation, *minus* the sums spent unproductively by the rich, fall into the wages fund, and are paid away directly at last to labourers, wages usually are above the minimum; consequently, labourers either invest their savings or consume luxuries. If they invest their savings, they have a store for the evil day. If they spend their superfluous income on luxuries, this implies that there is room for more population, and that wages are not at the minimum. When their families grow up, therefore—waiving for a moment the fact that every mouth sent into the world is accompanied by two hands—even though the children earned nothing, yet their parents could soon change their demand from buying luxuries for themselves to buying necessaries for their children. Neither demand nor supply is ever wanting to bring to market the necessary stock of corn, assuming that no capital is destroyed, and that the wages fund has only been acted upon by a change of circulating into fixed capital.

With respect to improvements effected in land without any purchase of commodities, Mr. Mill thought that such improvements may be made so as to lead to a diminution of gross produce. As an instance of this he refers to the conversion of arable into pasture in Ireland. This resembles

the making of a permanent improvement, so far as that both may be attended with a reduction of gross produce, and yet be more profitable to the particular agriculturist than the old methods of cultivation. In Ireland, however, the demand for raw produce has declined, owing to the diminution of the population, and this sufficiently explains why the conversion has been made. Free trade has had a similar effect in England, for an increase of the supply of corn is equivalent to a decline of demand, caused by a decrease of population. Both phenomena occasion a reduction of price.

In both Ireland and England, however, the conversion of land from arable into pasture was attended, and in fact preceded and caused, by a greater abundance and cheapness of corn. These instances, therefore, are but srroy proofs of Mr. Mill's position, that the gross produce of the world may decline in consequence of the adoption of machinery and permanent improvements, notwithstanding that population continues stationary; in short, that the labouring classes may be improved out of existence. Never was there a more unphilosophic or unfounded doctrine.

When a farmer turns all his capital into railway shares it is transferred partly to dealers in iron and in the other commodities used in making railroads, and partly, also to engineers, &c. This demand for iron and engineering skill, it has been already explained, does not maintain any past labour either in the iron or engineering trades. But it constitutes a demand for future labour of these descriptions, and gives the capital necessary for employing such labour.

Let us now suppose that the permanent improvement adopted by the farmers is not made by the purchase of any commodities, but by the employment of labour directly. Let us even assume that the supply of gross produce is lessened very much, owing to several farmers executing similar improvements at the same time. What follows next? The price of raw produce rises in proportion as the supply

is diminished. The profits of dealers in raw produce are thus raised beyond the ordinary level of profit. Capital is then necessarily attracted, not to make permanent improvements, but to increasing gross produce, by which alone the unusual profits are realized. The moment that the supply of raw produce is either actually lessened, or even merely threatened with diminution, a contrary force is called into existence, which tends to increase the supply, just in the exact proportion in which it has been, or is likely to be, diminished. This new force is the unusual rate of profit realized by producers and dealers in gross produce; this increased profit adds to the supply of raw produce, and thus draws away capital from other trades to producing supplies of the very commodity, the supply of which was less than the demand, and so yielded unusual prices and profits.

Let us consider this important matter somewhat further. Waiving the practical objection to Mr. Mill's view—for it is never in fact realised—let us assume that a permanent improvement made by A is really attended with a diminution of gross produce. What A has done may be also effected by B and others. Let us, then, suppose that the supply of gross produce is so diminished as to raise its price.

In proportion as the supply of gross produce diminishes the demand for it continuing the same, the price rises. All demand for luxuries will cease until the supply of necessaries is had. Therefore the profits of all concerned in raising gross produce increase. It thus ceases to be their interest to turn their circulating capital into fixed, in proportion as the price rises. Nay, when the price rises, capitalists will transfer their capital from other employments—for instance, from raising luxuries and making machines—to raising gross produce, inasmuch as by the terms of our supposition greater profit can be thus realised than if they continued to raise luxuries or to make machines. This is the only advantage of having capital applied unproductively; whenever the popu-

lation increases and the price of corn and the profit thereon rise, capital is turned from raising luxuries or making machinery to raising corn. Luxuries are thus the safety valve of capital, and prevent over production of necessaries. Private vices are public benefits, not indeed in the way Mandeville imagined, but in keeping capital within the country. The rich are outbid by the poor; the Egyptians are despoiled by a vagrant race, for labour always has value, as it is the source thereof. On every rise of the price of necessaries and the profits thereon, as compared with the prices of luxuries and the profits thereon, capital is transferred to raising necessaries. In a country, therefore, having any capital applied either to the raising of luxuries or even to the making of machinery or other fixed capital, there never can be any real dearth occasioned by the conversion of circulating capital into fixed. But, it may be asked, is there not a temporary diminution of gross produce, and is not this all that is meant by Ricardo and Mr. Mill? I reply that it is not all that is meant by them, and, if it were, there would be no necessity to write paragraphs on the point. They lay down their positions without the exceptions I have mentioned—exceptions which exist universally, and which, therefore, actually prevent beforehand any such adoption of machinery or other permanent improvements as would lead to a scarcity of gross produce.

When a sowing is made in spring, there is less gross produce available than there was in the preceding winter; yet spring is nearer the coming harvest, and no one regards the seed put into the ground as any deduction from rent, wages, or profits. Land allowed to lie fallow for a few years is not considered to indicate a reduction of gross produce. The labourer when asleep is as much a labourer as when he is awake. So with meadow lands, permanent improvements, and rotation of crops. The whole cycle of the rotation of crops must be taken into account. The various successive

crops within this cycle have virtually only a joint cost of production. What right, then, has any one claiming the breadth of view which belongs to a philosopher to assert that gross produce may be diminished because land is allowed to lie fallow for a year or two, or because a permanent improvement has been adopted? Long before the whole cycle of the rotation of crops has been gone through, the incipient dearth has been checked by a hundred different causes.

As capital never can be diverted from producing necessaries to producing luxuries so long as the former are needed, so, *pari ratione*, capital cannot be drawn from raising gross produce to making machines or permanent improvements, so long as a certain amount of gross produce is necessary for the population. The process, as already explained, is obvious. Labourers, when receiving more wages than are necessary, buy luxuries. An increase of population—which is only possible when wages are above the minimum, and when labourers are buying luxuries—raises prices and profits in the provision trades. Capital, therefore, flows from those trades that produce luxuries to those that produce necessaries. If labourers are receiving the minimum rate of wages, no one will direct his capital to producing more luxuries or making more permanent improvements, because in such a case a slight diminution of raw produce would lead to an enormous rise of its price, and the profits thereon; and besides, there can in such a case be no increase of demand for luxuries by the rich, because without an increase of labour there cannot be increased profits, produce, or demand. But if there be an increase of profits, there must, as already shown, be a consequential increase of wages to the same amount. When wages, then, are at the minimum, profits also are at their lowest, and capitalists cannot possibly increase their demand for luxuries without an increased income, which, in point of value, cannot be had without an increase of population, that is, without an increase of gross produce.

Wages are exactly of the same amount as the whole revenue of the nation, *minus* its luxuries. Hence the large sums realized by even a slight tax on luxuries consumed by labourers. It is the same body of wealth that circulates under the different phases of profits, or rather revenue generally, and wages. The labourers, therefore, hold in their hands all the reins for regulating the direction in which capital and production must move. What more could La Commune give? But it would not give so much because it would lessen production. There is no doubt that trades' unions may obtain an advance in the rate of wages not only in one trade, but in all. The wages fund is, indeed, a fixed quantity, but the pivot on which it rests is moveable. Suppose that the wages fund of a country is ten millions sterling, and that the employés in a certain trade obtain by means of a strike more than their usual share of this fund, less no doubt remains in the first instance for others. The producers struck against, by laying out more than they used on wages, buy less of commodities than they used to do. The prices of these articles fall accordingly, and the dealers, thus suffering a reduction of profits and income, employ less labour. Their labourers, therefore, suffer as much as the strikers gained. But as the strikers buy commodities it is only a change of demand after all, and a third class of labourers is also benefited by the strike. There are thus two sets of labourers benefited; namely, the strikers and the labourers employed in producing the commodities which the strikers buy, and there is one set of labourers injured, namely, the labourers who used to produce the commodities purchased by the dealers struck against. There is consequently a clear net gain to the whole labouring class of the amount gained by the strike. If, however, the strikers spend more of their increased wages unproductively than the employers would have done, the permanent gain to wages is diminished in that proportion. As the labourers are likely, owing to their

greater numbers, to spend a larger proportion of the sum in question unproductively, there is usually a deduction of this kind to be set off to the whole amount gained by the strike.

Mr. Brassey, in his very practical and lucid treatise on *Work and Wages*,* attributes the low wages of German workmen to the low price of provisions in Germany. Price, however, is a product of the foreign exchanges, and the low prices and wages of Germany are both common effects of the state of the foreign demand for German productions. Labour is a commodity *quoad* price, and is affected by the state of the exchanges, since producers must buy labour, just as they buy plant, machinery, and other commodities. The price of provisions can have no effect on wages, except in preventing them from falling below a certain amount. The relations of the cost of necessaries to the rate of wages are thus the very reverse of what Mr. Brassey states.

"The exports from the United Kingdom last year," writes Mr. Brassey, "reached the value of £319,000,000, and the greatest increase took place in those trades in which the wages had advanced the most."† Here is a plain connexion between high wages and high profits. When profits rise beyond the average in any trade, capital flows to it. This adds to the demand for labour and raises wages. It is unnecessary, therefore, that labourers should claim to see the books of their employers, in order to ascertain whether they are themselves entitled to an increase of wages; for, every increase of profits is certain to be followed by a rise of wages in the particular line that has experienced a rise of profits.

Mr. Thornton considers that as labour has no reserve price, in other words, as labourers have no choice but to work, there is supply only, but not demand, to control the rate of wages. As well might he say that luxuries are

* "Work and Wages," p. 15. † *Ibid.* p. 50.

sold cheaper in proportion to their cost than necessaries, because people must buy the latter, and can have no reserve price for them, whereas they need not buy luxuries unless they please. But it is certain that the rate of profit in a trade that prodnces luxuries is exactly the same as the rate in a trade that produces necessaries. So in the case of a particular labourer he must work, but a particular employer, though aware of that certain fact, is not equally certain that another competitor for labour may not carry him off. As he is anxious to invest his wealth productively, that is to employ labour, he is therefore forced by his desires to exercise his power of demand and to hire the labourer. Competition thus acts on the demand for labour, just as it does on the demand for any other subject of exchange; nor will any one destroy his wealth or lose profit by hoarding more than will labourers perish rather than work.

There is one point on which English workmen are decidedly in the wrong. In America piece-work is not unpopular,* but here it is. The question of apprentices,† too, it seems, gives some trouble in America. From inquiries made by us in New York in 1870-72, we ascertained that piece-work was objectionable only when accompanied with delay in giving out the work. As to the hours of labour, American tradesmen do not complain of them. Wages are the question. Workmen would consent to work for more time if wages would be raised to the required level. Short hours are sought only as an approximate mode of obtaining better remuneration.

Political economy is essentially a strictly demonstrative science. Its premises are certain and known to all, and admit of a great variety of immediate and remote conclusions

* Evidence of Mr. A. S. Hewitt, "Second Report of Trades' Union Commission," p. 9.

† See evidence of D. G. Lloyd, "Tenth Rep. Trades' Union Commission," p. 29, sec. 18, 58; p. 2, sec. 18, 584.

equally as certain as the premises, without requiring specific evidence or experimental verification. Its terms are homogeneous, being those of supply and demand, and there never is any change in the law of a series, although, no doubt, it is open to numerous disturbing influences, being *avide des faits* and dealing—as indeed all philosophy of a high order does—with obscure causes and numerous analogies of laws. We, therefore, think that the wages question is one for the forum of philosophy and not of positive legislation. The value of labour, or the rate of wages, is regulated by a law of nature as potent in its sphere as that of gravitation—*laissez faire*.

Briefly, then, to summarize the foregoing points :—Wages are regulated by a necessary law; for the competition of all capitalists and hirers of labour compels them to lay out their whole income on wages. The wages fund is thus the whole circulating wealth of the nation, *minus* the portion consisting of luxuries. The only way to increase wages, therefore, is to add to this circulating wealth or to production. It is only, then, by first raising profits that wages can be increased; they cannot be enlarged by diminishing the number of labourers, for this would proportionately lessen production. Produce can only be increased in the home trade by improved processes of production, and in foreign trade by an increase of demand, or, in other words, by a favourable balance of trade. Retaliatory duties sometimes accomplish this object. A threat to impose such duties also may be as effectual as their actual imposition. Price is the parent of both profits and wages, and, therefore, high prices, profits, and wages, are always found in the same country, and not merely under exceptional circumstances. Low wages and low profits are also necessarily concomitant. Wealth is like a bill first introduced into the Upper House and then passed on to the Commons. All produce is first the property of the capitalists, who transfer it bodily—

minus their own luxuries—to labourers. *All that they intend* possessing as capital is paid away to labourers; *otherwise it* would not be capital. After it is given to labourers it is consumed by them, but there is a new product of equal value *plus* the rate of profit reproduced for the capitalists by the labour of their employés, and this new product—*minus* its portion of luxuries—is again bodily transferred to labourers to be consumed and reproduced; and so the process goes on from year to year, its characteristic being that when price or produce declines profit declines, and, when that decreases, wages also suffer loss. *Sic vertitur ordo.* As to wages and profits varying inversely, and wages rising while profits decline, in the progress of society, the doctrine is demonstratively absurd.

The Commissioners appointed to inquire into the working of the Master and Servant Act, 1867; the Criminal Law Amendment Act, 34 & 35 Vict., c. 32; and the Law of Conspiracy, have not yet completed the body of evidence they intend publishing on the two latter subjects. The evidence appended to their first report, which consists of only a few formal lines, comprises various instances of disobedience and unruly conduct. Yet we doubt whether it can disclose anything not generally known before, and we shall not be surprised to find that some evidence on the defendants' side is equally conclusive or injurious to the case made by the masters. It is in the iron and coal trades where masters combine most to settle prices, that combinations amongst workmen are also most rife. Is there not some connection between these two facts? It seems, therefore, that any law aimed against trades' unions should likewise contain some provision against what formerly was called "forestalling, regrating, and rigging the market" by combinations for fixing uniform scales of prices. Every one should be left to learn the state of prices, as in other trades, from the current quotations without any prospective settlement of them for the future by masters, whose interest it is to tax

consumers. There surely can be a conspiracy without intimidation. We know not whether the coal owners of South Wales have by their recent lock-out violated the law, as was suggested by the Trades' Union Congress on the 21st ult., assembled at Liverpool. Neither do we concur with Adam Smith in regarding masters as always in a state of tacit combination. All we contend for on the point is that the law ought not to leave the question of combination to the discretion of any of the parties concerned, but forbid it wholly both to employers and employed.

The report of the Labour Laws Commission has just been issued. But, we regret that it is much more favourable to the freedom of combination than we believe to be consistent with the interests of order. The legislation which England will adopt in respect to this matter will be looked up to as a common form and precedent for other nations. If, however, a Conservative legislature opens the door so widely to combinations, what will not employés in the United States expect? The order of the physical world results from the subjection of every particle of matter to a necessary law. If each atom or class of atoms could govern its own motions, the result would be chaos. In the mercantile world, in like manner, if instead of the necessary law of demand and supply, acting through the free will of individuals, each class is allowed to exercise its own discretion as to the value of its labour, the end must be the overthrow of all order, and a system of terror, little, if at all, different from the worst phase of La Commune. The desire to advance oneself in the world, at the least effort or labour, operates with as unfailing regularity on large classes of people as the law of gravitation does on the mass of any of the planets. This principle of our nature equalizes the rates of profit and wages in all employments, and thus adapts supply to demand with more exactness than any bureaucratic device could effect. Fluids do not more readily fall to their proper level than prices, profits, and wages, through the law referred to, which might be

termed the gravitating principle of industrial forces or atoms. It should be the aim of the legislature, therefore, to procure for this social law full and free operation, and not to embarrass it by holding out any bounty on combinations or even by tolerating such. As regards wages, the nature of things has provided that all circulating wealth, *minus* luxuries, must be annually paid away in wages. What more could legislation offer to all labourers, considered together, and not merely to a particular class? Combination is a violation of free trade as well as of the principles of fair competition. It ought to be the aim of every industrial statute to restore labour and capital to perfect freedom, by protecting both against combinations of every kind. It is not sufficient to rely on the mutual jealousies of trades' unions in order to neutralize their influence. We repeat, that every combination for the purpose of raising prices, profits, or wages, ought to be prohibited by statute, since the good old rules of the Common Law on these points are now obsolete.

II.—WHARTON ON NEGLIGENCE.*

DR. WHARTON is known to us as an able and accurate compiler of some very useful law books. We read with interest one of the volumes of his works upon Medical Jurisprudence, and although there were unmistakeable traces of paste and scissors there were also indubitable signs of wide reading, judicious selection, and careful thought. We were, therefore, prepared to find much excellence in his work on the "Law of Negligence" and we may say that we have not been disappointed. It is true that we have, of late, had a good many works which have dealt with this important

* A Treatise on the Law of Negligence by Francis Wharton, L.L.D., author of Treatises on the "Conflict of Law," "Criminal Law," and "Medical Jurisprudence."

subject. In 1871 two members of the English Bar * published works upon the law of negligence, and we see that since that time Messrs. Shearman & Redfield's well known work has passed into a third edition in New York. Each of these works has merits. Mr. Campbell's "Practical Law Tract" is succinct and clear. Mr. Saunder's work, although small, is able, but none of these are entitled to rank with Dr. Wharton's bulky work in completeness. There was room for such a work as that which Dr. Wharton has given us.

There is scarcely any question which arises in connection with legal practice which is surrounded with greater difficulties, and which is nevertheless of greater interest to the student of scientific jurisprudence than that of negligence. There have been definitions, the redefinitions of negligence, and there have been very many efforts to distinguish the various degrees of negligence. It is evident that negligence can only be understood in relation to its opposite, and that any definition of it can only be of a negative character. It is really nothing positive in itself, but is an absence of what is positive and that is diligence. Now diligence depends upon the mental state of the individual. And the mental attitude which corresponds to diligence is attention, the mental condition which corresponds to negligence is inattention. But there are degrees of attention and inattention, and these degrees in relation to action are productive of various degrees of skilfulness or unskilfulness. Genius, which is just the highest skill, has been well defined as an infinite capacity for taking pains, and "taking pains" is only the strenuous direction of attention to the work on hand. There is, therefore, not only attention and inattention, but there is learned attention or skill, and unlearned attention or unskilfulness. Now when any of these mental states are brought into relation with action careful or skilful doing results on the one hand, or careless or unskillful doing results on the other. That is, there is either

* Mr. Saunders and Mr. Campbell.

diligence or negligence. But there may be either the diligence of skill or the diligence of the tyro. And consequently there may be the negligence of the expert or the negligence of the inexpert. If we find the diligence of skill we may expect the thing to be well done, but the tyro even with all his pains may blunder. More is to be expected from the former than the latter, and as more is to be expected it follows that negligence in the former, frustrating the performance is more to be reprobated than negligence in the latter, for responsibility is always in proportion to capacity. This, then, gives us a means of dividing negligence into two kinds. *Culpa lata* and *Culpa levis*. From a specialist we have a right to expect great care and great skill, and the absence of these is great negligence; from one who is not a specialist we have still a right to expect ordinary care and skill, and a failure to bring these to bear upon the work on hand would be negligence, although not of such a grave character as that of the specialist. Where less is expected we have less to complain of if we get nothing.

But although that is a division of kinds of negligence, it is not that which has been adopted by lawyers. Sir William Jones, in his work on "Bailments," has, as he thought, following the Roman lawyers, distinguished slight neglect (*livissima culpa*) from ordinary negligence (*livis culpa*), and that, again, from gross neglect (*lata culpa*).* This division has been made the foundation of innumerable decisions in this country, and has been adopted by American writers as correct.† But it has not been found to be practically useful, and many difficulties have arisen in relation to it. The distinctions drawn may have been psychologically correct, but they were not found to be practically useful. These degrees may have been appreciable in the lecture room, but they were lost sight of in the market place.

* See, also, for Lord Holt, in "Croggs *v.* Bernard," see Smith, L. Case (6 Ed.) 189.

† See Story, on Bailments, and Kent's Commentaries.

Thus it came about that practically attempts were made to get rid of one of these superfluous terms. Certain writers showed a tendency to consider "gross negligence" as equivalent to "fraud;"* an identification, which would have deprived the term negligence of any meaning in the phrase, as will be evident from the explanation given above; while, upon one occasion, Lord Cranworth declared that "gross negligence" was only ordinary negligence, with "a vituperative epithet," added to it. Again, in other quarters we find gross negligence identified with ordinary negligence; Chancellor Kent, in one place, remarking, "gross neglect is the want of that care which every man of common sense, under the circumstances, takes of his own property."† It is unnecessary to refer to other decisions which indicate this tendency. In many cases the distinctions referred to have been disregarded, and the more practical rule to which we have adverted has been substituted for it. Thus, in one case, Justice Willes clearly identifies gross negligence with negligence of experts, for, he says, "Gross negligence can only be said of a person who omits to use the skill he has, not of a person who is without skill."‡

The confusion which has arisen in this connection has more than once been commented on,‖ but it has not been so exhaustively treated, or had its causes so thoroughly exposed by any one as by Dr. Wharton in the work before us. He points out that the foundation of the views of Lord Holt and Sir William Jones, which have been the leading or misleading dicta in relation to this matter, is to be found in the scholastic jurists and not in the classical jurists, and he asserts that "the scholastic theories" in relation to negligence and bailments "are the products of a recluse and

* See Jones, on Bailments, 21. Storey, on Bailments, s. 18.

† 2 Comm., 560.

‡ Phillips v. Clark, 5 C. B., n. s., 884.

‖ See Campbell on Negligence, sec. 11.

visionary jurisprudence scheming for an ideal humanity, the classical theories are products of a practical and regulative jurisprudence, based on the tentative processes of centuries on humanity as it really is, and so framed as to form a suitable code for a nation which controlled in periods of high civilization the business of the globe." He admits, however, that although there was confusion as to the principles of the law, there was little error in the practice; and, as we should expect from English and American jurists, that their actions were excellent, although their theories were defective. He says of Mr. Justice Story, that he, notwithstanding his enthusiasm and admiration for the civil law (which includes, in his acceptations of the term, the scholastic jurisprudence) shrunk from judicially imposing the subtleties he accepted, as theoretically sound. But the fact that this confusion existed, the fact that there was a want of conformity between the principles and the practice of the law of negligence, that the judgments of the Courts was on the business level of jurisprudence, while the book law which was supposed to be applicable to the werk-a-day-world was on a different level, called, in Dr. Wharton's opinion, for a work in which the Roman was substituted for the scholastic jurisprudence as a basis of the law of negligence. In that opinion we cannot but agree with the learned author of this work.

There are other points, which, in his opinion, are differently understood in the light of scholastic and of Roman jurisprudence. One of these is as to Mandatum (agency), which is ably treated by him in a long and learned chapter of his present work.* and another is the doctrine of contributory negligence.† The doctrine of the old law, which has been adopted both in England and America, is that a person, who by his negligence has exposed himself to injury, cannot recover damages for the injury thus received. He holds, however, that this principle can only be accepted with qualifica-

* Book 2, ch. iii. † Book 1, ch. ix.

tions, and points out that there must be a casual connection between the plaintiff's negligence and the injury; that the plaintiff, as a rule, must be a person to whom the alleged contributory negligence is imputable, thus excluding persons of unsound mind, infants, and drunkards, and that if the defendant is guilty of gross negligence, he cannot set up a trifling negligence or inadvertence of the plaintiff as a defence.*

We cannot, however, follow Dr. Wharton further. His work has been ably and carefully executed, and is a valuable addition to the literature of this important branch of the law. He has an interesting chapter upon "Dangerous Agencies," to which we may in a subsequent paper refer, when dealing with the subject of the carriage of explosives—a subject which has been brought into prominence by the curious catastrophe upon the Regent's Park Canal. Meanwhile, we must take leave of Dr. Wharton, with an assurance that we have not been able to detect even *levissima culpa* in his work.

III.—ON THE CONTEMPLATED DESTRUCTION OF THE ANCIENT ORDER OF SERJEANTS AT LAW.

By PYM YEATMAN.

IN that unfortunate and ill-drawn measure, the Judicature Act of 1873, an Act which persistently puts the cart before the horse and unnecessarily destroys ancient systems instead of correcting abuses in them, there is one piece of destruction that is especially irritating to the antiquarian and politician, the destruction, for it virtually amounts to it, of the ancient Institution of Serjeants-at-Law.

The assumption of the coif which, for reasons which

* Sec. 301.

will be shewn presently, is essential to the newly created judge, is no doubt attended by absurd ceremonies and useless expense, and it is worth while to correct them, though it is absolutely dangerous to do so at the expense of the loss of the Institution itself.

The expenses attendant upon the creation of a Serjeant are, undoubtedly, over great and a very great nuisance to a newly-fledged judge, who only assumes the honour as a formality; but, for the most part, they are evils which are within the powers of the judges themselves to correct, and might well be corrected without doing any injury to the British Constitution, for there is a great constitutional question involved in the matter.

The giving of rings is an ancient ceremony which might well be dispensed with, or the poor judges might present rings of brass or iron in imitation of the gorgeous orders of the Prussians. Originally the fortunate Serjeant, who must have plucked a good many clients before he arrived at this distinction, was mulcted in a seven day's banquet, a very costly affair. That piece of good fellowship is cut off, and by all means throw the rings after it, although a curious ceremony is lost to us. At the same time cut down the heavy fees which are exacted. It is absurd to take back with one hand what the other gives. Generally the learned Serjeant is about to become the paid servant of the State, so dock all these abuses and excrescences by all means, but spare the tree; for an important part of the constitution depends upon it. The right of every man to the assistance of counsel in any question between himself and the Crown depends entirely upon it.

The Serjeant is especially the subject's advocate, as the Queen's Counsel, by a fiction, is retained for the Crown and a general retainer for the public is taken by the Serjeant on assuming office, for he then takes the following oath:—"Ye shall swear that well and truly ye shall serve the King's people, as one of his Serjeants-at-law; and ye shall truly counsel them that ye shall be retained with afte

your cunning, and ye shall not defer, tract, nor delay their causes willingly, for covetousness of money, or other thing, that may turn you to profit; and ye shall give due attendance accordingly. As God you help and His Saints."

It must not be supposed that this is an idle ceremony or one that may safely be dispensed with, as the following considerations will shew. Suppose a great conflict should unhappily arise between the Crown and the people; such things have happened before and may happen again; what is the result? by destroying the order of Serjeants, and giving rank to the leaders of the Bar only, in the forms of patents of counsel for the Crown in the event of any such question arising, as no leader will care to remain without rank, the people would absolutely be without the protection of the first men of the bar, and would have only such counsel to choose from as the Crown did not fear, or who had been unable to make their way in the profession. That there are some able and worthy men overlooked, is quite certain, and occasionally a positive injustice is done by refusing rank to one who, for some cause, possibly a meritorious one, has become obnoxious to the leaders of the profession; but who would care to intrust his case to such a man however honest and however so much illused, when he would be certain to be prejudiced both in the eyes of the Court and reflectively in the eyes of the jury? and as for the chance of a private person being able to select the able but modest man who has been hitherto overlooked by the profession, it is but a poor one; so that, practically, if there are no Serjeants to retain, the subject is placed in a position of great disadvantage, and has to fight against the Crown at great odds. There must always be something oppressive and discouraging to a poor man to find arrayed against him the great officers of the Crown—the Attorney and Solicitor General, with other of the leading Queen's Counsel of the day—but his position becomes almost hopeless when he cannot retain any Queen's Counsel he pleases to meet them. And the fiction, that the

leaders of the bar are retained by the Crown, becomes a reality on an occasion of this kind, for though no real retainer is given to the counsel, and no emolument may ever accrue from his position, a Queen's Counsel cannot accept a brief against the Crown without a special license; and the question of giving or withholding a license is a thing which is settled privately, and hence the public danger.

The unfortunate prisoner cannot even approach the Queen's Counsel, and all that his solicitor can do is to inquire whether that gentleman can accept a retainer, a question which that gentleman cannot answer until he has applied for a license; and then arises the point, and it is decided in secret, and no one knows whether such a Queen's Counsel is gagged because he was chosen by the prisoner, or because the Crown fears his eloquence, or for what other reason.

Therefore it follows that, simply in the endeavour to save the judges the expense and trouble of assuming the coif, a great institution is threatened, which, in no mere figure of speech, may be called one of the bulwarks of the people. But, it may be asked, is this a matter of inadvertence? Is there any intention on the part of the Ministers of the Crown to destroy this bulwark? With regard to the Gladstone Government, there is positive proof on this point, for an application was made to Lord Selborne for the honour of the coif, and by him the applicant was informed positively, that it was not the intention of the Government to create any more Serjeants, and by means of a side wind through this wretched Judicature Bill of 1873, the two Houses of Parliament have been bamboozled and induced to aid in cutting down and destroying this important pillar of the State—almost its chief support—for the safety and happiness of the people, and the assurance that justice will be done to them is the very foundation of our grand Constitution.

Nor is it seemly that our judges should cease to bear this title. Every one who is created a judge, and at present

none can be created without it, ought to be *serviens ad legem*. Judges are but too frequently chosen for political considerations, or on account of political services, which is sometimes merely a scattering of marigolds, and learning alone is but a poor recommendation, especially if it be allied to an independent and enquiring spirit. A safe man is usually selected for obvious reasons. But if a man is created a judge, though not on account of learning, it is as well that he should shew some respect for it, and at least acknowledge its service. It will be an evil day for this country, when, under the judicial garb we may find a successful general, a merchant, or any speculator; and we cannot keep up the pretence of learning too long, for the very pretence may restore the reality, and, at any rate, it will lead to foster what should never be despised—the respect of the people.

It is worth while to examine the decline of this order compared with the rise of the modern order of Queen's Counsel. In 1827 the number of Serjeants, including the King's Serjeants, was 18 as against 30 Queen's Counsel; in 1831 there were 28 Serjeants against 39 Queen's Counsel; in 1834 the numbers were 25 and 40 respectively; in 1843 there were 28 Serjeants against 69 Queen's Counsel; in 1846 there were 29 Serjeants, but the Queen's Counsel had increased to 75; in 1856 there were 28 Serjeants, but the Queen's Counsel had increased then to 100; in 1866 there were still 27 Serjeants, although only eight had been created in the last eight years, but the Queen's Counsel had increased to 145, (14, 15, and in 1861, even 16 being created in a single year), and now, in 1875, there are only 12 Serjeants remaining who do not hold office, whilst there are no less than 183 Queen's Counsel, only three Serjeants having being created in the last nine years, and they were created by the present Lord Chancellor. Thus it is seen, that under Liberal administrations, there is a determination to destroy this truly popular institution.

The Lord Chief Justice of the Common Pleas has, by law

and custom, the right to choose the persons fit to be made Serjeants, and this after consultation with the other Judges; but, in these days, the right is in abeyance, and probably from having chosen the Queen's Counsel, the Lord Chancellor of the day now assumes to himself the right to appoint what Serjeants he pleases; though a Lord Chancellor is not and cannot be such a good judge of the matter as the judges before whom alone the majority of counsel practise. There is a very curious letter printed in Manning's "Serjeant-at-Law," p. 237, from one Mr. Justice Windham to Lord Burghley, of the date of 1579, endeavouring to prevent the appointment of two persons included in the list presented for preferment by the Lord Chief Justice; then, as in these days, Catholics had but a poor chance of justice, and this worthy *puisne* objected to them solely upon account of their being suspected of leaning to the Catholic faith.

But, notwithstanding the Judicature Bill, the order of Serjeants is not yet actually destroyed, and it cannot be destroyed without the direct aid of an Act of Parliament. In the Serjeant's case, the legality of the Royal Warrant of 1834, which affected merely to alter the condition of Serjeants, was, on the remonstrance of the Serjeants of the day, abandoned by the Government. Lord Abinger, who attended the Privy Council, and called for a consideration of this question, declared that it was a very illegal proceeding to take away the exclusive privilege of the ancient practitioner of a court of justice; and later, when the matter was argued in the Common Pleas, Lord Chief Justice Tindal, in giving the judgment of the Court, decided that the privileges of the Serjeants could not be affected by a warrant from the Crown under the sign manual, nor indeed by any power "short of an Act of the whole legislation;" his Lordship declaring that the antiquity of the state, degree, and office of a Serjeant-at-Law was as early, at least, as the existence of the Court itself. This principle is affirmed by the 9 & 10

Vict., c. 54, the Act by which the exclusive audience possessed by the Serjeants was ultimately destroyed. In the preamble of that Act, it is declared that only by authority of Parliament can the privileges of this order be affected, and yet a modern Chancellor has assumed to himself the power to strangle the order by refusing to appoint fit men who aspire to the office. It would be worth while to enquire through Parliament how many applications for this rank have been made during the last twenty years. It is easy to see that there is a vast difference between destroying the monopoly of the Serjeants and their order; that was no doubt a popular measure, whilst this would be a grave blow to the people.

It is curious to see that, during the debate upon the Judicature Bill in the House of Lords, and not even in the speech of the Lord Chancellor, in introducing it, was there one word uttered upon this important subject, as if, indeed, it were a mere suggestion of the draughtsman of the Bill, and made without instructions, and which was overlooked by those who debated upon it; nor is this wonderful, for the only notice of it in the Act is not by way of a substantive proposition, but merely by way of proviso to a clause, declaratory of the necessary standing at the bar, for one to be appointed a judge; nor does it appear, from Hansard, that any single word was uttered upon the point during the passing of the Bill through the House of Lords, not even in Committee. In the House of Commons, however, one champion arose, who proposed to strike out the obnoxious proviso, and that honour belongs to Mr. Henry Mathews, Q.C., M.P. for Dungarvon. This was opposed by the Attorney-General, who simply said that he could see no reason for maintaining Serjeant's-Inn; and Mr. Serjeant Simon alone, probably the only Serjeant in the House of Commons, protested against the certain extinction of the order, which he contended would be the effect of the enactment, and he very shortly referred to the fact that the Serjeants were the ancient and legitimate leaders of the bar,

the persons who were essentially the people's counsel, and whose creation was quite independant of anything like political or party influence. Upon a division, only 39 enlightened members of the House of Commons voted with Mr. Henry Mathews. The question was one either above the comprehension of those who delight to style themselves the people's advocates, or not within their programme. Few of the Tory party had the enlightenment to discern its importance, and, unhappily, it was not made a party question, but the minority, feeble though it be, is strong in the support of the true friends of the Constitution and the people, and at the head is to be found the name of the Prime Minister of to-day, Benjamin Disraeli. Most of the lawyers in the House—hostile to the profession and to the people—are to be found in the majority; there we grieve to see the names of Richard Paul Amphlett, Sir Richard Baggallay, Sir John Coleridge, Sir George Jessel, Henry James, Robert Lowe, &c., &c., and the people's friends—John Bright, George Dixon, and P. W. Muntz, the Birmingham trio—with many other of their professed friends, assisted the Gladstone Government to strike this deadly blow at the liberties of the people; but the order is not destroyed yet, and the country, if instructed, will not permit the Chancellor to do, secretly and with malice aforethought, that which clearly cannot be done without the aid of an Act of Parliament. Let some able men seek the rank; let them refrain from seeking the more courtly rank of Queen's Counsel—it is a grander thing to be the people's advocate—and the Chancellors will be compelled to create them; for they must act according to the Constitution. As we owe it to Lord Cairns that the last three Serjeants were created, again we look to him to preserve our cherished rights; and, happily, in Mr. Disraeli the Constitution has a true friend, and he will not suffer an injury to be done to it in an underhand and indirect manner; moreover, by voting in so

small a company, he has shown a greater appreciation of this important subject than the great majority of his party.*

Serjeant Woolrych, in his valuable and interesting "Lives of Eminent Serjeants-at-Law," doubts whether a Serjeant could be retained by the Crown, at all events against a prior retainer by a subject; and he styles him the most independent advocate known to the British Constitution, unequalled in Europe; and somewhat hopelessly, he adds, "if justice be done to the time-honoured rank of Serjeants, men of note will, as of old, come forward as candidates for the coif; and the order will remain inviolate a bright gem in the Constitution of our country and of Her Majesty's prerogative. A monument,

Ær perennius
Quod non imber edax non Aquilo impotens
Possit deruere aut nunc mirabilis
Annorum series nec fuga temporum.

IV.—THE RETIREMENT OF MR. JUSTICE KEATING.

ALTHOUGH the retirement of a public servant is always a matter of regret, it would be wrong to look at it solely in that light. If we are sorry to part with one upon whom we have looked with respect and reverence, and possibly with affectionate regard for many years, we ought always to see with satisfaction the termination of a life well spent. It is a grand thing to finish a work: it is more grand still to have done it worthily; but there is something beyond a public life—even in this world. Too many, alas! of our public men die in harness. Far too few retire whilst the mind is in its full vigour, with the perfect use of its glorious faculties. Men naturally shrink from an admission that they have grown old and useless; no one likes to be regarded as mere lumber.

* A historical sketch of the office of Serjeant-at-Law will be found in the September number, 1874, of this Magazine.

But is this a right way of thinking? is it not better for any man, and especially for a judge, to leave the work which growing age makes burdensome to him, to younger and fitter men, and to retire whilst he is still in the full possession of his mental faculties, and when he may have time to reflect upon his past life, to consolidate the wisdom he has acquired, and to see in what matters he has erred? and if it is not too late, to correct his acts, at any rate to prevent any of them producing bad precedents which may grow into a practice. The most able men amongst us err at times, and often unwittingly; in the hurry and bustle of life this must occur. A particular view unduly forces itself uppermost; and one is apt to apply it often unreasonably to circumstances which do not fit in with it. How much better is it, then, that we should look forward to the retirement of our judges from the more active duties of the profession, not entirely as an end to our intercourse, but only as a happy change—a time for rest and thankfulness; a time for the ripening and perfection of that share of wisdom, which, in a long and arduous life, has happily pertained to them.

Mr. Justice Keating has just given a remarkable example of this idea. Only a few hours after he had taken leave of the Judgment-seat, for ever, although personally unable to attend, a letter from him was read at a meeting of the Social Science Association conveying a wise and wholesome caution against the very rational indignation, which has been lately raised to fever heat against that brutal class of our fellow countrymen who very properly fall under the punishment of the lash. Do not go too far, writes Mr. Justice Keating, or you will make matters worse, you will drive these men to desperation; when Recorder after Recorder throughout the country in those pleasant moments, when for the nonce they command the public attention, have vied with each other in decrying this great public evil—the very youngest Recorder being of course the most determined and vigorous. It is necessary to restrain a zeal which may become a

mischief, and the wisdom of Mr. Justice Keating's remarks will be admitted all over the country. Are not such ripe judgments as these of value? and who can more fitly give utterance to them than our retired Judges? It would be far better for the country if more of our Judges would retire when, as in the case of Mr. Justice Keating, their judgments are still ripe and excellent. The ordinary practice of a Judge's routine becomes irksome and tedious to an old man, and he is not always fit to perform it; but if he has, at last, some leisure and some time before he departs finally and is no more seen, his usefulness will be extended and the bitterness of our parting will be wholly removed, for we shall look forward with satisfaction to his later utterances. Let us hope, as we do most fervently, that we shall hear again from Mr. Justice Keating.

But while everyone cordially respects the sentiments uttered upon his retirement by the Solicitor-General, the leader of the Common Law Bar, we are not sure that they are either judicious or in good taste. At any rate they are hardly in accordance with the consistent and dignified silence hitherto pursued on the question of a great public scandal, which unhappily has been rife amongst us. We feel sure they were kindly meant, honest, and sincere; but is not this sort of thing rather calculated to challenge and provoke the reckless and indiscriminate libels of those men who have recently shocked the general sentiment and mind of the public? We wish to see respect and honour paid to the Bench, and we earnestly desire to see it fairly earned, but is the payment necessarily to be made in this manner? Happily, Mr. Justice Keating has passed through a long life, without the arrow of calumny having ever been pointed at him. Men, good men, honest, and able, have been assailed, but Mr. Justice Keating stands forward *sans reproche*. Why then enumerate so elaborately his many virtues? as if a Chancellor or Chief Baron were addressing a newly fledged Lord Mayor; not because it

was palatable to the judge, for he must have been pained by it.

The learned Solicitor General himself has been most cruelly attacked, and he took the opportunity, in the course of his professional duties, in the celebrated City libel case, to reply to his libellers, and to denounce, very powerfully, the iniquity of their libels. But the result to himself has been that these libels have been repeated with circumstances of even greater aggravation. He, therefore, was the last man to act in this manner; and it was a matter of supreme indifference to the learned Judge whom he was addressing. It is something like giving permission to the public to applaud in a Court of Justice. No judge has allowed that since Lord Campbell called for three cheers for (or against) the Inquisition. The unpleasant comments of the press subsequently poisoned the sweets so cheaply purchased, and even Lord Campbell did not repeat it; and though a little more latitude may be allowable when a learned judge casts off his robes for good, just as when a schoolboy goes home for the holidays masters and tutors cease to be very strict; still it is a bad precedent, and when a judge not quite so able, so modest, and so dignified as Mr. Justice Keating may retire, the precedent may become rather arduous and difficult to a future leader of the bar; and this is a difficulty which may be looked for any day, for the learned Solicitor in this case has, to the general contentment, exhausted all the superlatives.

No doubt it is a matter for rejoicing when Bench and Bar so cordially agree; and, in discussing this subject, we beg to add our own respectful congratulations upon the happy termination of the judicial career of Mr. Justice Keating.

V.—THE SCOTCH LAW OF PARTNERSHIP—WITH SPECIAL REFERENCE TO PARTNERSHIP LIABILITY—,AND ENGLISH DECISIONS FROM 1860 DOWNWARDS.*

By Andrew Mitchell, Advocate, Edinburgh.

ENGLISH lawyers are agreed that since the year 1860 the English law of partnership has been undergoing change. A judgment of the House of Lords in that year, they tell us, altered the law of partnership liability, and affected the law of partnership generally.

As it has happened, the Supreme Court in Scotland has not yet been called on, so far as I know, to consider the application to the law of Scotland of the rules and principles laid down by the House of Lords in 1860. Scotchmen are therefore left to judge for themselves how far their interests are touched by the change in England. The question cannot fail to be interesting to lawyers; and, as modern commerce in great measure rests on partnership, it ought to interest merchants and traders also. For these reasons I have thought its discussions not unsuitable in this place.

In conducting the proposed discussion, I will assume that the House of Lords judgment of 1860, being in an English case, is a precedent for Scotland only so far as the grounds of judgment are consistent with the principles of the law of Scotland.

Prior to 1860, the law of partnership both in England and Scotland was not in a satisfactory state. The case-law of both countries had been tending in the direction of holding persons to be liable as partners, when neither themselves nor any one else had regarded them as so liable. In all departments of business, enterprise was checked by the risk of an

* Read at the Social Science Congress, Glasgow, October, 1874.

arbitrary responsibility. The evils which the Law of Partnership Amendment Act of 1865 sought to provide for are but a few of the many which then pressed upon trade and upon society at large in England and Scotland. According to the tendency of case-law, certainly in England, possibly also in Scotland, participation in profits made the receiver liable as partner; and thus in many ways well known to merchants and lawyers business was impeded and hardship incurred. Glasgow lawyers and men of business will remember a case which came before Sheriffs Bell and Alison in 1866, where the whole system of home agency for a foreign commission agent was thus imperilled,—the case of *Ewing and Co.* v. *Lorrain* and *Adam* (reported in the *Scottish Law Magazine*, N. S., vol. 6, p. 29.)

The position, however, was really different in England and Scotland. In both countries, it is true, participation in profits was looked on as dangerous; but the cause of fear in Scotland was not so much any existing Scotch decisions as the English decisions. It was always at least doubtful whether Scotch case-law implied the rule in question; but in England there could be no doubt. The cases of *Grace* v. *Smith*, in 1774, and of *Waugh* v. *Carver*, in 1793, were regarded by the most competent authority as fixing the rule in English law that participation in profits inferred liability for the company's debts. The rule, indeed, extended only to the case of net profits, or profits as profits; but within that sense its application was unlimited.

Farther, these English decisions, besides inferring partnership liability as to creditors, were held to settle at the same time that no partnership existed between the debtor and the person held liable along with him, perhaps consistently with the *ratio* given for inferring liability, namely, that if any one takes part of the profit of a trade he takes part of the fund on which the creditor of the trader relies for his payment. When, then, the points thus involved in these decisions came to be stated articulately in books on partnership, a chapter

had to appear devoted to what is called *quasi*-partnership,—that is something which is not proper partnership, but a relation inferring certain of the chief results of partnership in the absence of partnership itself. Later Scotch writers on partnership adopt this division, some with emphatic protest, as Mr. Francis Clark, some without. Professor George Joseph Bell approved the *ratio decidendi*, and adopts the corresponding division. The *ratio* and the division are not found in Stair or Erskine, and I hope yet to make it appear they are foreign to the principles of Scotch law. At present I go on to enquire what the change introduced into England by the House of Lords judgment of 1860 precisely was.

The judgment in question was given in the now well-known case of *Cox* v. *Hickman* or *Wheatcroft* v. *Hickman*, reported in Clark's "House of Lords Cases," vol. viii., p. 268. The subjects there dealt with have not subsequently come before the House of Lords, so we have no authoritative interpretation of the judgment.

The question in *Cox* v. *Hickman* was, as Lindley, in his work on the Law of Partnership (3rd ed., p. 40), puts it, substantially whether certain scheduled creditors—parties to a deed of arrangement—who were to be paid their debts out of the profits of their debtors' business, were liable in debts contracted by the trustees in carrying on that business pursuant to the deed. The trustees were to have power to do whatever was necessary to carry on the business, without reservation to the creditors of more than a power to make rules as to the mode of conducting it, or to order its discontinuance. The question was argued chiefly as one of *quasi*-partnership, or partnership liability as to creditors, the pursuer relying on the rule that participation in profits infers such liability. The Lords who heard the case—Lord Chancellor Campbell, and Lords Brougham, Cranworth, and Wensleydale—were unanimous in deciding there was no liability. With regard to the reasons of the decision stated by their

Lordships, the prominent feature is the treatment of partnership liability as a question of agency, and the substitution, in place of the former test of partnership—participation in profits, which is emphatically repudiated as a final test—of a test derived from agency, namely the presence or absence of the relation mutually of principal and agent.* But their Lordships went farther. It seems clear that at least Lord Wensleydale regarded agency as the key to the principles of the whole law of partnership. He says categorically, "the law as to partnership is undoubtedly a branch of the law of principal and agent;" and he quotes with approval the words of Pothier, "*Contractus societatis non secus ac contractus mandati.*" No one of the other judges committed himself to any statement of like generality; still I cannot but think it a correct inference to draw from the terms of the very full opinion of Lord Cranworth, if not also from the opinion of the Lord Chancellor, that they too held partnership to be in fact mutual agency, and the law of partnership a branch of the law of agency. The interpretation put upon *Cox* v. *Hickman* by English Courts up to this time seems to me to confirm the view here taken.

Now, we in Scotland must, I think, feel great difficulty when this English resolution of partnership liability and partnership itself into questions of agency is presented to us. The idea is new to the law of Scotland. Although agency is in the view of Scotch law an element in partnership, partnership and agency have never been regarded as in any sense the same contracts, nor the law of the one as a branch of the law of the other.† This question, too, at once occurs, how can certain of the most obvious elements of partnership

* I have said mutually, because though the element of mutuality may not be explicitly set forth, it is set forth, and the facts of the case presume and imply it. The trustees were admittedly principals, and the question was whether the creditors were not principals too.

† See Story "on Partnership," chap. i., sec. 1, in an American view of the relation of partnership to agency.

be the result of mandate, such as the contribution of capital, and the corresponding joint interest in capital, profits, and losses? Again, while Scotch law has, to say the least of it, no objection to offer to the repudiation of the old test of partnership, it must hesitate to accept the substitute, and must ask with regard to it, for instance, how can a dormant partner be regarded as an agent as well as a principal, when by the very contract he is excluded from management?

So far, then, the grounds of judgment in *Cox* v. *Hickman*, as distinct from the actual decision, are not to a Scotchman very satisfactory. It appears, however, to be the case that more is to be found in *Cox* v. *Hickman*, besides the prominent feature of mutual agency. Knowledge of Scotch principle helps, as it seems to me, to the discovery. Accordingly I proceed to state what appears to be the Scotch view of partnership.

Mr. Clark has said that no definition has been given of partnership which is either sufficiently exhaustive or sufficiently exclusive to be adopted as a practical rule. The remark applies to Scotch definitions as well as to all others. Still it seems to me the Scotch law has a clear conception of what it regards as of the essence of partnership. First of all, Scotch partnership, having for its original the Civil Law contract *societas*, is itself an association or union of individuals; and, as the terms *societas* and association imply, of individuals who are in some sense equals. Again, like its original, Scotch partnership is a society formed by a contract, and a consensual contract. It is implied in a consensual contract that the parties agree to be or act towards each other in some definite relation, and that without that agreement the relation does not exist. The theory of a consensual contract is therefore unfavourable to a conception which infers the presence of the results of an agreement without the agreement itself, to such a conception as *quasi*-partnership. Next, what is the end and object of the agreement? Lord Stair says, "Society may be described a contract for

communicating the profit or loss of that which is brought into the Society, proportionably according to the share and interest of each partner;" and Erskine, "Copartnery, another consensual contract, may be defined that by which the several partners agree concerning the communication of loss or gain arising from the subject of the contract;" and Bell begins his description of partnership thus, "Partnership may be described as a mutual contract and voluntary association of two or more persons for the acquisition of gain or profit." Now these passages one and all express the idea that the object of the agreement or contract of partnership is to make profit, and that for behoof of the whole contracting parties; and the passage from Stair points to the circumstance of contribution by all to the means that are to be employed in making the profit. But the conception of a voluntary union of individuals, for making profit, for all, by use of the means of all, seems to imply farther that the profits are to be made by the association, not by the individuals,—that the trade and the trade-contracts are not the individuals' but the association's. We are not, however, left to draw this inference for ourselves. Later Scotch law has, in very striking manner, recognized the essential unity of an association such as it defines copartnery to be, both in itself and as to all its relations and acts: it says that partnership constitutes a person in law. This theory, now so well known as a peculiarity of the law of Scotland, is not expressed in so many words in Stair or Erskine; but it is stated in our law books at least as early as the middle of last century. The researches of Lord Medwyn, in *Forsyth* v. *Hare and Co.*, 13 Shaw, p. 465, prove that in relation to procedure the distinct *persona* of a copartnery was acknowledged at any rate about the beginning of that century. It must not, however, be supposed the conception had regard, primarily, to procedure. Lord Curriehill, in his opinion in the *Antermony Coal Company* v. *Wingate*, 4. M. 1020, gives the true order, when he says, "it is a settled rule in our law of

partnership that, in respect such a private trading company is a separate person in law it has a *persona standi in judicio.*" It is curious that Professor G. J. Bell should be the first great institutional writer to express the theory, and the one who has departed most from the ideas symbolized by it. No doubt his great acquaintance with English law, which denies any collective personality in partnership, was the cause.

A co-partnery, then, being one person, and the contract of co-partnery being that the parties shall to a particular end be one person, the act of one partner is the act of the other, and the obligation of one binds the other. My partner's act binds me, not because I entered into any contract with him and he with me that each should have authority to bind the other, but because to a certain defined end we have become one. So Erskine, having finished his discussion of mercantile *societas*, goes on, "Marriage is truly a society;" and Stair, in speaking of the dissolution of co-partnery by the death or incapacity of a partner, says, "Society being one individual contract of the whole, and not as many contracts as partners, it is like a sheaf of arrows bound together with one ty, out of which, if one be pulled, the rest will fall out."

Having in view what thus appears to be the Scotch idea of the essence of partnership, partnership might perhaps be defined in some such way as this,—a contract between two or more persons to carry on a particular trade or business with a view to profit, together with one another. Such a definition might not be thought sufficiently exclusive. But it states clearly the radical relation of joint-trading for profit, and the other elements of partnership seem but consequences of that relation. The definition given in the proposed Civil Code of New York State (published 1865) is to like effect; "Partnership is the association of two or more persons, for the purpose of carrying on business together, and dividing the profits between them."

Underlying the judgment in *Cox* v. *Hickman*, as it seems to

me, something very similar to this Scotch view of partnership is discoverable. Mutual agency is probably the closest tie or union conceivable to a system which denies a legal person in co-partnery. By the light of Scotch law we can, I think, read in the analysis in *Cox* v. *Hickman* of partnership into mutual agency an English recognition of the close union, if not unity, of the partnership relation. I cannot here verify these conclusions by quotation, and only call attention to one point, namely the introduction by Lord Cranworth of the question of intention. Consensual contracts are just contracts of intention.

The judgment in *Cox* v. *Hickman* is subject of interpretation in the following among other English cases:—Re *English and Irish Church and University Assurance Society*, May 6th, 1863, 1 Hemming & Miller, p. 85; *Bullen* v. *Sharp*, 29th November, 1865, 1 L. R. C. P., p. 86; *Holme* v. *Hammond*, 25th April, 1872, L. R. 7 Ex., p. 218; and *Mollwo, March & Co.*, v. *Court of Wards*, 27th July, 1872, L. R., P. C. Apps. The decisions in these cases are very important. For example, in the one first mentioned, participation in the bonus of a life insurance company was expressly held not to constitute partnership. Farther, the judgments in these cases, more and more clearly as the cases succeed one another, seem to confirm the view that mutual agency is an English approach to the Scotch conception of a joint personalty in partnership. Whose is the trade? Is he or is he not owner of the business? are the test-questions put with increasing emphasis. Now these questions certainly point to a relation closer even than mutual agency. Used, as they always are, in circumstances where one party is avowedly a principal, they ask—Is the other party a principal too? Is he united to the first on terms of substantial equality? They have reference to a union of like with like, and have no concern with such an unequal relationship as that of principal and agent. Accordingly, we find, that in one of the cases above named, that of *Mollwo, March & Co.*, so far as the judgment

relates to partnership, the words principal and agent do not once occur. Intention, and ownership of the business, are the things there dwelt upon. No one of the English cases which have expressly followed the judgment in *Cox* v. *Hickman* has come so near the Scotch view as this case; and no one of them is, I venture to think, more able and business-like. The case is one of the latest on the subject (judgment was given in July 1872); and, though an appeal from India, it was decided entirely on English principles.

With regard, then, to the question of the effect upon the Scotch law of partnership of the change introduced into England by the House of Lords judgment in *Cox* v. *Hickman*, the conclusions arrived at may be summed up thus. In *Cox* v. *Hickman*, participation in profits as a final test of partnership is expressly repudiated, and indirectly the nations of *quasi*-partnership and *quasi*-partnership liability are abandoned. Scotch law offers no defence for theories falling so far short of its own first principles. Another test, that of mutual agency is adopted. Scotch law recognizes it to be better than the former one, but cannot accept it as final. Hints are given of another test of partnership liability,—the intention of the parties that there should be partnership and that partnership liability should be incurred; and of another test of the existence of partnership, expressed in the later cases by the questions: Whose is the trade? Has he power to deal with the trade as owner? These last tests are accepted, as being deducible from the principles of Scotch law.

With regard to partnership, English law has led Scotch law and Scotch trade and society into serious difficulties, by introducing foreign elements and by diverting from the development of the native theory: in *Cox* v. *Hickman* English law clears away most of the evils it introduced, and gives an independent, practical corroboration of the value of the principles it overbore. Such I take to be the effects of *Cox* v. *Hickman* on the Scotch law of partnership.

If the views above expressed are sound, two lessons may be learned from them on the subject of assimilation. 1. This instance of late approximation of English opinion to Scotch goes to prove to both Englishmen and Scotchmen that assimilation is not a matter to be pushed on hastily—to the sacrifice of destinctive elements of good existing in the laws of the two countries. 2. Assimilation must not be mere eclecticism: regard must be had to principle and theory. A useful conception, or a sound practical rule, divorced from its principle and introduced alone into a foreign system, will lose much of its value. It was proposed by the Mercantile Law Commission of 1855 that the principle (so they called it) of the Scottish law which recognizes partnership as a distinct and separate person, should be introduced into the law of England and Ireland, as being "a very convenient and useful one." But the introduction of that symbol, apart from the principles it expresses, would have been at best but a partial help towards a scientific system of partnership law. Assimilation, I think, must proceed in a more sensible and more philosophical course.

VI.—BIRTHS AND DEATHS REGISTRATION ACT, 1874.

THIS important Act, which affects every person in England and Wales, as well as every person on board a British ship, whether of Her Majesty's navy or the merchant service, and passengers entering or leaving the United Kingdom by any vessel irrespective of nationality, came into operation on the first of January. Its object is to effect a complete civil registration of all births and deaths occurring in England and Wales, on board British ships and passenger

ships landing at and carrying passengers to and from any port in the United Kingdom. Registration in other parts of the United Kingdom is regulated by special Acts. In Scotland it is effected under the provisions of the Act 17 & 19 Vict. c. 80; and in Ireland, of the Act 26 & 27 Vict. c. 11. These observations will be confined to the most recent enactment. It should, however, be mentioned that in this Act of 1874 there is by no means a consolidation of the law respecting the registration of births and deaths in England. This is much to be regretted as the Legislature, by losing this opportunity of consolidation, has not only made the working of the Registration Acts needlessly intricate, but it has failed to take the first and easiest step towards codification. In July last, when the Registration Bill was before Parliament, its merits and defects were discussed in these columns. Its great defect was that it left registration to be performed very much as it had been under the old law, that is, it did not make the registering of births and deaths compulsory as a civil duty. This we recommended should be done, and also that the whole law upon the subject should be included in a single Act. Before the passing of the Bill several penal clauses were added, and we now have a compulsory system of registering births and deaths.

The main object of the Legislature was to make a complete civil registration of births and deaths; and this was sought to be effected by—

(1) Making registration compulsory under penalty.

(2) Obliging medical practitioners to give certificates of cause of death.

(3) Making statutory declarations necessary before correcting errors of fact.

(4) Providing for the recovery of fines and authorizing superintendent registrars in certain cases to prosecute; and

(5) Making regulations as to the proper burial of still-born children.

Among other alterations made in the law upon this subject

by the 37 & 38 Vict. c. 88, may be stated that the number of persons qualified to give information of a birth or death was considerably increased; that the period during which registration would be gratuitous, was doubled; that certain fees were reduced; that registration was permissible during a much longer time; that names changed subsequent to registration were allowed to be corrected; and that, when notice of a death, accompanied by a medical certificate, should be given to a registrar, registration might be deferred until after the funeral of the deceased.

We will now proceed to dissect the provisions of the Act 37 & 38 Vict. c. 88, which is entitled, "An Act to amend the law relating to the Registration of the Births and Deaths in England, and to consolidate the law respecting the registration of births and deaths at sea." By the first section, the duty of giving information of any birth to the registrar is imposed upon persons, termed qualified informants, who are to proceed to the registrar's office for this purpose within forty-two days. The registrar's attendance at the informants' residence can now be obtained only on payment of a fee of one shilling. For not giving the necessary information within that time, the parents of any child are liable to a penalty of forty shillings.

After that time, should no information be received by the registrar, he can order the attendance of any of the qualified informants to furnish the particulars, under a penalty for refusal.

After three months have elapsed from the birth, registration can only take place before a superintendent registrar as well as the registrar; and after twelve months it can only be effected on the written authority of the Registrar General. Within three months registration is gratuitous, the fee is 2s. 6d. each to the registrar and superintendent after that time, and that amount is doubled after a year.

An important provision in the Act is contained in the sixth section, which allows the registration of a birth to take place

out of the sub-district in which it occurred in cases where the parents of the child have removed before registering the birth. In cases of illegitimate births it is no longer permissible for the mother to have the name and rank of any person inserted in the register as the father of the child; and the names of the father and mother together will only appear when it is at the joint request of the mother and of the person acknowledging himself to be the father of the child.

If, on registering the birth of a child, a name is given which it is subsequently desirable to change; or if a child is registered without a name, the name may be afterwards given or altered on production of a baptismal certificate upon payment of a small fee.

A certificate of naming in cases where there is no baptism may take the place of a baptismal certificate.

The persons qualified to give the necessary information respecting deaths are required to do so within five days of the occurrence, or to give to the registrar notice of the same accompanied by a medical certificate of the cause of death. In case the relatives of a deceased person, who are either present at the death or in attendance, fail to register the death within five days, or give notice, they are liable to a penalty of forty shillings. One of the most remarkable features of this new legislation is that, while medical practitioners are liable, under a penalty, for not giving a certificate stating the cause of death of every person whom they have attended during last illness, no remuneration is provided for their doing so. Several new classes of persons are now qualified to act as informants of deaths; such as persons finding a body, causing a body to be buried, or in charge of a funeral.

Under the twelfth section, notice of a death, accompanied by a certificate of its cause, signed by a registered medical practitioner, sent to a registrar within five clear days of the death, will exonerate the informants from giving the necessary full particulars within five days, provided they do so within fourteen.

After the lapse of fourteen days the registrar can issue his order for the attendance of any of the qualified informants, subject to a penalty for non-compliance.

After twelve months no deaths can be registered except on the written authority of the Registrar-General, and on payment of double fees. The registration of deaths is gratuitous within twelve months.

When an inquest is held the coroner's information shall be taken in lieu of the information given by ordinary informants; and the cause of death returned by the coroner, shall be considered equally "certified" as if returned by a medical practitioner.

With the intent to prevent any death escaping registration no person is allowed to perform any funeral ceremony without having delivered to him either the coroner's, or registrar's, order for burial, or the registrar's certificate of having registered the death; or, in the absence of these, without giving notice to the registrar, within seven days of the burial, of the omission to produce such order or certificate.

A coroner upon holding an inquest may issue an order for burial, as may a registrar upon receipt of a notice of death or a requisition for his attendence accompanied by a medical certificate.

The order should be given to the informant, relative, or undertaker, who must deliver it to the minister officiating at the burial, under a penalty of forty shillings.

A most important section is that relating to the burial of still-born childrén, not with reference to registration, but as likely to reduce the alarmingly high rate of infant mortality. Still-born children cannot be registered either as a birth or death. But the persons who would have been required to give information concerning the births, had such children been born alive, are responsible for the proper disposal of the bodies. Before any such body can be interred in a burial ground, the person having control over or who ordinarily buries bodies there, must not permit to be buried, or bury

in such burial ground any still-born child before there is delivered to him either—

(*a*) A written certificate that such child was not born alive, signed by a registered medical practitioner who was in attendance at the birth, or has examined the body of such child; or,

(*b*) A declaration signed by some person, who would, if the child had been born alive, have been required by the Act to give information concerning the birth, to the effect that no registered medical practitioner was present at the birth, or that his certificate cannot be obtained, and that the child was not born alive; or,

(*c*) If there has been an inquest, an order of the Coroner.

Any person acting in contravention of these provisions is liable to a penalty not exceeding ten pounds.

It is well known that, owing to the fact of two or more bodies having been buried in the same coffin, many deaths have hitherto escaped registration. To prevent a recurrence of this evil, undertakers and others in charge of funerals will have to deliver a certificate, under a penalty of £10 for non-compliance, to the person performing the burial, stating all the particulars within his knowledge, respecting any additional body contained in any coffin.

The additional body contained in the coffin may be that of a deceased person whose last abode is well known, probably the workhouse, or it may be one of a child or adult person found exposed, or one still-born; in every case all the particulars ascertained by the undertaker are to be inserted in his certificate, which should be passed on by the minister to the registrar.

By the twenty-third section, superintendent registrars are authorized to prosecute persons guilty of any offence under the Act; but this power is given subject to the consent of the Local Government Board and Registrar-General to institute proceedings.

Under the twenty-eighth section, sanitary authorities are

empowered to require registrars to furnish them with returns of the particulars registered by them concerning any deaths as may be specified in the requisition of the sanitary authority. This section will doubtless readily recommend itself to the various sanitary bodies.

In concluding our review of this Act, in which many important provisions are undoubtedly overlooked, our intention being to point out what is especially new in the Act, it should be mentioned that the thirty-seventh section contains all the regulations with reference to the registration of births and deaths at sea, a subject which may not be considered unworthy of special attention upon another occasion.

VII.—ON CERTAIN DISTINCTIVE CHARACTERISTICS OF ORIENTAL AND EUROPEAN JURISPRUDENCE.

By Professor LEONE LEVI, F.S.A., F.S.S., of Lincoln's Inn, Barrister-at-Law.

THE ancient laws of Oriental nations forming part in most cases of their religious systems, are often the most valuable, if not the only vestiges we possess of their learning and institutions. Of the commercial exploits of the Rhodians we would know but little, except for their maritime ordinance, "De lege Rhodia de Jactus," incorporated with the Roman laws. Hindoo, Mohammedan, and other oriental laws are indeed known in Europe, and they are studied the more closely since Europeans are often called to administer them in India, and their provisions frequently come under the consideration of our highest Court of Appeal. Yet I doubt whether their value is sufficiently appreciated; or their dictates often compared with those of European

Codes. The different systems are not, it is true, strictly comparable. What is there in common between the extracts of moral precepts of ancient philosophers, as the Chinese laws mostly are, and the European laws or Codes, which are in all such cases the expressions of the national will? But imperfect as any comparison can be in such cases especially, comparative jurisprudence is ever invaluable for purposes of legislation and history, and I venture to say, that it may be even useful as a help to philological studies. In the Codes and laws of European States an undercurrent may be traced of those principles of natural law, which must of necessity govern the relations of civil society, and if we put aside such portions as belong purely to religion and such provision, as are of a purely local character it will not be difficult, I think, to trace in Oriental jurisprudence the same principles of natural law permeating every ordinance and modifying and softening every institution.

The principal texts and authorities on Oriental law are the *Précis de Jurisprudence musulmane, par* M. Perron; the *Recueil de Lois concernant les Musulmans Schyites, par* M. A. Querry. It should be remembered that the Koran contains only the germ of Mussulman law. The judgments of the prophets and the decisions of the twelve Imâms, his legitimate successors, forming an important corollary to the Koran. For the Hindu laws we have the Ordinances of Manu, translated by Sir Thomas Strange, together with the works of Halhead and Colebrooke. For the law of China we have the *Ta Tsing Lee Lee*, by Sir George Staunton, as well as the Scientiæ Sinicæ of Confucius. And for the Jewish law we have the Bible. The ancient laws of Japan are mainly founded on the laws of China.

Oriental and European Jurisprudence differ in the first instance in the sources whence they are held to emanate and in the authority they are supposed to possess. That all laws originally emanated from the Divinity is an opinion held by many philosophers of ancient times. "All laws came from

God," said Plato; "no mortal man was the founder of laws."* Heraclitus affirmed "that all human laws are nourished by one divine law." The Greek judges, said Dr. Maine, were supposed to receive from Themis, a divine agent, Themistees or Awards divinely dictated. Minos, with a view of giving authority to his laws, put forth that when he retired into a cave at Crete, Jupiter his father dictated the laws to him. The Hindu laws, attributed to Manu, are presented as notes of a learned divine, whose spirit reflected the Divine being. The Koran is held by Mohammedans, not only of divine original, but as eternal and uncreated, the first transcript having been from everlasting by God's throne, and a copy sent down by the angel Gabriel to Mohammed. Among Mussulmans there is only one law, and that is the Religious law. With them, Law is not only a legislative enactment, it is a dogma. Moses is held by Jews and Christians as having been divinely commissioned, and his legislation as proceeding direct from God. The Ten Commandments emanated direct from the Divinity and they were written by the very fingers of God.

Now in direct contrast with such claims, European jurisprudence confesses itself to be altogether human. The State being an emanation of the national will, Law is the expression of the will of the people. Doubtless it may be deemed a defect of European laws that they are the work, not of Gods, but of men, and that since *humani est errare* imperfection and instability must consequently ever be inherent to European jurisprudence, but society is ever changing, human wants are constantly

* Amasis and Mneves, law-givers of the Egyptians, pretended to receive their laws from Mercury. Zoroaster, the lawgiver of the Bactrians, and Zamolxis, law-giver of the Getes from Vesta. Zathraustes, the law-giver of the Arimasri, from a good spirit or genius. Rhadamanthus and Minos, law-givers of Crete and Lycaon of Arcadia, pretended to an intercourse with Jupiter. Triptolemus, law-giver of the Athenians, affected to be inspired by Ceres. Pythagoras and Zaleucus, who made laws for the Crotoniates and Locrians, ascribed their institutions to Minerva. Lycurgus of Sparta professed to act by the direction of Apollo.—Warburton on *Divine Legation of Moses demonstrated.* Vol. 1, p. 315.

revealing themselves under new phases, and jurisprudence would cease to be the science of law if it did not take cognizance of the altered condition of society. But other consequences arise out of this contrast. A system of legislation, as the Oriental professing to come from God, must of necessity be immutable. One confessedly the work of man, as the European, is ever changing and changeable. In the East, the observance of laws is sought for by inspiring a sentiment of awe towards their authors, and fear for the absolute monarch who executes them. In the West, the better observance of law is sought for, first, by making the people themselves their own legislators, and, secondly, by creating a united responsibility for and a common interest in the execution of the law. How far the most important systems of law may be traced back to one common human source it is not easy to establish. We know how much British, French, German and Italian jurisprudence owe to Roman laws, and how much Roman jurists have drawn from Greek jurisprudence. And if the conjecture of Sir William Jones should be rightly founded that Minos, the son of Jupiter, was the same person as Manu, the son of Brahma, a common source would be found to exist for both Greek and Indian jurisprudence; whilst there is much reason for supposing that the Mosaic Legislation has itself drawn much from Egypt, and that Egyptian jurisprudence has in turn taken much from India.

As an immediate result of these different characteristics of Oriental and European jurisprudence, whilst Hindu laws unite and intermingle notions of cosmogony, metaphysical ideas, precepts relative to human conduct and religious duties and ceremonies, together with the laws of contract and civil laws; and Mussulman law mixes fasting, pilgrimages and the holy war with civil rights, European laws make a sharp distinction between the sacred and the profane, between things pertaining to God and things pertaining to man. Hindu laws make the rights of the person and the

rules of succession to depend on the solemnization of fixed religious or funeral ceremonies. European jurisprudence makes the one wholly independent of the other. For the same reason Oriental laws are eminently personal laws. They affect certain races of people, or rather a given number of co-religionists. European laws affect the citizen to whatever race, clime, or religion he may belong. They are personal in so far as they govern the person in his civil condition, and real in so far as they contemplate things as the object of rights.

Oriental jurisprudence divides men into classes. Manu recognized the Brahamin or Sacerdotal class, the Kohatrya or Chuttree or the military class, the Vaiṣya or the mercantile class, and the Soodra or the Serviles. Zoroaster divided the people into four classes—the Sacerdotal, the military, the cultivator of land, and the working population. The Japanese divided the people into eight classes: the object in all such systems being of constituting some the rulers and some the servants of society. In practice, indeed, such broad distinction will ever exist, but it is the glory of European jurisprudence to admit of no such distinction and to recognize the perfect equality of right of all men in the eye of the law. "*Ogni cittadino gode dei diritti civili*," says the new Italian code, admitting of no difference of race, religion, or caste. And that is the spirit and letter of all European codes.

As in matter of caste so in matter of sex. In India, woman is under perpetual tutelage. She is under the guardianship of her father till she marries, and subject to her husband when she does. And when her father dies, if she be unmarried, she becomes subject to the guardianship of her nearest male relations. No such subordination is recognised in European jurisprudence. By Hindu law, marriage is a sacrament, the last of the ceremonies prescribed to the three regenerate classes. By European laws, marriage is a civil contract. Polygamy is countenanced by Mussulman

law, allowed by the Hindu, and prohibited by European laws. In India, marriage is prohibited within the sixth degree. By the laws of China, marriage is permitted up to the fourth degree. So it is by the Hebrew laws, as well as by the European. The age of majority differs in the East and West probably from the earlier time at which puberty is acquired. According to the Hindu or Mussulman law, the attainment of puberty as a fact fixes the time of personal responsibility. European laws now generally agree in fixing 21 years of age as the specified limit. In Oriental jurisprudence, adoption has an important place. In European laws, the institution is not general. Adoption was known to the Roman law; and at Athens it existed also. But it was unknown to the Teutonic nations, and it never existed in England. The Oriental Laws of Inheritance differ in many points widely from the European. According to the Hindu law, all legitimate sons succeed equally to both real and personal property. No right of primogeniture exists. In England, the eldest son inherits the whole of the real property, the rule being that whenever a man dies intestate leaving real estate, *e.g.*, lands and tenements, his eldest son is the only person by law entitled to the whole. In India, in default of a son, the grandson inherits, and in default of the grandson, the grandson's son. In default of the same, the widow inherits, and in default of the widow, the daughter. In England, though males are, as a rule, preferred to females, in all cases daughters succeed before any collateral relation whilst the widow is entitled to endower. And since by Hindu law a man is considered only as a tenant for life in his own property, a will as understood by English law is wholly unknown to Hindu law, though there may be a gift in contemplation of death. The Mussulman law, however, fully recognises a will.

When, from civil rights, we pass to matters of contract, another order of questions arises, wherein Oriental and European jurisprudence come into greater contact. It is,

indeed, more in the sources of law, and in the combination of religious observances with common judicial ideas, that Oriental laws stand wholly apart from European laws. But we must not criticise such combination too severely, for we must remember what Sir William Jones said, that the best extended legislative provisions would have no beneficial effect even at first, and none at all in a short course of time, unless they were congenial to the dispositions and habits, to the religious prejudices and approved immemorial usages of the people for whom they were enacted. "Les lois politiques et civiles de chaque nation," said Montesguieu, in his *Espirit des Lois*, "doivent être tellement propre pour le quel elles sont faites que c'est un très grand hasard si celle d'une nation peuvent convenir à une autre. Il faut qu'elles se rapportent à la nature et aux principes du gouvernement qui est établi, ou qu'on veut établir; soit qu'elles le forment comme font les loix politiques, soit qu'elles le maintienne comme font les lois civiles. Elles doivent être relatives au physique du pays, au climat glacé, brulant, ou tempéré, à la qualité du terrain, à sa situation, à sa grandeur, au genre de vie des peuples labourers, chasseurs ou pasteurs; elles doivent se rapporter au degré de liberté que la constitution peut souffrir, à la religion des habitants, à leurs inclinations, à leurs richesses, à leur nombre, à leur commerce, à leurs meurs, à leurs manières. Enfin, elles ont des rapports entr' elles; elles en ont avec leur origine, avec l'objet du legislateur, avec l'ordre des choses sur les quelles elles sont établies. C'est dans toutes les vues qu'il faut les considérer."

VIII.—CURIOUS LAW REPORTING.

MR. FRANKLIN FISKE HEARD, of Massachusetts, United States, author of "Curiosities of the Law Reporters"* has very kindly forwarded to us the *Central Law Journal*, published at St. Louis, U.S., containing a contribution intended originally for this Magazine, but which for convenience sake, he got set up in type in a local periodical. The *Law Magazine* for January, 1873, contained, in an article, a review of Mr. Heard's book, and quoted liberally from the large stock of quaint maxims and odd expressions which it contained. It is intended by Mr. Heard himself to follow this up with other articles on the reporters and text-writers of this and his own country, and we commence the series by quoting from the contribution in question. In the volume of 1871, the author confined himself principally to extracting from the reports and text books, but now he has extended his researches, not only into the archives of the common law records of this realm, but more into the modern ones of the new world. We select a few amusing reminiscences.

In a case in which it was held that a bond in consideration of past cohabitation is good in law. Mr. Justice Bathurst "pleased the sanctimonious by enriching his judgment" with quotations from the books of Exodus, ch. xxii. v. 16, and Deuteronomy, ch. 22, v. 28, 29, to prove that "wherever it appears that the *man is the seducer*, the bond is good." *Turner*, spinster v. *Vaughan*, 2 Wils. 339. We wonder when a case will occur in which the question of the validity of the bond, the woman being the seducer, shall be solemnly adjudged and reported.

In *Commonwealth* v. *Merriam*, 14, Pick. 518, which was an indictment for adultery, it was held that other instances of

* Boston U.S.A.: Lee & Shepard. 1871.

improper familiarity between the defendant and the same woman might be given in evidence to corroborate the witness. But such evidence has been rejected, the court say, "where it tends to show a *substantial act* of adultery on a different occasion." *Thayer* v. *Thayer* 101 Mas. p. 112.

The *Albany Law Journal* makes mention of a statute of New York, which allowed deductions of a certain number of days to be made, on account of good behaviour from the term of imprisonment of convicts, with a proviso that the statute should not apply to any person *sentenced for the term of his natural life.*

Mr. Justice Putnam, in considering the subject of the conclusiveness of judgments, remarked, that if the principle were otherwise, "the law would become a game of frauds, in which the greatest rogue would become the most successful player." *M'Rae* v. *Mattoon*, 13 Pick. 58.

It is said in "March on Arbitrements," 215, that a non-suit "is but like the blowing out of a candle, which a man, at his own pleasure, lights again." Quoted by Justice Metcalf, in *Clapp* v. *Thomas*, 5, Allen, 159.

In a recent volume of "Reports of Cases Argued and Determined in the Court of Appeals of the State of New York," is this marginal note, and this only: "Judgment affirmed of course." *Lyman* v. *Wilber*, 3 Keyes, 427.

In a very recent case in Tennessee we find one of the learned judges saying: "The same doctrine is to be found in Bracton, *Lord* Bacon, in Bacon's Abridgment, and was a maxim of the civil law." *Girdner* v. *Stephens*, 1 Heiskell, 286.

Lord Coke says that Moses was the first law reporter. Preface to 6 Rep. p. xv.

Lord Bacon writes that certainty is so essential to law, that law cannot even be just without it. "For if the trumpet give an uncertain sound, who shall prepare himself for the battle?" 1 Corinth. xiv. 8. So, if the law gives an uncertain sound, who shall prepare to obey it? It ought, there-

fore, to warn before it strikes. It is well said also, "That that is the best law which leaves least to the discretion of the judge. Arist. Rhet. i. 1; and this comes from the certainty of it. De Augmentis, viii. Aph 8, Vol. v. p. 99, ed Spedding.

The criticism of Lord Chief Justice Willes on "Piggott's Treatise of Common Recoveries," is not *mutatis mutandis*, without its application to some of the text-books of the present day. "Piggott," he says, "who was as able a conveyancer as any man of the profession, has confounded himself and everybody else that reads his book, by endeavouring to give reasons for, and explain common recoveries. I only say this to show that when men attempt to give reasons for common recoveries they run into absurdities, and the whole of what they say is unintelligible jargon and learned nonsense." *Martin* v. *Strachan*, 1, Wils. 73.

Memorandum. I Mod. 9. Seventeen Serjeants being made the 14th day of November, a day or two after, Serjeant Powis, the junior of them all, coming to the King's Bench Bar, Lord Chief Justice Kelyng told him that he had something to say to him, viz.: that the rings which he and the rest of the Serjeants had given, weighed but eighteen shillings apiece; whereas Fortescue, in his book *De Laudibus Legum Angliæ*, says: "The rings given to the Chief Justice and Chief Baron ought to weigh twenty shillings apiece;" and that he spoke not this expecting a recompense, but that it might not be drawn into a precedent, and that the young gentlemen might take notice of it.

The statute of Merton, so called because the Parliament or Council sat at the Priory of Merton in Surrey, was passed in the twentieth year of the reign of Henry III., A.D., 1236. It is a remarkable fact that women were summoned to this council. *Omnes uxores comitum et baronum qui inbello occisi fuerunt, vel captivorum.* Gale, *Annales Waverleienes.* Spilsbury's Lincoln's Inn and Library, pp. 200, 201.

Thomas's case—Dyer 996, quoted in Phillimore's Law of

Evidence, 136. One witness of his own knowledge, and another of hearsay from him, though at the third or fourth hand, are two sufficient witnesses in high treason.

The marginal note to Clement's case, 1 Lewin C. C. 113 (1834), runs thus: "Possession in Scotland evidence of stealing in England." This is the summary of a case of horse stealing tried at Carlisle, the evidence being that the horse was a few days afterwards found in the prisoner's possession, across the border, and it has been made the ground for much gibing, by the English, at the acquisitive propensities of their northern brethern.

In an action for scandalous words spoke of a justice of the peace, the court observed: "There is not much difficulty in this case, but there is no end of citing and answering cases. The plaintiff here is said to be a justice, yet no special damage laid in the case; the office of justice of the peace is not so considerable but that many people choose to decline it." *Palmer* v. *Edwards*, Cooke, 242, 3d. ed.

By the Court: "You cannot charge your attorney without leave of court, to be obtained on motion, though he be ever so great a cheat." Mod. 59.

Chief Justice Holt said: "That if we see one against whom there is a judgment of this court, walk in Westminster Hall, we may send our officer to take him up, if the plaintiff desire it, without a writ of execution." 7 Mod. 52.

"We must not steal leather to make poor men's shoes," said Mr. Justice Twisden, in *Earl of Plymouth* v. *Hickman* 2 Vern. 167.

The virtue of woman does not consist merely in her chastity. 2 Atkyns, 338; 1 Coop. Temp. Cottenham, 537 note.

The following language used by Justice Maule, in *Martindale* v. *Falkner*, 2 C. B. 720, is characterized by Justice Blackburn, in *Regina* v. *Mayor of Tewksbury*, L. R. 3 Q. B. 629; 37 L. J. Q. B. 288, as clear and common sense: "There is no presumption in this country that every person knows the law; it would be contrary to common sense and reason if it were so."

In *Protector* v. *Geering*, Hardres, 85, 99, Atkins says, *arguendo*: "Errors are like felons and traytors; *any* man may discover them; they do *caput gerere lupinum*." 1 Man. and Gran. 16 note.

Testators should be prevented, if possible, "from sinning in their graves." This expression, which has become one of the current bye-phrases always used in courts of equity on the fitting occasion, fell from Sir John Strange, in *Thomas* v. *Britnell*, 2 Ves. Sen. 314.

An inhabitant in a county goes with wares in the same county from one house to another to sell them. He is a *rogue* within the statute of 39 Eliz. cap. iv. and other statutes. Jenk. Cent. viii. Cas. 16.

Sir Bartholomew Shower's mode of treating Monmouth's invasion is excellent for its brevity. "Memorandum—In Trinity term Monmouth's rebellion in the west prevented much business; in the vacation following, by reason of that rebellion, there was no assize held for the western circuit; but afterwards five judges went as commissioners of oyer and terminer and gaol-delivery, *and three hundred and fifty-one of the rebels were executed, &c.*" 2 Show. 224.

Chief Justice Scroggs—"As anger does not become a judge, so neither doth pity, for one is the mark of a foolish woman, as the other is of a passionate man." *The King* v. *Johnson*, 2 Show. 4.

Lord Eldon mentions a remarkable instance as regarded himself, of the uncertainty of evidence as to handwriting. A deed was produced at a trial, on which much doubt was thrown as a discreditable transaction. The solicitor was a very respectable man, and was confident in the character of his attesting witnesses. One of them purported to be by Lord Eldon himself; and the solicitor, who had referred to his signature to pleadings, had no doubt of its authenticity, yet Lord Eldon had never attested a deed in his life. *Eagletor* v. *Kingston*, 8 Ves. 473. Quoted by Mr. Justice Coleridge in his judgment in *Doe* v. *Suckermore*, 5 Ad. & El. 716, and 2 Nev. & Per. 34.

"The parents of trusts were *fraud and fear*, and a court of conscience was the *nurse*." *Attorney-General* v. *Sands*, Hard. 491, quoted in "Perry on Trusts," sec. 3 note.

Sir Francis Palgrave relates this anecdote: Within memory, at the trial of a cause at Merioneth, when the jury were asked to give their verdict, the foreman answered: "My Lord, we do not know who is plaintiff or who is defendant, but we find for whoever is Mr. C. D.'s man." Mr. C. D. had been the successful candidate at a recent election, and the jury belonged to his colour. On the Authority of the King's Council, p. 143.

The Term Reports, when they use the very language of Lord Kenyon, often contain a series of broken metaphors. For example: "If an individual can *break down* any of those safeguards which the Constitution has so wisely and so cautiously erected, by *poisoning* the minds of the jury at a time when they are called upon to decide, he will *stab* the administration of justice in its most vital parts." Townsend's Lives of Twelve Eminent Judges, Vol. 1. p. 79.

"Heresay is no evidence. But it may be admitted in corroboration of a witness's testimony." Gilb. Ev. 890. Kelyng Appendix to 3d ed. 92.

In the thirtieth edition of "Burn's Justice," vol. III. p. 1031, note, it is said: "It seemeth to savor not much of gallantry that one's ancestors supposed none but women could be guilty of being a common scold; for the technical words denoting the same, whilst the proceedings were in Latin, were of the feminine gender; as *rixatrix*, *calumniatrix*, *communis pregnatrix*, *communis pacis purturbatrix*, and the like."

Sir Harbottle Grimston wrote in true professional language of his father-in-law, on George Croke, that he was continued one of the judges of the King's Bench, "till a *certiorari* from the Great Judge of heaven and earth to remove him from a human bench of law to a heavenly throne of glory." Preface to Cro. Eliz.

J. was indicted for battery of L., and sued R. in trespass

for the same battery; plea, *son assault demesne*, and issue thereon. T. H., one of those who indicted (found the bill), was of the inquest on the trial of the action of trespass, and gave a verdict for the plaintiff, with twenty shillings damages; and T. H. was committed to the custody of the marshal, and fined for two causes, one of which was that he was one of the indictors of the said J., whom now he has acquitted, and did not challenge himself. Lib. Assis. 40 Edw. III. f. 241 A. pl. 10. See Bro. Ab. Challenge 142; 21 Vin. Ab. 256; Trial (B. d.) pl. 14; 8 Ad. & El. 834 note.

In an old case—Bagnal *contra* Langton, Mich. T. Jac. 1—a man stole his wife against her friends' consent, and sued them for her portion in this court—the Court of Chancery, but was refused relief on the ground, as it was quaintly stated by Sir Thomas Egerton, that "he who steals flesh let him provide bread how he can."

When sitting in the Rolls Court, indignant at the conduct of one of the parties, Lord Kenyon astonished his staid and prosaical audience by exclaiming, "This is the last hair in the tail of procrastination!" Whether he plucked it out or not, observes Mr. Townsend, the reporter has omitted to inform us. "Lives of Eminent Judges," vol. 1. p. 79.

In Mr. Goldwin Smith's "Sketch of Pitt," it is related that Lord Eldon, at that time Attorney-General Sir John Scott, "opened his attempt to procure the capital conviction of a man who, he knew, had done nothing worthy of death, with a pathetic exordium on his own disinterestedness and virtue. He should have nothing to leave his children but his good name. And then he wept. The Solicitor-General wept with his weeping chief. What is the Solicitor weeping for? said one bystander to another. He is weeping to think how very little the Attorney will have to leave his children." The *North American Review*, vol. 94, p. 78.

"The Court of Equity in all cases delights to do complete justice, and not by halves." Per Cur. in *Knight* v. *Knight*, 3 P. Wms. 333.

Rex v. *Johnson.* Comberbach, 377. Fine or indictment for lying with another's wife prevents an action. Q. The defendant appeared to be fined upon an indictment for seducing and living with another man's wife. North moved to charge him with an action, but the Court would not suffer that, now he comes to submit to a fine.

A curious instance of the plea, "*molliter manus imposuit,*" occurs in a case reported in "Levinz," *Ashton* v. *Jennings*, 2 Lev. 123. The plea to an action for assault and battery was, that the female defendant, being the wife of an Esquire and Justice of the Peace, the female plaintiff being the wife of a Doctor in Divinity, assumed to go before her at a funeral at Plymouth, whereupon the defendant gently laid her hands upon her to displace her, as she lawfully might. The Court, without deciding the question of precedence, gave judgment for the plaintiff.

If a pauper be non-suited, the usual practice is to tax the costs, and for nonpayment to order him to be whipped. Bac. Ab. Pauper D. Salkeld reports: "I moved that a pauper might be whipped for non-payment of costs upon a non-suit, and the motion was denied by Chief Justice Holt, saying he 'had no officer for that purpose, and never knew it done.'" 2 Salk. 506, pl. 1.

In truth, as was said by Chief Justice Wilmot, "the common law is nothing else but statutes worn out. "*Collins* v. *Blantern*, 2 Wils. 341, quoted by Justice Willes, in *Pickering* v. *Ilfracombe Railway Company*, L. R. 3 C. P. 250.

"Judgment was given against a man of 40 years of age, and he brought a writ of error, and he assigned infancy for error, and the attorney was punished by the Court." Per Chief Justice Holt in *Pierce* v. *Blake*, 2 Salk. 515.

In Jenkins' Centuries it is said: "A., a woman of twelve years of age, married B., of thirteen years of age; A. has issue; this is a bastard in our law. Yet some write that Solomon begot Rehoboam at ten years of age, by the computation of the Scriptures." Cent. vii. Cas. 26. See also Cent. ii. Cas. 84, citing Year Book, 1 Hen. vi. 3.

Ascough et al. v. *Lady Chaplin*, Trin 4 Geo. II. 1730. Cooke 93, 3rd ed.; 2 P. Wms. 591; 2 Eq. Cas. Ab. 780; Mosely 391, S. C. A writ *de ventre inspiciendo*, returnable Tres Mich., on the behalf of Edward Ascough, Esq., and Elizabeth, his wife, Anne Chaplin, spinster, Charles Fitzwilliams, and Frances, his wife, co-heirs of Sir John Chaplin, Bart., their brother, against Dame Elizabeth Chaplin, widow of the said Sir John; the writ was returned that the lady was with child, and a motion made for the safe custody of her until her delivery; it was suggested that the lady's mother was likewise with child, and therefore neither she nor any other women with child were proper persons to be with her; the court agreed that such a clause should be inserted in the writ, and ladies were named on the part of the prosecutors or heiresses, to attend the lady during her pregnancy and till her delivery, but they must not name any spinster; and the mother was allowed to visit only.

In an action for words spoken of the plaintiff, namely; "She is a whore, a common whore, and N's whore," all the court were of the opinion that these words are not actionable, *being only scolding*. *Osborn* v. *Wright*, 2 Mod. 296.

"When a man is taken in adultery with another man's wife, if the husband shall stab the adulterer, or knock out his brains, this is bare manslaughter; for jealousy is the rage of a man, and adultery is the highest invasion of *property*." *Regina* v. *Mawgridge*, Kelyng, 137.

Chief Justice Holt: "If a man solicits a woman and goes gently to work with her at first, and when he finds that will not do, he proceeds to force, it is all one continued act, beginning with the insinuation and ending with the force. And this being an attempt and solicitation to incontinency, coupled with force and violence, it does by reason of the force which is temporal, become a temporal crime in the whole. An indictment will not lie for a plain adultery, but libel in the Spiritual Court will." *Rigault* v. *Gallizard*, Holt, 51.

The old English lawyers occasionally rejected the evidence of women on the ground that they are *frail*. Best Ev. sec. 64, citing Fritzh. Abr. Villenage, pl. 37, Bro. Abr. Testmoignes, pl. 30.

In the Court of King's Bench, women were early engaged as counsel. In a case in Lord Raymond, we find "Mrs. Cheshyre counsel with the plaintiff." *Vincent* v. *Beston* 1. Ld. Raym. 716, A.D. 1702.

ON THE APPOINTMENT OF MR. HUDDLESTON AS JUDGE OF THE COMMON PLEAS.

THE appointment of Mr. Huddleston to the Judgeship vacated by Mr. Justice Honeyman will be a popular one at the Bar. For many years the undisputed leader of a great circuit, not only in name but in professional status, and especially as regards the quantum of briefs and as a London practitioner well known and frequently employed, Mr. Huddleston has perhaps held more briefs and become acquainted with more juniors at the Bar than any other leader now living; and certainly without flattery it may be said of him that no one was more courteous and considerate to those beneath him, nor did any leader set a better example of patient industry and conscientious attention to the interests of his client. It is well known in the profession that Mr. Huddleston's briefs were models for imitation, every fact and every date being carefully noted and digested in precise, accurate, and logical sequence; and unquestionably, without wishing in any way to detract from his personal ability, much of Mr. Huddleston's success at the bar may be attributed to the care and patient industry which he bestowed upon his cases. No

doubt he will carry those habits with him upon the Bench; and if he earns the character of a careful and painstaking and courteous judge, he will gain one that is to be envied, and, let us hope, frequently emulated. It is impossible to pass over this appointment with a simple congratulation. Dr. Kenealey has made this impossible: for nearly a year the columns of the *Englishman* have been filled with vulgar abuse of Mr. Huddleston, and his appointment to the Bench has been anticipated aud described in a whirlwind of passion and of intemperate clamour. But to do justice to Dr. Kenealey, whoever he abuses, and their name is legion, he also charges specifically with the offences he prefers against them, and there is an advantage in this over which Mr. Huddleston at any rate may rejoice, for it may very fairly be contended that if Dr. Kenealey does not charge his victims with other offences than those he specifies, it is because he has none other within his knowledge with which to charge them. We are, therefore, able to state positively the charges which Dr. Kenealey has thought fit to make against Mr. Huddleston, except for scattering his marigolds at elections, a charge which, now that the Doctor has done the same thing at Stoke, we may consider to be withdrawn, there is no other except the terrible accusation of having promoted the action of the Bar Mess of the Oxford Circuit against Dr. Kenealey on account of his conduct during and subsequent to the trial of Arthur Orton.

Now, in the first place, there is no proof that Mr. Huddleston was an actor at all in this matter, and if he were, his action and responsibility is shared by the whole circuit.

But surely this act has been more than justified by the conduct of a much greater Bar Mess to which the Doctor has had the temerity to appeal. The House of Commons, as independent a body of gentlemen as exists in the empire, has unanimously arrived at the same conclusion; and, cut by the Circuit, Dr. Kenealey now finds himself cut by the House: and such a fate must the Doctor expect to meet with whilst

he continues to abuse the giant strength of the press in order to gratify his petty feelings of spite and revenge; and he cannot justly complain of it, for he must be aware that, so long as he continues a course which no gentleman can excuse, he forces every one, even those who are disposed to act more kindly towards him, to hold aloof from him, and, if it must be, to act against him.

Because Mr. Huddleston, as a member of the Oxford Circuit, or as a member of that doomed institution (in Dr. Kenealey's eyes), Gray's Inn, is compelled to action against a man who courts prosecution, he is not to be abused. And under the circumstances it is unworthy of the person prosecuted, however severely he may be punished, to retaliate by such abuse or by bestowing absurd names, or by the other means adopted. As curses are said to go home to roost, most assuredly will the offensiveness and bitterness of those attacks cling to him who makes them so long as he lives; and after his death they must pollute his memory. Such invariably is the bitter end of the slanderer; a man cannot touch pitch without being defiled.

To Mr. Justice Huddleston this abuse is now a matter of indifference, for he is removed from the influence of the fickle will and passion of the multitude, and cannot now be assailed except for wrong actually done and only in a legitimate and constitutional manner. Moreover, the Ides of March are approaching, and our modern Brutus has enough work before him, so that he may well afford to be merciful to those whom he only charges with having injured himself and whom he does not charge with destroying the Constitution. He may well nurse his energies for the three Cæsars he so patriotically and righteously proposes to assassinate upon the 16th of March next. It is perhaps useless to point out to Dr. Kenealey that even if he succeeded he would assuredly earn the fate of Brutus, or, to use a more homely parallel, his end would be like that of the celebrated Kilkenny cats, the destroyer would be annihilated with his victim.

As a matter of fact he cannot succeed, for every one in the House of Commons, and, through the members, nearly every one in the country is against him, that even if he had a case to present, he could not present it, and that assuredly in pressing forward he is only bringing upon himself fresh mortification and a fresh defeat. It is with no unfriendly feelings that we counsel Dr. Kenealy, even now, to desist from the ill-advised and erroneous course that he is pursuing. If he has lost his status at the Bar, he has gained a seat in Parliament. Let him use his new profession for the good of his fellow-men, and he may even yet regain the respect of those, whom, say what he will, he cannot despise.

LORD ST. LEONARDS.

WE are indebted to the *Law Times* for the following extract from an able memoir of the late Lord St. Leonards :—

"The late Right Hon. Edward Burtenshaw Sugden, Lord St. Leonards, of Slaugham, Sussex, in the Peerage of the United Kingdom, LL.D. and D.C.L., formerly Lord High Chancellor of Great Britain, who died on the 29th ult., at his seat, Boyle Farm, near Thames Ditton, in the ninety-fourth year of his age, was the second son of the late Mr. Richard Sugden, a respectable tradesman—a wig maker—in Duke-street, Westminster. He was born on the 12th Feb. 1781, and was to a large degree self educated, *faber fortunæ suæ*. He gained the first rudiments of his education at home, and the rest at a private school. Nearly all that is known about the commencement of his legal career is that towards the end of the last century, while still under age, he entered the office of a certain conveyancer. The tradition widely believed, is that while still quite a youth, and employed as a clerk in the offices of a large firm of solicitors in London, he was in the habit of taking matters of business for them to the chambers of an eminent conveyancer—we have heard it said, the late Mr. Duval. The latter one day, having occa-

sion to speak to young Sugden with reference to some business that he had brought to him, was so struck with the lad's acquaintance with the law of the case, that, at the suggestion of the firm, Mr. Duval took him as a pupil without the customary fee; and it was in this eminent man's chambers that he got that insight into the law of real property which afterwards led him to the woolsack. Mr. Sugden became a member of Lincoln's-inn at the same time at which he entered Mr. Duval's chambers as a pupil, and, having completed the needful number of terms, commenced business on his own account as a conveyancer under the Bar, and in this capacity soon became as favourably known to solicitors for his punctuality and assiduity as he was for his knowledge of the law; but it was some time before his special qualifications as a lawyer were recognised and appreciated by the public at large.

"Even at this early stage of his career he gave evidence of his minute acquaintance with the branch of the profession he had made his special study, by the publication of his treatise on 'Vendors and Purchasers,' a work which at once became a text-book with the Profession, and which, enlarged from time to time, has since gone through several editions. This work was written before Mr. Sugden had reached his twenty-second year, and, as he tells us in the preface to the 13th edition, published in 1857, the book was certainly the foundation of his early success in life. To the general reader, it may be remarked, this work is of an intensely practical character. Its sweep is immense. The gifted author exhibits the power of grasping the whole subject, however extensive and complicated, and yet applying accurate, and the latest, legal knowledge to the minutest exigency. He was called to the Bar by the Honourable Society of Lincoln's-inn in 1807, and early in the following year published his 'Practical Treatise of Powers," which is regarded as eminently characteristic of its author's legal genius; it at once elevated him to a conspicuous position in the foremost rank of his profession: and he soon entered upon a respectable practice, which continued constantly enlarging till, as was generally admitted, it became one of the most lucrative in that particular branch. Occasionally he argued a case in the Court of Chancery, and for a few years most of those special cases which were brought before the Court of King's Bench relating to the laws of real property. Most of these cases, we may add, will be found in East's, Maule and Selwyn's, and Barnewall and Alderson's 'Reports.' In 1817 he quitted his chambers and conveyancing altogether, and

took his seat in the Chancery Court. His profound knowledge of equity soon rendered him remarkable among Chancery barristers. In 1823 Lord Eldon conferred upon him the honour of a silk gown, and in the same year he was elevated to the position of a bencher of Lincoln's-inn.

In early life Mr. Sugden's ambition led him to aspire to senatorial honours, and he accordingly stood several contested elections, having been an unsuccessful candidate for Shoreham in 1826, and for Cambridge, if we remember right, more than once, his opponent being the late Lord Monteagle. He had also offered himself as far back as the year 1818 as a candidate for Sussex, in which county he had bought a small property called Tilgate Forest, but he withdrew without going to the poll. The story of his standing for Sussex and for Shoreham runs as follows: In 1826, as the general election was approaching, a vacancy was expected in the representation of Shoreham. Mr. Sugden, being in want of a seat, made overtures to the electors, and, considering that it was useless to prosecute a canvass without first conciliating the goodwill of the Duke of Norfolk, he applied to his friend the late Mr. Charles Butler, the eminent Roman Catholic barrister, to solicit his Grace's interest. According to Mr. Horsfield, the historian of Sussex, 'Mr. Butler wrote to one of the duke's most influential friends requesting his support, and stating in this letter that Mr. Sugden was "a decided friend of Catholic Emancipation,' a measure which at that time was of paramount interest. For some cause or other, however, the duke withheld his support, and a relation of his own, Mr. Henry Howard, offered his sevvices. On this' adds Horsfield, 'Mr. Sugden addressed the electors, stating to them that he sought their support in order to help them to work out their own independence, and, among other things, his handbill contained the following paragraph: "I have pledged myself to vote against the admission of Catholics into parliament, and that pledge I shall faithfully redeem." By some means or other Mr. C. Butler's letter came to the knowledge of the freeholders, who, feeling that they had been treated ill in the matter, declined supporting Mr. Sugden. The result was that his claims were rejected, and he found himself at the bottom of the poll, the numbers being —for Sir Charles S. Burrell, 865; for Mr. Henry Howard, 545; for Mr. Sugden, 483. In 1818 Sir Godfrey Webster suddenly announced his intention to withdraw from the representation of Sussex, and the Tories endeavoured to steal a march on their opponents by putting forward Mr. Sugden, who was nominated, together with Mr. Walter

Burrell, and fully expected to be forthwith girt with the sword of a "Knight of the Shire," being strongly supported by Mr. Huskisson and the Government. At the last moment, however, Sir G. Webster was again put into nomination without his knowledge; and at the end of the first day's poll Mr. Sugden was glad to retire from the hopeless contest, having polled only 122 votes.'

"It was on the hustings at one of these elections that an incident occurred which does honour to Sugden's good sense and feeling. He was publicly twitted by one of the mob in his opponents' interest with being the son of a barber. 'Yes,' he replied, 'I was, and I still am, the son of a barber; but there is one difference between myself and my assailant, and that is this—I was a barber's son and have risen to be a barrister; but if he had been a barber's son, he would probably have remained a barber's boy to the end of his life.' In 1828, however, Mr. Sugden took his seat in the House of Commons as one of the members for Weymouth and Melcombe Regis. In the next year he was appointed Solicitor-General, when he received the customary honour of knighthood, and he was again returned for Weymouth, as he was also at the general election after the death of King George IV. At the next general election he was returned for the now disfranchised borough of St. Mawes, in Cornwall, and sat till the passing of the first Reform Bill. On the first occasion of Mr. Sugden addressing the House of Commons he stood forward as the vigorous upholder of the Court of Chancery. A motion had been made to inquire into abuses connected with the constitution and practice of that Court. The advocates of improvements characterised the Court as it then existed as 'a public curse.' Against this Mr. Sugden protested in vehement terms, saying that 'a court which had conferred so many important benefits on the country ought not to be exposed to public odium;' indeed, his earliest parliamentary utterances generally were a thorough-going defence of the Court of Chancery, and he even went so far as to assert that it was 'chiefly fraudulent trustees' who complained of the Court, so that it was a surprise to many when he came forward a few weeks afterwards with a Bill for the amendment of the Law as administered in Chancery. On the proposal to repeal the Usury Laws, Mr. Sugden objected, on the ground that this 'repeal would be productive of great mischief, both to the commercial and the landed interest;' and he took this position, notwithing 'he was convinced of the injurious effects' of those laws.

"Sir Edward Sugden opposed the Reform Bill of 1831 as

creating the £10 householder, a kind of voter who would be found venal and corrupt. In one of his effective speeches against the passing of that Bill he endeavoured to show its evil tendency, and ended with threats of bringing before the House the dealings of Daniel O'Connell with the Irish Government. Indeed, among the opponents of the Reform Bill there were few more persistent or more shrewd than Sir Edward Sugden. The passages of arms between Sir Edward and Lord Brougham, on the elevation of the latter to the Lord Chancellorship, will be fresh in the recollection of many of our readers. These squabbles and attacks were almost of daily occurrence, perhaps greatly to the amusement of lookers-on, but much to the detriment of the due and orderly administration of justice, and they waxed even fiercer and more personal, till at last Lord Brougham so far forgot himself as to transfer the battle-ground from the Court of Chancery to the House of Lords, and there, where his opponents could not reply, he made a savage attack upon Sir Edward Sugden. Sir Edward took his revenge by replying in the House of Commons, where he declared that, while the office of Lord Chancellor would ever command his respect, he 'could never entertain any for the man who then filled it.' This state of things called forth an article on the subject in *Blackwood's Magazine* for April 1834, wherein the writer amusingly asks, "Did you ever chance to hear, reader, of a certain Sir Edward Sugden? Do you know that he is the most consummate real property lawyer that lives—perhaps that ever lived—in this country? That he is admitted on all hands to be the first practitioner in the Court of Chancery? And this is the man over whose head, to the indignation of the profession, Lord Brougham scrambles into the Chancellor's chair; this formidable individual was henceforth to appear *before Lord Brougham* as a counsel, and that in the profoundest discussions upon the most subtle and complicated of sciences. He was not to be cajoled by the new Lord Chancellor into acquiescence in his various innovations; for no sooner was Lord Brougham seated than, like a madman scattering firebrands, arrows, and death, he began to suggest alterations by wholesale in a system with which he was about enteriug upon. Sir Edward, in his place in Parliament, suggested an inquiry into certain manœuvres of his Lordship. 'As soon as this came to the ears of the courteous and philosophic Chancellor, did he temperately and dignifiedly vindicate himself? No: he called Sir Edward Sugden a bug.' The newspapers in 1834 asserted that Lord Brougham, when he once proposed to

sever the political and legal duties of the Lord Chancellor, proposed to offer to Sir Edward Sugden the latter portion of the work, as an *amende* for his own insulting conduct. In 1835 Sir Edward was appointed Lord Chancellor of Ireland, but did not hold the office more than a few months. In 1841 he was again summoned to the same post, and it is understood that a peerage was then offered him, but this latter honour he declined. In the meantime—namely from 1837 to 1841, he had again held a seat at St. Stephen's as member for Ripon. He retained the seals of the Irish Chancery till the fall of the Peel Administration in 1846, having given the greatest satisfaction both to the Bar and to the suitors in that court. During the Whig Administration which followed, Sir Edward Sugden remained in retirement; but on the Earl of Derby first coming into power, for his short Administration of 1852, he was at once offered the position of Lord High Chancellor of Great Britain. This offer, of course, involved an English peerage, and Sir Edward's scruples having by this time become weakened, he took his seat on the woolsack under the title of Lord St. Leonards. Great expectations were formed of the beneficial results of this appointment, but they were doomed to disappointment from the speedy downfall of the Ministry, after about ten months' existence.

"His accession to the woolsack may be said to have raised a positive excitement in the legal profession, of which, to some extent, the general public partook, for on the first day on which he took his seat as Chancellor in the old hall of Lincoln's-inn, an immense crowd assembled, so great as to fill the then tolerably spacious chamber, and to overflow its approaches on all sides. This crowding of the Court continued daily for a fortnight, to the great interference with the conduct of business; and at length it was found necessary to take steps to limit the number of persons who should enter the Court.

"With the end of the year 1852 ended the active public life of Lord St. Leonards, although for many years subsequently he took part constantly in the legal business which was brought on appeal before the House of Lords, where, until he was nearer ninety than eighty years of age, his vigorous and acute intellect shone forth; and as long as he was able to take up his position among the law lords it could hardly be said that the legal element of the Upper House showed any falling off from what it had been in the days of Lyndhurst. Away from the House of Lords, at his country seat near Kingston-on-Thames, he would gather his private

and political friends around his hospitable table of an evening and discuss old times in the law courts and in St. Stephen's over the best of Madeira, having devoted his mornings to the practical superintendence of his estate and farm, and amusing his leisure hours by 'posting' up all the recent decisions of the various courts of law in his common-place book, and in well-thumbed and interleaved copies of his own legal works, the copyright of which he kept in his own hands as a source of permanent income. We believe it is no secret that to these books he devoted so much care and diligence that it was with him a principle literally to have *nulla dies sine lineâ*, so that it would be quite easy for his executors to bring out to-morrow new editions of them all, corrected to the very latest date.

His works are most exclusively professional, and were addressed only to legal circles; his 'Handy Book of Property,' however, appealed to a wider range of readers, and in this his aim was to divest the subject of legal technicalities, and bring the scope and bearing of our system of property law within the comprehension of the general reader. It is stated that for a single edition of 'Vendors and Purchasers,' of which a fourteenth edition was published in 1862, its author once received the sum unprecedented in the writers of law books, of four thousand guineas! His Lordship will be well remembered for the alteration he effected in the law relating to contempt of courts, and for the conveyance of property of infants, lunatics, mortgagees, &c.

"We believe that his last appearance in public was on or about his ninetieth birthday, when, as high steward of Kingston-upon-Thames, he rode on horseback at the head of a procession to commemorate the throwing open of the bridge over the Thames entirely free from toll. It was not long before this date that he had come forward in the witness-box either at Horsham or at Lewes in order to give evidence in a case affecting his own interest in a property near St. Leonards Forest, on the borders of Surrey and Sussex. Subsequently on one occasion, in 1872 or 1873, he walked as a private individual into the assize court at Kingston-on-Thames, and on his entry all the Bar rose in token of respect for his person and years, and this tribute of respect much delighted the venerable peer.

"He was sworn a member of the Privy Council in 1834, and in the following year received the degree of LL.D. from Cambridge; he was a deputy-lieutenant for Sussex, a trustee of the British Museum, and also high steward of the borough of Kingston-on-Thames.

"His Lordship married in 1808 Winifred, only child of the late Mr. John Knapp, and by her, who died in 1861, he had issue three sons and seven daughters."

LEGAL TOPICS.

IRELAND.

THE Right Hon. Dr. Ball, late M.P. for Dublin University, took his seat in Hilary Term as Lord Chancellor of Ireland. The new Chancellor has long held a distinguished place in the profession; and his career in the House of Commons, since 1868, has also been very successful. Mr. Henry Ormsby, Q.C.,—whose practice has been in Equity and Conveyancing—is the Attorney General; and the Hon. D. Plunket, a political rather than a legal luminary, is Solicitor General for Ireland. No inconvenience follows from this appointment, inasmuch as there is an "Adviser to the Castle;" that is to say, a competent lawyer, who, residing in Dublin, daily advises the Executive. This post, which is compatible with private practice, and to which is attached a salary of £1,000 a year, is now held by Mr. George May, Q.C. The new M.P. for Dublin University, Mr. Gibson, Q.C., has risen rapidly towards the summit, having been called to the Bar so lately as 1860. Notwithstanding his silvery locks, he is a young man, being on the "right side of forty," full of vigour and ambition. It so happens that lately an English Q.C. has been electioneering in Ireland, and an Irish Q.C., in England. Mr. A. E. Miller, of the Equity Bar, a native of Antrim and a distinguished scholar of Trinity, Dublin, contested the seat vacated by Dr. Ball, but was beaten by the large majority of 450—Mr. Gibson being triumphantly returned. Mr. Gamble, Q.C., of this bar, who contested Rochdale last year, has been entertained by his numerous friends in that locality at a banquet; and this is held to signify that he has designs on that or some other Lancashire constituency, whenever an opportunity shall arise.

It may be remembered that one of the first acts of the present government was to bring in a Judicature Bill for

Ireland. Whether they prepared it, or merely found it ready drawn and biding its time in the pigeon-holes of the Irish office at Westminster, there is no evidence to show. It is a purely legal and non-political scheme, which may be therefore discussed freely and impartially.

The Bill was unfavourably received by the profession, and, so far as could be ascertained, by such of the public as take interest in such matters—the Conservative journals being especially loud in their complaints, and adverse in their criticisms. The salient defects of the Bill may be thus briefly summed up. It proposed to knock off two of the Common Law judges, who, in Ireland, are twelve in number. This number is held to be sacred—whether from analogy to the Cæsars, or to the Apostles, or to the defenders of our liberty in a jury box, the twelve must be maintained. There must (it is on all hands agreed,) be no diminution of the superior judges of the Dublin Courts. If economists and reformers wish to lessen the number of judicial posts in Ireland, let them slash away at the other tribunals—from Chancery downwards. It was also objected that, as a kind of bribe to the judges to submit to a slight reduction in their number, their salaries (already in the opinion of most people too high,) were proposed to be raised. In fact, throughout the Bill, a good many clauses might be taken to indicate that certain of the judges were to be extremely well taken care of, both as regarded money and patronage. Here, then, was a bill professedly drawn up in the interests of the public, for cutting away unnecessary expenses and employments, the direct and immediate effect of which would have been to increase by several thousands of pounds yearly, the expense of the Irish judicial establishment. Any clear benefit to arise from it—such, for example, as the substitution of a just and rational scheme of appointing and promoting officers, for the present much abused system (whereby the relatives of judges fill up nearly all the legal departments)—was to be postponed indefinitely. The great question of ultimate

appeal, was, of course, to be settled as in England; and on many other points the precedent of the English Judicature Bill was to be followed.

The Government has now had full opportunity of reconsidering the Bill during the recess, one which it is to be hoped has been taken advantage of. There is no reason why the Bill should not be revised, with a due regard to the interests of the public, and with a desire to get rid of the impress of special influence and favouritism. Under cover of a great scheme of Law Reform, it must surely be unnecessary to augment judicial salaries, and to increase private patronage. There is some hope that the Bill when re-introduced, will be found to have been purified, and freed from many defects and errors.

The barristers held their meeting in the library, at the end of Hilary Term, to consider some important points arising out of the Judicature Bill. Serjeant Armstrong and Mr. McDonough Q.C., eloquently spoke to a resolution, deprecating the proposed abolition of the appeal to the House of Lords. This was carried unanimously; as was also a resolution calling for the appointment of a Judge of the Landed Estate Court, in the place of Judge Lynch, who died in December, 1872, and whose place has never been filled. Another resolution, also unopposed, expressed the desire of the Bar to maintain the existing number of Common Law Judges and Circuits. But if the number of judges is too large in Ireland, where is the reduction to be effected? The only solution of the difficulty will be (1), to abolish the Court of Bankruptcy by absorption into one of the Common Law Courts—this will involve the abolition of two judicial posts. (2). To get rid of the Court of Probate by a similar method. (3). To abolish the very small Court of Admiralty, with its "Hon. Judge"—who hears about one small cause a week. (4). To eliminate the Solitary Master in Chancery (Mr. Fitzgibbon), who has full jurisdiction over Receivers, but whose duties might well be handed over to another court. Thus the

mystic twelve on the Common Law Bench might easily be preserved, to gladden the heart of Ireland. But as to the difficult question of Appeal, it is hard to see how, consistently with any judicature scheme worthy of the name, the House of Lords can retain its old appellate jurisdiction. On this point the lawyers of Dublin must be prepared for disappointment; but it will afford some consolation if the new Appeal Court be carefully constituted, containing men, individually not less eminent, and, on the whole, rather more attentive to their duties than the Law Lords of the venerable but doomed Supreme Tribunal.

The *Irish Law Times* has the following:—

"The meeting of the Bar in the Law Library on Saturday last, and the remarks of the gentlemen who spoke thereat, will do something, we trust, to show the English members of the Government that the proposed changes in the legal system are not only not acceptable in their entirety in Ireland, but also that a considerable modification of the Irish Judicature Bill of last Session is absolutely necessary. The first point under discussion was the expediency of retaining the appellate jurisdiction of the House of Lords. That this eminent tribunal possesses certain faults is most true, but true it is also that the faults are merely accidental, while its merits are inherent, as everybody knows who has experience of its work. The English Press, almost with one accord, misrepresented the intention of the resolution for the retention of the jurisdiction of the House of Lords, themselves, perhaps, misled by inadequate reports; the gentlemen who proposed and seconded, and the assembly who accepted the resolution unanimously, did not want the jurisdiction retained for Ireland exclusively, but wished to sustain the efforts of the Committee formed in England for its retention for the Three Kingdoms. It was resolved last year that to procure the certain current of decisions the Court of Final Appeal should be constituted for both countries.

"The next two resolutions are more completely within the cognizance of the Irish legal profession, and it is impossible for the most captious to find fault with the facts and figures by which it was shown to demonstration that it is inexpedient to reduce the number of the Common Law Judges consistent with the due discharge of the various functions of the Common Law Bench, and in view of the steadily increasing legal practice of the country. So surely as the country recovers

from the horrid drain in money and population, induced by the famine of twenty years ago, and the consequent emigration, so surely does and will the legal business increase, while the tendency of modern legislation, unintentionally perhaps, has undoubtedly been to increase practice, while the very Judicature Bill itself will, if it becomes law, probably double the work of the Junior Bar and the Court business of the solicitors. The last resolution had reference to the necessity of appointing a second judge to the Landed Estates Court. The present judge is probably able to discharge the duties of the office single-handed, better than could any other individual, and every acknowledgment was made of his ability and conscientious industry, but still the most experienced practitioners persist in the already expressed sentiment, that the duties of the Court require the appointment of another judge.

BOOK REVIEWS.

THE CRIMINAL LAW CONSOLIDATION AMENDMENT ACTS of 1869, 32 & 33 Vict., for the Dominion of Canada, as amended and in force on the 1st day of November, 1874, in the Provinces of Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, and on the 1st day of January, 1875, in British Columbia, with Notes, Commentaries, Precedents of Indictments, &c. By Henri Elzear Taschereau, one of the Judges of the Superior Court of the Province of Quebec. Vol. I. (Montreal, printed by the Lovell Printing and Publishing Company.)—The recent return of Mr. Mitchell for Tipperary has directed attention to the intimate connection that exists between constitutional and criminal law. Yet, although a knowledge of criminal law may be acquired in one-tenth of the time necessary to make a good equity lawyer, still, owing to the comparatively trifling rewards that attend upon proficiency in criminal branches, there is perhaps no department of jurisprudence that gives rise to so many unanswered doubts, or is even subject to so many statutory defects. Criminal law is neglected both by the prosperous practitioner, the jurist, and the legislator. Their motto appears to be *Paullo majora canamus.* In the Tichborne case, accordingly, serious apprehensions were

at first entertained as to whether the Court had power to adjourn in order that fresh evidence might be adduced. In Mr. Mitchell's case it is said that he cannot be punished for escaping from detention, and yet that the disability attendant on his conviction remains. If this be so, our statutory code requires numerous additions, in order to render it a real terror to evil doers. We cannot, however, concur in these doubts; we believe that the common law furnishes every power and right to the executive that is required to punish an escape from prison even in a colony, though whether a disability—which should, like everything else penal, be strictly construed—can endure longer than the period comprised in the sentence creating the disability, is a question on which we offer no opinion. The powers of either House of Parliament, and of any Court, to inflict a punishment, which naturally ought to require the concurrence of the three estates of the realm to impose, are perhaps the only matters on which our criminal code is really obscure. Yet, we doubt whether the existence in the House of a second Wilkes, or Junius, will be adequate to evoke more than an ephemeral interest for questions, attention to which in practice would be anything but remunerative. However, it is interesting to look into the statute books of our leading colonies, and to see whether their comparative boldness of innovation and disregard of precedent has enabled them to leap over the snares and pitfalls which beset the criminal jurist in the mother country.

Judge Taschereau's work certainly is a very good consolidation of its kind. It comprises in a portable volume the full text of the Criminal Consolidation Statutes of Canada, 1869, with a synopsis under each clause of the law, pleading and evidence applicable thereto. Any changes made in these Acts are noticed, so that the text is exactly as it was in force on the 1st of November, 1874, in the provinces of Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, and on the 1st day of January, 1875, in British Columbia. But few references are given to the criminal statutory law in force before the Confederation. The work is thus of the same value throughout the whole of the Dominion of Canada. The reported English Crown cases, however, down to July last are largely cited. Their importance to the Canadian practitioner must have greatly increased since 1869; for the present Consolidation Acts are framed on the plan of the Imperial Criminal Consolidation Acts of 1861, the language of which they frequently copy *verbatim*. At the end of each clause Judge Taschereau gives the corresponding clause of the Imperial statute, remarking any difference between both. The present

volume also contains a list of the cases cited, a table of contents and of statistics, and a copious index.

The statutes relating to death caused by negligence or by unskilful medical men appear in the main to agree with the corresponding rules of British law. Travellers by railway, however, will not be satisfied with the 74th section of the Railway Act of 1868, 31 Vict., chap. 68, which punishes the destruction of a railway bridge or the "wilful and malicious" removal of a railway switch or rail as manslaughter, even "if, in consequence thereof, any person be killed, or his life be lost." Truly life is held cheaply in the dominion of Canada! The penalty for the offence mentioned is, it appears, "imprisonment in the Penitentiary for any period not more than ten nor less than four years." Manslaughter in other cases is punishable by imprisonment for life (sect. 5, ch. 20, 32 & 33 Vict.) Accordingly the editor very properly exclaims against the absurdity of lessening the penalty when the crime is attended with aggravating circumstances. Miss Edwardes, in one of her spiritualistic stories, describes the attempt of a forsaken lover, who was a driver on a railway in Italy, to upset the train in which the false one and her husband were travelling, even though his own life was to be forfeited at the same time. Any vindictive American who wished to take away the life of another must be tempted to watch his movements by railway, and upset the whole train; since in that way he could wreak his vengeance at less risk of his own life than if he picked him off solely and separately. Offences against the coin, as also homicide, perjury, larceny, forgery, and all the most common kinds of offences, appear in the main to be carefully provided for by these enactments. Judge Taschereau has, at all events, produced a neat and handsome volume with a clear text and good letterpress, while the paragraphs are so artistically arranged as to comprise much useful knowledge without any display of antiquarian details.

HANDY BOOK OF RULES AND TABLES FOR VERIFYING DATES WITH THE CHRISTIAN ERA, &c. By John J. Bond, Assistant Keeper in Her Majesty's Record Office. (London: George Bell & Sons, York Street, Covent Garden; Bartlet & Co., 186, Fleet Street. 1875).—The subject of chronology is an important one in itself, and in its relation to English Law cannot be valued too highly. The most important results frequently follow from a clear knowledge of dates, causing matters, which otherwise would possess but little value, to assume an importance far beyond

their intrinsic merit, inasmuch as they tend to give value to other and cognate facts.

The reason why the discoveries of our Egyptian scholars are valued so lightly, is simply because of the worthlessness of their chronology; the Coptic and Arabian traditions and histories revolve around and form part of no great system, but depend entirely upon petty systems of their own, each independent of the other. We cannot tell whether the separate dynasties of Egypt preceded or were contemporaneous with each other. Egyptologists themselves feel no shame in confessing to differences between their calculations of thousands of years.

The Common Law of England is of wider scope; it is cosmopolitan in its origin, borrowing one principle from the Greeks, another from the Romans, many more from the Gauls, many principles from the Israelites, and some undoubtedly from Eastern and Aryan sources; every fact, therefore, and every law may have a wider significance than we at present see, and it is of importance to give them precise places in history, in order that their true origin and meaning may be determined. Hence this volume is one which, at any rate, deserves attention, and a careful perusal of it justifies an expression of approbation. The author has evidently bestowed much research and labour upon his work, and has succeeded in treating a confessedly dry subject in an interesting and readable manner; the portion of his book relating to the important subject of the Eras of Nations is especially valuable; in less than 100 pages a very clear and succinct account is given of no less than 28 eras, together with rules of a very simple and practical character, for converting the date of one era from or into another, and all of them into our own.

The portion of the book concerning "Feasts and Holidays," is also very valuable and accurate; a correct knowledge of these dates is absolutely essential to the practical use of our ancient records, for they are chiefly dated by reference to certain feasts and Saints' days, and are generally destitute of precise dates. Of course nothing is gained by this list when such feasts are moveable, for then the use of a perpetual calendar and year letters is necessary; the reader will find all the requisite information in this book. Elaborate tables are given, which save the inquirer an immensity of labour and calculation; for instance, there is given the Pascal Cycle of Dionysius Exiguus, with the Dominical letters, and golden numbers for finding the date of Easter day, from 532 to 1227 A.D., and a table of the golden numbers and year letters under the Gregorian style, to the year A.D. 1926—matters

of every-day importance to the genealogist and historian, a table of the year letters from the date of 1,000 A.D. to 2,063 Julian, and from 1582 to 2037 Gregorian, and many others. A large portion of the book which is called an Appendix, (why, does not clearly appear,) containing nearly 156 pages, is devoted to the Regnal years of each sovereign, from 1066 to the present day, giving the actual date of Easter, the year letter, and golden number for each year, and since the Gregorian institution, in both old and and new styles.

The work contains much curious and valuable learning, and as we should almost expect from a writer on so precise a subject, a good deal of dogmatic declaration on disputed points, for instance, it is declared that the Saxons used the Dionysian system of dating from the Incarnation, because, curiously, the transcripts of Saxon charters, which are to be found on the Rolls of the Record Office, are actually dated; and Mr. Bond gives an extract from a Roll 36, Edward III, of an exemplification of a charter of 605, dated in the city of Canterbury, Anno ab incarnatio Christi, DCV, and another dated Idus Januarii, 604-5; a date, however, which appears to be borrowed from Kemble's Codex Diplomaticus. Mr. Bond does not seem to be aware that one of the peculiarities of Saxon charters is, that they do not generally possess dates, and that, therefore, the appearance of a date is presumptive evidence of forgery; like the records of the Egyptians, they refer only to certain kings and dynasties, a slight proof, perhaps, of the identity of the Assyrians and Germans. It is a startling assertion that, the Dionysian Cycle was introduced into England so soon after its introduction—only 70 years—though, doubtless, St., Augustine may have brought it with the Pascal Cycle. It is however, generally supposed, that the English dated from the Passion, and not from the Incarnation, down to the end of the 8th century, though again, unquestionably, these dates were at times used indiscriminately. This is an important point, and Mr. Bond hardly appears to have rescued it from its present obscurity. Of course, if the assumption be correct, that the deeds enrolled 36 Edw. III are genuine, the matter is settled; but their authenticity can hardly be accepted without further proof or shew of reason.

Without at all desiring to disparage the great value of a book which is cheerfully acknowledged, we cannot help thinking that, in a future edition, the author would do well to add an index; the great use of works of this kind is, the facility to ascertain a fact with rapidity; and without an index this cannot easily be accomplished. It should, however, be noted, that there is a tolerably clear and full table of contents.

JURISDICTION AND PUNISHMENT OF SUMMARY CRIMINAL COURTS, WITH SPECIAL REFERENCE TO THE LASH. By Walter Cook Spens, Sheriff substitute, at Hamilton, Lanarkshire. (Edinburgh: T. & T. Clarke).

This treatise has its origin in five questions issued in November last from the Home Office, addressed to magistrates in England and sheriffs in Scotland, with reference to the trial and punishment of aggravated assaults. Why Ireland should have been so indulgently excluded it is not easy to divine. It may be, that no venomous reptile finds place there, but it does not necessarily follow, that malignant passions do not occasionally develope themselves amongst the inhabitants of the Green Isle, and which require to be curbed as much as in the other two sections of the United Kingdom.

The following are the five queries put by the Secretary of State:

I. Is the penal law against assaults of brutal violence, as distinguished from trifling assaults on the one hand, and indecent assaults on the other, sufficiently stringent; and if not, in what way should it be amended?

II. Are there any kinds of assault, which may now be summarily punished, which should be declared triable only at Assizes and Quarter Sessions'?

III. Is it desirable that the *maximum* fine, or the *maximum* term of imprisonment which may be imposed for assaults by Courts of Summary Jurisdiction should be extended?

IV. Should flogging be authorised for other kinds of violence than those within the provisions of the 26th & 27th Vict. cap. 44, especially in cases of assault on women and children?

V. Has flogging been efficacious in putting down the offences for which it is authorized as a punishment by 26 & 27 Vict. cap. 44?

This mode of obtaining information by circular is novel, but has the obvious preference over the more usual plan of commission of its greater economy, as well as its more wide application to all competent quarters, and not limited to a few selected witnesses; it wants, however, the great advantage of further interrogation, leading to more full explanations from the informants. The Government has wisely published the answers received from those, who, from their experience, are best able to form and give a trustworthy opinion on the subject. We observe, as might have been expected, a very great diversity of opinion in these answers. In like manner, amongst the public bodies that have

already volunteered opinions, the conflict is still greater. Some have adopted resolutions approving of the lash, and some to the contrary, and seldom with unanimity on either side. The queries, as a whole, and, especially the second of the series, is not very applicable to Scotland. The ancient office of sheriff in that country is seemingly ignored, and the criminal jurisdiction of Quarter Sessions is in practice there wholly unknown. Indeed, were it not seemingly presumptuous, we greatly doubt, and desire authority for, the concluding portion of the learned author's note to page 18, as to the competency of Quarter Sessions in Scotland possessing any criminal jurisdiction whatever.

The author has taken the opportunity of the queries very seasonably to issue this treatise. He is well entitled to demand a hearing on the subject. His territory embraces one of the largest mining districts in North Britain. He tells that he has to exercise summary jurisdiction in between 300 and 400 cases annually. The greater portion of his book contains a most exhaustive exposition of the history and practice of jurisdiction in Scotland in trials of crimes and offences, either with or without juries, both before the Superior Courts or the Sheriff's (answering somewhat to our stipendiary magistrates), and that with or without fines, and by magistrates of burghs and Justices of the Peace. This portion of the work may be chiefly of interest to the profession and the public north of the Tweed, but, nevertheless, on the question about to be agitated as to the introduction of Public Prosecutors or Procurator Fiscals into England, it deserves the close attention of the English lawyer and legislator.

That portion of the book which deals with the question of the introduction of the lash is so important, and coming from one so experienced that we almost incline to give his opinions at length had they not appeared recently in a Parliamentary Report.* Sheriff Spens thinks it hardly possible not to look upon corporal punishment, even though applied to men, only as a sort of relic of barbarism, and if the lash is to be introduced at all, it should only be inflicted in cases of wilful fire-raising where there is a manifest risk to life, and breaking into houses armed with lethal weapons.

He would not entrust this dangerous power to the numerous citizens and untrained magistrates sitting on the bench throughout the country, or to the Sheriffs sitting in their Summary Criminal Courts. He does not say that the lash is not necessary; but so far as regards the offender himself, he does not

* Reports to Secretary of State for the Home Department on the State of the Law relating to Brutal Assaults, &c., 1875.

believe that, as an end to moral reformation, it will have any effect, but as a deterrent and example, it may be of some good. It would savour of the ludicrous and horrible combined, to think that every little police court throughout the country had the power of giving itself a notoriety for the day, by ordering the infliction of this revolting punishment. The use of the lash for wife-beating, might lead to a vast amount of social misery. To an honest hard working man, betrayed into ungovernable passion through an exceptional fit of intoxication, resulting in an assault, the lash might bring utter moral degradation, and his usefulness as a member of the community might thereby be impaired. It might cause disunion and hatred in those homes where the wife's or children's evidence had brought about the husband's or father's punishment. It might lead to murder, moral torture, physical suffering, or even starvation, as a means of revenge.

The system of an eye for an eye, and a tooth for a tooth, was a good one for barbarous ages and uncivilized natures, but it is not a rule which commends itself to the refined and educated people of more enlightened times.

The author reprobates the punishment of certain offences by fines. In many cases they are not only quite inadequate but often fall on the innocent, and the wrong-doer escapes wholly with impunity, if not rewarded. Thus juvenile offenders have their fines generally paid by their innocent parents; husbands pay the penalty imposed on their offending wives, and not unfrequently wives, by selling their articles of dress, relieve their husbands from prison when punished by fine, perhaps for an assault on themselves. The great stock insurance from punishment among operatives is widely known and practised, as testified by the Author, (p. 8). A County Justice informed us that on the day after each pay night, in a large public work, numerous culprits were brought up for offences of all kinds, the outcome of indulgence in strong drink. A purser was in attendance and readily paid the mulcts inflicted. The amount was increased by degrees, but without the least beneficial effect. At length, after notice given, no fines were imposed, but imprisonment in every case was the sentence, and straightway good conduct was the result.

One important subject is attended to by the author, and deserves grave attention and speedy amendment, that is, the seeming caprice observed in the measure of punishment allotted in the same degrees of offence, sometimes, even the heaviest infliction

being imposed on the least degree. Every newspaper proclaims this startling anomaly. The author (p. 16,) quotes from a newspaper where the same magistrate in a police court sentenced a culprit to sixty days imprisonment for stealing 2s. 6d., and next fined a man 10s. 6d. for brutally assaulting his wife. The unskilled occupants of the police bench are as variable in their views of criminal administration as are the seasons in this ever-changing climate. One day there sits a *Draco*, resolved to put down all offences by the highest imposition of punishment within his power, expressing deep regret at its being limited; next day there comes a second *Howard*, gushing with the milk of human kindness, dismissing the seeming penitent with a paternal admonition, or with a mere nominal fine, and regretting that he has been compelled by a sense of duty to punish at all. It is well known that the criminal classes in large towns know well their magisterial friends and foes, and the measure of punishment they are destined to receive, not according to the amount of crime, but merely because the magistrate of the day is Bailie Forcible or Bailie Flexible. Nothing can tend more than this farcical administration of justice to bring law into contempt and encourage crime. The most effectual mode of deterring from crime, is its speedy, certain, and adequate punishment. Punishment should promptly flow on the heels of offence. If the heavy crime receives no greater but even lesser punishment than those of minor degree then there is a total confusion of the rule of punishment, and the criminal is invited to perpetrate the greater, with the hope that, undetected, his gain is the greater, and if convicted, the punishment is nowise increased by the extent of crime. This is not therule in the Jewish economy of an eye for an eye, a tooth for a tooth, and the threefold restitution by the thief. H. B.

THE LAW OF INJUNCTIONS. By Francis Hilliard. (Philadelphia; Kay & Brother: London; Sampson, Low, Marston, & Co., 1874).

This is the third edition of a well-known work. It is a volume of convenient size, and as well for that reason as also and more especially by reason of its inherent merits, it is calculated to hold its own with the work of Mr. Kerr and the more recent work of Mr. Joyce, upon the same subject.

Every treatise upon the Law of Injunctions contains much in common, and almost of necessity pursues the same method and order of treatment. With a view, therefore, to testing the merits

of Mr. Hilliard's work, we have determined to examine the treatment which he has given to a small but vexatiously important branch of that law: namely, the extent to which covenants relating to land, but not "running with the land," are binding upon an assignee or purchaser with notice thereof, and whether and to what extent a court of equity will issue an injunction against a breach thereof. Now Mr. Hilliard, in chap. xxxi. sec. 33, refers to this matter in the following terms:—

"The question of injunction against violation of a covenant relating to land is sometimes connected with that of the covenants *running with the land*. But an injunction lies upon a covenant though not running with the land, if the defendant bought with notice, (Tulk *v.* Moxhay, 2 Ph. 774). And, in general, an injunction lies against a purchaser with notice of the covenant, (De Mattos *v.* Gibson, 4 De G. & J. 282)."

Now this statement of the law is accurate in every respect, as well in what it expresses, as also in what it implies. The covenant notice of which is to bind the purchaser, who would not otherwise be bound thereby, must be a covenant "relating to the land," not, for example, a covenant to pay compensation in respect of a certain user of, or mode of using, the land. Mr. Kerr, in his work, expresses an opinion (although he frankly acknowledges the absence of any authority hitherto for the opinion) that notice of a covenant which is purely personal would be binding upon a purchaser, although otherwise he would not be bound. If we may hazard our own opinion in the matter, we should beg to differ from Mr. Kerr and agree with Mr. Hilliard, that notice of such a covenant as that lastly hereinbefore instanced, would not bind the purchaser, assuming that he was not otherwise bound; for that the remedy is one for damages only, and not for an injunction. We should, however, have been gratified to find in Mr. Hilliard's book a more detailed treatment of this particular subject.

Mr. Hilliard's treatise is one with which we are very much gratified in its general features and contents. Its method is admirable, its style concise and clear, its references are accurate, and its contents exhaustive. As containing the American decisions more fully than any other existing treatise that is procurable in England, it is a welcome addition to the library of the English lawyer. As it has now reached the third edition, further commendation of it on our part is unnecessary.

LECTURES ON JURISPRUDENCE; or, THE PHILOSOPHY OF POSITIVE LAW. By the late John Austin: abridged for the use of the Students by Robert Campbell, of Lincoln's Inn, Barrister-at-Law. (London: John Murray, 1875).

At first sight Austin's Lectures appear to be eminently fitted for abridgment, not only on account of the chaotic state in which their author left them, but also on account of the peculiar style in which they are written. Almost everything is said two or three times over, especially in the first six lectures, while in the Fragments and Notes the author's opinion on a given question seems to change on every page, and after several contradictory statements the whole is capped with a *sed quære*. But it is in these peculiarities that no small part of the value of the book consists. Austin's mind, though singularly acute, was not really original; if he had to chose between Blackstone and Savigny he was able to see that Savigny was generally right, or if Thibaut, Bentham, and the Corpus Juris Civilis, were all of different opinions, he could pick out what was true in each of them and thus construct a true theory, but without such materials to work upon his speculations were, as a rule, of little value. Nor is this of such importance as might be supposed. Austin's work, at the time when he wrote and lectured, was a great innovation on the prevailing method of studying law, and we may well forgive a few blemishes in the details, in consideration of the incalculable service which his book has rendered to English students; his feeble successors and imitators have done little to make us overlook him. He had the rare gift, derived from natural vigour of mind and enthusiasm for his subject, of making the student think for himself; and, viewed from this point, even his repetitions and inconsistencies have their use, for nothing elucidates and fixes a subject in the mind more than the necessity of collecting, comparing, and reconciling imperfect materials. It is hardly to be hoped that the ordinary student will wade through the original edition of Austin if he can have an abridgment, unless he is compelled to do so, for in these days of cramming students insist in having epitomes and tables ready made for them, forgetting Lord Coke's words of wisdom: "I had once intended, for the ease of our student, to have made a table to these Institutes; but when I considered that tables and abridgments are most profitable to them that make them, I have left that worke to everie studious reader."

We need hardly say that Mr. Campbell has executed his task as well as it could possibly be done, assuming that an abridg-

ment of Austin, pure and simple, is all that is expected. Another editor might, perhaps, have been tempted to criticise a little more freely, but Mr. Campbell evidently has too much reverence for his author to dispute any of his fundamental propositions. He does, indeed, go so far as to admit that "an investigation into the nature of what is called *customary law* puts a severe strain upon the rigid definition [of law] laid down by Austin,"* but he repeats Austin's positions that "what is commonly called *International Law* is excluded from the proper province of jurisprudence,"† and that the phrase *customary law* "means, not that custom is the source of the law, but that the law has been *fashioned by judicial decision upon pre-existing customs.*"‡ These doctrines sound somewhat antiquated at the present day, however useful they may have been in opposition to the nebulous theories which Austin loved to demolish. Again, we think that Mr. Campbell, on such important questions as the meaningof "right," and the phrase *jus personarum* as used by the Roman lawyers, might have devoted a few lines to the mention of Mr. J. S. Mill's suggested completion of Austin's analysis of "Right" by adding the idea of benefit to the person entitled, and of Savigny's familiar explanation of *jus personarum* as meaning the law of the family, although we happen to consider both these opinionserroneous. We are glad to see that Mr. Campbell ventures to condemn Austin's derivation of *utilis* in the term *actio utilis*: "The author, apparently following Thibaut, derives the word 'utilis,' as applied to these actions, from 'uti' the adverb, because the action was given by way of analogy to a right of action obtaining according to the *jus civile*. I prefer the more obvious derivation. The cause moving the Prætor to grant the action was *utility*. *Utile visum est . . . quasi in rem actionem polliceri.* Dig. xliii. 18 (*De superficiebus*), l. 1, sec. 1:—and the action is, moreover, *utilis* in the sense of being really *available* in contradistinction to the often illusory actions of the civil law. It is certainly hard to find a passage furnishing the *elenchus*; and for this reason, that the action is almost invariably given by way of analogy as well as on grounds of utility." ‖ Towards the end of the book (pp. 401 seq.) Mr. Campbell has altered the form, and, to some extent, the substance of the original text, and the argument certainly gains in clearness from this; in the remainder of the book he has preserved the original language of his author,

* Intro. xiii. † Ibid x. ‡ Ibid xii.
‖ p. 304 n.

even to retaining his quaint abuse of Hooker and Blackstone, so that the ordinary objections to abridgments apply less strongly to the present work, and if it induces students who have been deterred by its size from studying the larger work to exercise their minds on Austin's healthy, vigorous discussions, Mr. Campbell will have done good service to the cause of legal education.

THE STATUTES. Revised edition, Vol. VI. 5 George IV. to 1 & 2 William IV., A.D., 1824—1831. By authority. (London: Eyre and Spottiswoode. 1875.) The Lord Chancellor stated in his speech on the Statute Law Revision Bill, in the House of Lords on 16th June last, that he did not consider that the statutes were a fit subject for codification. They will, therefore, probably not be comprised at any scheme of codification which he will propose. This omission, however, is rendered the less important as the revision of the statutes is being briskly proceeded with. The sixth volume has just been issued; it brings the revision down to the 1 & 2 William IV. cap. 60, and doubtless possesses all the characteristics of the preceding volumes. The last preceding volume extended from 52 George III., to 4 George IV., that is from 1812 to 1823. The present volume comprises only a period of seven years, viz., from 5 George IV. to 1 & 2 Will. IV., that is from 1824 to 1831. But, of course, as the revision approximates its end, the statutes for each year will be found to increase much in size and importance. It is likely, therefore, that half-a-dozen volumes more will be necessary to complete the series. Not the least useful part of the work done by the commissioner, is the Chronological Table and Index of Statutes published in 1874. This work shows the extent to which the public Acts of the period comprised in volumes 1 to 5 (inclusive), of the revised edition of the statutes have been repealed by acts passed subsequently to the publication of those volumes. It is perhaps to be regretted that the Commissioners did not revise the latest statutes first. The volumes issued by them are in an order inverse to their importance and recentness. The plan we have referred to was adopted by the United States Commissioners for revising the federal statutes, and was found to prevent repetition and to be otherwise convenient. However, our own Commissioners certainly deserve much credit for their diligence and efficiency.

We have received the last edition of "Addison on Contracts." The fact that this edition is the seventh at which this work has

arrived, speaks plainly in favour of the work, and the fact that Mr. Cave's last edition appeared so lately as 1870, speaks even more favorably of Mr. Cave's editorship, considering that this is not the only work on the subject. We shall, in our next Number, recur to the notice of this work, and will only now say that this edition is a great improvement on the last in form and arrangement, and that it cannot fail deservedly to increase the high reputation of the gentlemen who have produced it.

We regret also being unable in the present Number to give a review of Mr. Aird's able work on "The Civil Laws of France to the present time."

CALLS TO THE BAR.

Hilary Term, 1875.

The following gentlemen have been called to the Bar:—

Lincoln's Inn.—James Wilson, Esq., late of Caius College, Cambridge; Henry Howard Batten, Esq.; Frederick William Stone, Esq., M.A., B.C.L., Oxford; Charles Clavell, Hore, Esq; John Allen Mylrea, Esq., LL.B., London University; Walter Hayward Peel, Esq., Trinity College, Cambridge; John Geldard, Esq., B.A., Cambridge; Samuel Arthur Sampson, Esq., LL.B., Cambridge; Harry Inglis Richmond, Esq., B.A., Oxford; Alfred Edmund Packe, Esq.. B.A., Oxford; Charles Albert Janson, Esq., B.A., Oxford; William Manning Harris, Esq., M.A., Cambridge, Fellow of King's College; William Henry Dyer, Esq.; Cumberland Henry Woodruff, Esq., B A., S.C.L., Oxford; Ashley Henry Maude, Esq.; Thomas Lennox Irwin, Esq.; John Anderson Foote, Esq., B.A., Cambridge (holder of studentship in Jurisprudence and Roman Civil Law, from the Council of Legal Education, Hilary Term, 1874); Charles Henry Witts Woodroffe, Esq., B.A., Cambridge; and Andrew Lyon, Esq., of the University of Edinburgh, and the Bombay Civil Service.

Inner Temple—Douglas Moffatt, Esq., M.A., B.C.L., Oxford; Stephen Newcome Fox, Esq., B A., Oxford; Henry Maynard Mills, Esq., M.A., Oxford; William Marshall Venning, Esq., B.A., Oxford; Charles Marriott, Esq., M.A., Oxford; Edgar Broome Cope, Esq., Oxford; Francis Hallett Hardcastle, Esq., B.A., Cambridge; Sydney Philip Nicholls, Esq., B A., Oxford; John Marshall Dugdale, Esq, B A., Oxford; John Bevill Fortescue, Esq., B.A, Oxford; the Hon. Reginald Gilbert Murray Talbot, LL.B., Cambridge; Willliam Baker, Esq., B.A., Dublin; the Hon. Francis Parker, B.A., Oxford; Aretas Akers, Esq., Oxford; William Keith, Esq., M.A., Cambridge; John Tennant, Esq., M.A., Cambridge; William Charles Higgins, Esq., B.A., Oxford; John Joseph Bickersteth, Esq., B.A., Oxford; William

Peregrine Propert, Esq., M.A., LL.M., Cambridge; John Cumming, Esq., B.A., Cambridge; Arthur George Rickards, Esq., B.A., Oxford; Samuel Haughton Graves, Esq., B.A., Cambridge; Horace Edmund Avory, Esq, LL.B., Cambridge; William Blake Johnson, Esq., M.A., Cambridge; William Eaton Young, Esq., B.A., B.C.L., Oxford; William Houston-Boswall, Esq., B.A., Cambridge; Alfred Dobson, Esq.; Herbert Percival, Esq., LL.B., Cambridge; Henry Cooke, Esq, B.A., Cambridge; James Kinder Bradbury, Esq., B.A., Cambridge, and Douglas Metcalfe Metcalfe, Esq.

Middle Temple—Samuel Thomas Stanislaus Richardson, Esq., B.A., Trinity College, Dublin, and of the Irish Bar; Arthur Rankine Blackwood, Esq., B.A., Balliol College, Oxford; Francis Frederick Handley, Esq.; Henry Priestley, Esq., University of London; Prince Mahomed Wuhiduddin; John Yonge Anderson Morshead, Esq., University College, Oxford; Louis Pitman Russell, Esq., B.A., Trinity College, Oxford; Richard Harry O'Brien, Esq., of the Irish Bar; George St. Leger Daniels, Esq.; John William Gustavus Leo Daugars, Esq, B.A., St. Alban Hall, Oxford (holder of a studentship in Roman Civil Law, from the Council of Legal Education); James Knighton, Esq., University of London; Pramatha Natha Mittra, Esq.; David Law, Esq.; Allan Gilmour, Esq., LL.B., Trinity Hall, Cambridge; and Arthur Becher Ellicott, Esq., B.A., Trinity College, Cambridge.

Grays' Inn—Edward Dicey, Esq., B.A., Trinity College, Cambridge.

INCORPORATED LAW SOCIETY.

Hilary Term, 1875.

At the final examination of candidates for admission on the roll of attorneys and solicitors of the Superior Courts, the examiners recommended the following gentlemen, under the age of twenty-six, as being entitled to honorary distinction:—Charles Paice, Walter Maddoc Simpson, Richard Percival Walton, Hugh Greenfield Doggett, Reginald Benson, B.A., Radclyffe Walters, B.A., Humphrey Milner Wightwick, James Fraser Buckley. The Council of the Incorporated Law Society have accordingly awarded the following prizes of books: To Mr. Paice, the Prize of the Honourable Society of Clifford's Inn; to Mr. Simpson, the Prize of the Honourable Society of Clement's Inn; to Mr. Walton, Mr. Doggett, Mr. Benson, Mr. Walters, Mr. Wightwick, and Mr. Buckley, Prizes of the Incorporated Law Society. The examiners have also certified that the following candidates, under the age of twenty-six, whose names are placed in alphabetical order, passed examination which entitle them to commendation: William James Curtis, George Watson Neish, B.A., James M'Connell Owen, Claude Hurst Peter, Arthur Henry Renshaw.

The Council have accordingly awarded them certificates of merit. The examiners have further announced to the following candidates, whose names are placed in alphabetical order, that their answers to the questions at the examination were highly satisfactory, and would have entitled them to certificates of merit if they had not been above the age of twenty-six:—Francis Kearsey, Edward Lyon Shelton, Edward Warwick Williams, Thomas Wright. The number of candidates examined in this term was 201; of these 172 passed, and 29 were postponed.

APPOINTMENTS.

Mr. William Field, Q.C., of the Inner Temple and Midland Circuit has been appointed a Judge of the Court of Queen's Bench, and Mr. J. W. Huddlestone, Q.C., of Gray's Inn and the Oxford Circuit, a Judge of the Court of Common Pleas; Mr. Justice Archibald has been transferred from the Court of Queen's Bench to the Common Pleas; Sir Henry James Sumner Maine, K.C.S.I., barrister-at-law, has been nominated as Sir Robert Rede's Lecturer at the University of Cambridge; the Queen has granted the dignity of a Knight unto Joseph George Long Innes, Esq., Attorney-General of the Colony of New South Wales; Mr. Richard Garth, Q.C., has been appointed to the Chief Justiceship of Bengal; Mr. Augustus Keppel Stephenson, barrister-at-law, to the Solicitorship to the Treasury; Mr. G. P. Martin, Paymaster R.N., barrister-at-law, officiating judge-advocate at Portsmouth, Deputy-Judge Advocate of Her Majesty's fleet; Mr. Walter Murton to be solicitor to the Board of Trade; Mr. Edward Shearme, chief clerk in the chambers of Vice-Chancellor Malins; Mr. R. J. Pawley has been elected by the Common Council to the office of registrar of the Lord Mayor's Court; Mr. George Rose Innes, junior, solicitor, Chairman of the Law and Parliamentary Committee of the Common Council; Mr. Thomas Beard, solicitor, Chairman of the Officers' and Clerks' Committee of the Corporation; Mr. William Barstow, solicitor, has been elected Coroner for the Halifax district; Mr. Clarke, solicitor, Coroner for the Ford division of the county of Salop; Mr. Harvey Winson Fellows, solicitor, has been appointed clerk to the county magistrates for the Watford division; Mr. Theodore Bell, solicitor, clerk to the county magistrates at Epsom; and Mr. Isaac Newton Edwards, solicitor, Registrar of the St. Alban's County Court (Circuit No. 37). *Ireland*.—Mr. Ormsby, Q.C., has been appointed Attorney-General and Member of the Privy Council, and Mr. Plunket as Solicitor-General for Ireland: Mr Beauchamp Newton Johnson, solicitor, has been appointed Sessional Crown Solicitor for the county of Down; and Mr. Irvine, solicitor, Senior Crown Prosecutor for the county of Donegal. *India*.—Chief Justice Couch, Scindia, the Maharajah of Jeypore, Mr. Nevill, and Sir Dinkur Rao, have been appointed members of the Baroda Commission.

THE

LAW MAGAZINE AND REVIEW.

No. IV.—Vol. IV.—April, 1875.

I.—UNDUE PREFERENCE.

SOME curiously interesting cases come before the Railway Commissioners. Perhaps they are the more interesting because they are not altogether questions of pure law, but are intimately connected with questions involving intricate points of railway management, and even political economy. This result was anticipated at the time Lord Cardwell's Act (the Railway and Canal Traffic Act, 1854,) was introduced to the notice of the Legislature. The Bill, as originally drawn, threw the somewhat anomalous judicial duties which were to be discharged under its provisions upon all the judges, but Lord Campbell protested against such duties being cast upon himself and his brothers, and said, "The code was not one which the judges could interpret; it left them altogether to exercise their discretion as to what was reasonable, with no Statutable or Common Law authority to guide them." Ultimately, the jurisdiction under the Act of 1854 was relegated to the Court of Common Pleas; and although several of the judges of that Court grumbled at having to exercise judicial functions in relation to "undue preference" and "reasonable facilities," their decisions were such as to command the respect of the profession; and although many of them may be taken exception to, they are, on the whole, very admirable expositions of most vague and intricate law. The method, however, by which the remedy under this Act

was obtained was inconvenient, and the small number of cases which were brought under the notice of the Court showed that this attempt at practical regulation of railways was likely to prove abortive. Hence the establishment of the Railway Commission. Hence, too, its constitution. Here technical knowledge of railway management is represented upon the Bench. Here, too, we take it, that political economy is represented by an able Statesman, who had held several important offices under Government. Here, too, Law is represented.

There is no tendency more remarkable in modern times than our disrespect for man, and our reverence for facts. Authority is nothing, evidence is everything. This is not a literary, but a scientific age. The study is nothing in the nineteenth century; the laboratory everything. Our heroes of to-day are great experimentalists, not great thinkers. This tendency has a strange and wide influence upon many of the facts of our times. The worth of men being guaged by what they have seen, and not by what they have thought, the important thing is always to procure men of technical experience for technical work, rather than men of great capacity.* This is the policy of the times. We have specialists in every profession. And here in the new Railway Tribunal we find specialists upon the Bench. We have recently had an opportunity of judging of the success of this new experiment. Two important cases came before the Railway Commissioners during the month of February, and the decisions in these cases were given on the 3rd and 10th days of March respectively. †

We have read the judgments in these cases with very

* One curious result of this tendency may be noted in relation to the frequency with which experts are introduced into courts of law in our times. And it is curious that experts are called to speak from and not to facts, to give an opinion, which is only by courtesy to be called evidence.

† The Billsdyke Coal Company and others *v.* The North British Railway Company, and Thompson and others *v.* The London and North Western Railway Company.

considerable interest. That in the Billsdyke case seems to us truly admirable, and is to be placed on a level with the best efforts of the Court of Common Pleas in relation to this difficult Statute. In this case certain coal owners in Lanarkshire, complained that the North British Railway Company carried coal for the firm of Baird & Co. at rates lower than those which were charged to the complainants, who were thereby unduly prejudiced. Messrs. Baird & Co. are Ironmasters, but, like the complainants, they have coal to sell in the various markets East and West of their works and colleries in the Airdrie coal district, which must be carried by the lines of the North British Railway Company. That company charged all the complainants equally, and the difference between their coal rates and the lower rates of Messrs. Baird, averaged 5½d. a ton for all distances over four miles. It appeared that Messrs. Baird's scale of rates was fixed by an agreement made in 1865, for a term of 30 years. The Railway Company asserted that the preference complained of was not undue or unreasonable, seeing that it was justified by the diminished cost, at which they would conduct the Messrs. Baird's traffic. The situation of their pits both naturally, and in relation to the lines of rail with which they communicated, gave them an advantage which the Railway Company was bound to acknowledge and act upon.* It cannot be doubted that if, as was asserted, the Railway Company had, in making that difference in the rates charged to the complainants and Messrs. Baird, only had a due regard to its own interests, and had varied its charges in relation to the various circumstances which might have enabled them to conduct the traffic more or less cheaply, they would have been justified in so doing. But, although in the agreement referred to, Messrs. Baird had bound themselves to send all their traffic to certain places by the North British

* Nicholson *v.* The Great Western Railway Co., 5 C. B., N.S., 366; 28 L. J. C. P. 89.

Railway, the Commissioners found that "no advantages are stipulated for in return, and Baird & Co. do not bind themselves to send large quantities of coal or iron every year, or full train loads at a time, or, with the exceptions mentioned to send only by the North British. Nor has it been made to appear to us that at equal rates, with due allowance for the inclines, there is not the same profit to be made on the coal of complainants as on the coal of Baird & Co. True, there is the produce of the iron works also to be carried, but it is not a valid consideration nor a circumstance that can substantially affect the rate at which it can profitably be carried, that the party favoured is a customer also of the same railway company, in goods of quite a different kind." * This is, it seem to us, good law, and is in conformity with the decision in *Baxendale and others* v. *Great Western Railway Company*.†

But there was a special circumstance in the case which did justify a distinction between the traders who complained and the Messrs. Baird who were favoured. The six collieries of the complainants were on, and connected with the Slamannan Railway, which was laid with a single line, and on which there were some heavy gradients. The Ballochney incline, which descended to Kippes Station, is a mile and a quarter in length, and requires special incline services, which cost the company, so they calculate, £8,300 a-year, or in relation to the amount of coal brought down in 1874, 3¾d. a ton. The Railway Commissioners pointed out that the extra charge which this special circumstance justified could with justice only be laid on traffic going in one direction, while the company exacted it in relation to traffic which went east from the complainant's collieries, as well as on that which went west. They also observed that the cost of the incline would not be in propor-

* See report of Judgment in "*Times*" of March 4th, 1875.

† 5 C. B., N.S. 309; 28 L.J., C.P., 69.

tion to the tonnage brought down. They admitted that an incline due was fairly exigible in relation to traffic which profited by incline services. And coming to the correct conclusion that a fixed toll was a more equitable method of charging for this extra service than an extra mileage, they fixed the toll for the Ballochney incline at 3½d., if the 500,000 tons of coal, or less, was brought down the incline in the preceding year; and at 3d., if the number of tons exceeded half a million.

But besides the difference in the rates charged to Messrs. Baird and the Complainants, there were further differences which the Commissioners, in their judgment, analyse with clear sense, and indicate in vivid language. These, they properly decided, to be contrary to the provisions of the Railway and Canal Traffic Act.

After a very careful perusal of this judgment, we cannot but regard it as in many respects very masterly. The weak points of the defendants' case are explained and demonstrated. The principles upon which the decision rests are as prominent as the mere facts of the complaint. The use of a judgment is not merely to put an end, by the strong hand, to the disputes and differences which are brought for decision, but to render such disputes and differences impossible for the future. A judgment, in that it is an exposition of dark law, is oftentimes more important than the law itself. Besides, people learn more by example than precept. And such a decision as that to which we have referred will do more to open the eyes of traders to their rights, than much reading of the 2nd section of the Railway and Canal Traffic Act. The judgment indicates keen intelligence and good legal attainments as the possessions of this tribunal.

The next case to which we would call attention is that of *Thompson and others* v. *The London and North Western Railway Company*.* This was in many repects a much more important

* See Report of judgment in *Times* of the 11th March, 1875.

case than that to which we have referred above. The most important question which has, as far as we know, come before this Tribunal, was involved in the decision of this case. The facts were shortly these:—Messrs. Truman, Hanbury, and Buxton, and Messrs. Cooper and Co., firms of brewers in Burton, are proprietors of breweries communicating with the line of the Midland Railway Company. This circumstance gives them a natural advantage as compared with the complainants in this case, who are also brewers in Burton, but whose breweries do not communicate with the line of the Midland Railway, and who have consequently to cart all such goods as they desire to forward by the line of that Railway Company. Of this they properly do not complain. If Parliament had endeavoured to level out by Act of Parliament all natural advantages it would have done very foolishly, and its Acts would have been repealed by Nature herself, whose assent is quite as necessary to an operative statute as that of the Sovereign. But the applicants did complain that the London and North Western Railway Company, with a view, as it said, of competing with the Midland Railway Company, gave to Messrs. Truman & Co., and Messrs. Cooper & Co. certain advantages—either carting for them or allowing them a rebate when they carted for themselves—which they refused to the complainants, who were naturally as conveniently situated in relation to the London and North Western Railway Station and lines as Messrs. Truman & Co. and Messrs. Cooper & Co., to whom the preference was given. The question for the Court was whether the fact of competition between these two companies in Burton justified this treatment of the complainants, and took the preference which the London and North Western Railway Company gave to Messrs. Truman & Co. and Messrs. Cooper & Co. out of the category of being undue and unreasonable?

But, first, we may remark that it seems a misnomer to use the word competition in relation to the case. There was, in fact, no competition between these two companies. Indeed,

as was pointed out in the Report of the Select Committee on Railway Amalgamation, 1872, competition between railway companies is at an end in the matter of rates and fares. Indeed, it is somewhat to be wondered at, that it lasted so long. Competition is a foolish unintelligent struggle between persons jealous of each other's advantages. Where there are a very large number of persons in a trade, and where a unanimity of agreement is impossible, competition may continue and may even ruin some of the competitors, but there will always, in every trade, come a time when competition is no longer feasible. The minimum of profit and interest on capital, is a well ascertained amount in relation to any business, and that minimum sets a limit to competition. Underselling becomes impossible when there is no margin for profit. But it is clear that a competition which reduces prices so low, is ridiculous. The competitors are not the gainers. They are struggling *inter se* for the benefit of others. When there are a small number of competitors, this becomes palpable very early in their career, and instead of competing they combine. They perceive that competition is an evil to them, and they agree not to compete. Confederation is more advantageous to them than competition, hence they amalgamate. Now the trade is leagued against the public. Now that is what has taken place in relation to railways. At one time they competed, now they agree upon rates. Competition is at an end, and in this case we have a very good illustration of the results of this modern policy of railway companies. Messrs. Truman & Co. and Messrs. Cooper & Co., owing to their proximity to the Midland Railway, can of course send goods from Burton at a cheaper rate by that line of railway than Messrs. Thompson and others. If there was competition between the two companies, the Midland must secure the traffic of Messrs. Truman and Messrs. Cooper. But the result of competition would be that there would be reprisals at other places by the London and North Western Company, and what the Midland gained at Burton,

it would lose elsewhere. Hence the unity of the two companies and the absence of that division which is the condition of competition. Thus it comes that the London and North Western can make it as cheap for Messrs. Truman & Co. and Messrs. Cooper to send by their line, as it is to send by the Midland. The natural advantages of these firms, *quoad* the Midland Railway have, owing to the agreement of the two companies, secured them an equivalent artificial advantage in relation to the London and North Western Railway, and it appeared in the course of the case, that this system was very widely spread as regards railways, and that if it was held to be illegal, the whole traffic arrangements of the kingdom would be affected by the decision.

It was this question, then, that was submitted to the Commissioners. This was an admirable opportunity for the Court. Here were tough facts to be grappled with, a hard knot to untie. To our thinking their new decision cuts the knot. We regret very much that the judgment is not analytic. It says that there must be an injunction, but it does not set forth the premises which have led to that conclusion. The judgment, after stating the facts, says: "It is said in answer to their complaint, that the Traffic Act prohibits only undue advantages, and that an advantage given by a railway company to obtain traffic for which it competes with another railway company, is not undue. Such a proposition cannot, in our opinion, be laid down unreservedly. It may be true in certain circumstances; it would not be so in others, and what degree of favour can lawfully be shewn to some persons to the prejudice of others under the pressure of competition, can only be decided in any case that arises by a reference to its special circumstances." This looks like a legal principle, but it is in reality a refusal to lay down a principle. What one wants a Court to do is to make definite what was indefinite. The Railway Commissioners leave the question of what circumstances in relation to competition justify a

preference as indefinite as it was before. We wanted to understand the principles which were to guide one in the granting or withholding preferential rates, but the Railway Commissioners say we will not lay down any principle, but will deal with each case as it arises. Besides, they fall into the mistake of supposing that they are dealing with a question of competition instead of one of combination. Then they deal with the case before them according to this no-principle.

But again, they continue: "Another feature of this case which should be noticed is that though the London and North Western Company would, no doubt, make the same concessions to all in the position of Messrs. Truman and Messrs. Cooper, there are, as a matter of fact, scarcely any other persons similarly circumstanced. Truman & Co., and Cooper & Co., are the only firms, as far as we know, to whom the reduced rates are applicable, and we do not think a competition limited to them in its operation is a sufficient ground for the arrangements made in their favour." This also looks like a principle, but if it is a principle, it seems to us erroneous. This sentence, however, does indicate what, in the opinion of the Commissioners, will not justify a preference. If it were correct it would be something gained, although only negatively. The Commissioners think that the competition which will justify a preference, is competition for the traffic of a class, not for the traffic of individuals. But that can scarcely be sound law, for it is not any circumstance, incident to the persons sending, that makes competition an excuse for preference, but circumstances incident to the traffic sent, and the fair interests of the carrying company. The traffic of one man may be more valuable to a company than the traffic of a million. If two companies, in competing for that man's traffic, reduce their rates below those which they are, with a reasonable regard to their own profit, enabled to charge to the many, would competition not be a justification of that reduction, simply on the ground that the customer was an

individual? We confess we cannot see what the smallness of the number of the persons, whose traffic is competed for, has to do with it. That smallness is brought about, not by the arbitrary action of the railway company, but by the natural circumstances of the customers, in relation to the Midland Company's line. It is admitted that the London and North Western Railway Company would make the same concessions to every person similarly circumstanced. All these questions of preference or prejudice, must, it seems to us, be determined by the circumstances connected with the traffic. Thus if one man is in a position to send full train loads, that would justify a preference to him, although he was only an individual and the other customers of the company numbered thousands.* So it would seem, that if competition is to be a reason for preferential rates,† it must be circumstances having a bearing on the traffic, and connected with the fair interests of the company which must be had regard to. But here again the Commissioners deal with competition instead of combination, which has been entered into with a view to put an end to competition, and in that respect their *dictum* is not only, to our thinking, erroneous, but beside the mark.

It may have been practically a proper decision. We cannot say that the injunction ought not to have been granted, but we do regret that the Commissioners, having made up their mind to take this very important step, did not make up their minds to state their reasons for doing so. We cannot but think that the decision in the latter case contrasts unfavourably with that in the former. In other cases, such as the *Nitshill Coal Company* v. *The Caledonian Railway Company*, and *Lees* v. *The Lancashire & Yorkshire Railway Company*,‡ they gave their reasons. Here they only give one reason, and that seems to us erroneous.

* Ransome *v.* The Eastern Counties Rail Co., 8 C. B., N. S. 709; 29 L. J.; C. P., 329.

† In Garton *v.* Bristol and Exeter Rail Co., S. C. B., N. S., 639.

‡ Neville *v.* Macnamara. 352.

II.—THE PATENTS FOR INVENTIONS BILL.

IT is presumed that no one will dispute the correctness of the proposition, that legislation, applied to the improvement of existing laws, requires not only knowledge of the law, but knowledge of the special characteristics of the classes affected by the particular code which it is intended to improve.

As to comprehensive and accurate knowledge of the Law of Patents, there is no reason to doubt the possession of it, by the gentlemen who may have drafted the bill for the amendment of the law. Still less can there be doubt of the knowledge of the law, possessed by the noble and learned lord who has introduced the bill. But we fail to see in some of the most important provisions of the bill, a corresponding degree of knowledge of the habits of mind, the purposes, and idiosyncracy, of the class of men called inventors; and before discussing any of the alterations of the law, proposed by the bill now before the House of Lords, it will not be out of place to make a few remarks, founded upon a long experience of the character of inventors, as to what are in general their views, their aspirations, and their inducements to pursue the career of invention.

It may be observed, in the first place, that there seems to be generally in the public mind, a singular sort of antipathy to patentees; as though they were a species of ogre, going about and seeking whom they may devour; so that inventors are looked upon as a dangerous kind of animal, not to be trusted with a patent, as a weapon against tradesmen, unless they are well muzzled. On the other hand, there seems to be a somewhat misty notion afloat, that inventors are beings of a mental constitution so exalted, and so superhuman, that they will invent for nothing, rather than not invent at all; and this idea has been so far adopted in the highest branch

of the Legislature, as to lead to an intimation that though the time has not yet come for abolishing patents altogether, yet the time will come when, under a higher and more universal civilization, patents will become as a thing of the past.

Some additional confusion has been occasioned by the doctrine propounded from high authority, that *patents* are not matters of *property*, but of *contract;* a doctrine which fully explained is, no doubt, perfectly sound; but which, nakedly stated, may lead ignorant and unreflecting persons to draw this inference: that if patents are not founded on a *right of property*, there is no valid ground for granting a *right of property*, such as patents, by *contract*. Of course, that could not be the inference intended to be drawn by the noble and learned lord who is said to have used the expression. No doubt what his lordship meant was, to draw the distinction between the right of property in an *invention*, and the right to have a *contract* with the public for the grant of an exclusive privilege, in the shape of a patent, which would be *bonâ fide* property. That an inventor has a right of property, *quantum valeat*, in the possession of his *invention*, as being a part of his own *exclusive knowledge*, is perfectly clear. For there is no power in any law existing, and there never could be under any civilised government, a power compelling an inventor to divulge his invention, if he chooses to keep it secret. The result is that, if the public want the invention, they must buy the knowledge of it in some manner; and this they do, by the grant of a patent; which is the price they pay for the intellectual property of the inventor.

A Patent, in point of fact, stands upon exactly the same grounds as copyright. In the latter case, the MS. is the *intellectual property* of the author. He *contracts* with the public for an exclusive right of publishing for a term; and the law gives him that exclusive right, as the price of his communicating his work to the public. No one ever dreams of considering the copyright of an author, as a *monopoly*, in

the offensive sense of the word. But unfortunately for inventors, the Statute of monopolies, while abolishing *monopolies* properly so called, mixed up with them, by way of *exception*, and not of direct legislation, an exception in favour of useful inventions; and that exception has been carried into effect by the machinery of patents. But the odious word *monopoly* has still in the public mind clung to patents, and subjected patentees to a sort of popular hatred and jealousy. Whereas, patents are in fact simply a bargain or contract, founded upon this—that the inventor says to the public:—"The invention is my secret; if you want it, you must buy it;" and the reply of the public is, "we will buy it, on the terms that you alone shall have a right to use it for fourteen years; the reversion to belong to us." In that sense patents are the subject of *contract*, and without such a contract, or some equivalent arrangement, the public could not obtain the property, in the sense of using it; but the patent, once granted, is *property* in the legal and strict sense of the word, during the term granted. The writer is quite aware that the notion is entertained by many persons, (as is indeed shewn by the mere suggestion that it might be advantageous to the public wholly to abolish patents,) that inventive minds will pro-create inventions for the mere love of inventing; and that inventions, if patents were abolished, would, somehow or other, flow into the stream of manufactures, just as fast as they do under the shadow of patents. Persons, however, who hold these views, must have come very little into contact with inventors who, as a class, are very "like unto other men," and have no more idea of generously benefiting society at their own expense than other people have. In general, inventors look for a substantial reward for their inventive exertions, and are by no means Quixotic enough to be satisfied with praise and fame only.

It is, no doubt, true, that there is a class of inventors, who rejoice in bringing out pretty little trifling inventions, and comfort themselves with the *guerdon* of a small reputation

for cleverness. But these are quite exceptional inventors; men who invent, after the style of Watt and Woolf and Roberts, and of an endless army of inventors, of a class that may be called manufacturing inventors, are men of a totally different type; they are men who invent almost invariably with a view to extending and improving their business. Of course they desire fame also; but increase of worldly prosperity is their great spur to exertion. Be it remembered also, that with regard to inventions (especially improvements in mechanism), in most cases, (one might indeed say in all cases,) a considerable outlay of money, as well as a considerable consumption of time, is requisite before the invention is fit for practical use.

Persons who are not, from their position and occupations, brought into close and intimate contact and confidential communication with the inventors of *new machines*, or improvements in *known mechanism*, have very little idea of the tedious and expensive processes that have in general to be gone through, before the original idea is brought into a practical and effective condition. First, there are drawings to be made, and then frequently, models; and as it generally turns out, that some defect (unforeseen while the invention exists only upon paper) is detected, then the model must be taken to pieces and reconstructed; and this process may be repeated, and go on till large expense is incurred, before the invention is ripe for description in a complete specification. The result is that the inventor, when his invention has become really practically useful, finds himself loaded with a mortgage upon his industry, which would wholly unfit him to compete in trade, with other manufacturers not loaded with any such mortgage, if they are to be at liberty to use his invention.

The idea, therefore that, without the protection of a patent right, or some other equivalent protection, the best and most useful class of inventors would trouble themselves to concoct and perfect inventions, is about as preposterous as it

would be to suppose, that artists in the various departments of art would go through the laborious and lengthy training requisite for eminence, merely to win the admiration of the world; or that authors, as a class, would write valuable books, if there were no such thing as copyright.

Assuming that the foregoing observations are well founded, let us consider what is the general scope of the bill now before Parliament.

The general scope of the bill appears to be founded on a rather mistaken notion of the relative positions of the parties; that is, the bill seems to assume that the granting of patents is a *grace*, rather than a *bargain*, and that the balance of *power*, as to obtaining inventions, is in favour of the public.

Now if the previous observations as to the character and aims of inventors are at all correct, it would seem that the balance of *power* is rather the other way, and in favour of the inventors. In other words, that the inventors can better dispense with patents, and cease inventing, than the public can dispense with inventions. And the general scope of the bill seems to be, not only to make it more difficult to obtain patents, but to render them, when obtained, less advantageous to the patentee.

The clauses, for instance, relating to licenses, making it under certain circumstances, practically *compulsory* upon patentees, to grant licenses on such terms as the authorities shall dictate, are so hostile to the interests of patentees, that they will, in all probability, deter many persons of inventive genius from taking the trouble to invent.

A patent is, in effect, *at present*, a lease for years of an exclusive privilege to use the invention, in such manner as the patentee may find, or believe to be, to his interest It is now proposed, not only that underletting (for a license is simply an underlease) shall be compulsory, but that the rent or royalty to be paid by the sub-lessee, shall or may be fixed, not by the lessee himself, but by the Lord Chancellor. (Clause 27.)

Now it may be in the interest of a patentee not to grant licenses at all, or at any rate to grant very few; as in the case of the patentee being himself a manufacturer of the very articles to which the invention is applicable. Suppose, for instance, the case of a manufacturer on a large scale of locomotives, making some improvement on the engines; it is his interest to keep the manufacture of the improved engines in his own hands. But if he is told, when he applies for a patent, that the authorities may compel him to grant licenses to every other manufacture in the trade, and that, not at such royalty as he may fix, but at such royalty as the authorities may think fit, he will be very likely to spurn such a *damnosa hæreditas*, and to put his invention in his desk and leave it there. It may, on the other hand, be the patentees interest to depend largely upon his royalties, if he can fix them himself; but when the proposed authorities can say, "you shall not consult *your* interest; we will compel you to consult the interests of the public; and you shall not only grant a license to anybody who wants one, but we will fix the amount of royalty," the inventor may well reply, "of what use is such a patent to me?"

The clauses, therefore, affecting licenses would seem so far to diminish the value of a patent as to be likely to decrease considerably the supply to the public of useful inventions.

With regard to the clauses which place in a board of scientific men and lawyers, and the law officers of the Crown, the jurisdiction to decide *à priori* whether a patent shall be granted or refused, those clauses seem also very well calculated to dimnish the supply of inventions; and, therefore, to be injurious, rather than beneficial, to the public.

According to the proposed alteration of the law in this respect, an inventor, desiring to have a patent for his invention, must lay before the examiners a full and complete specification of his invention. And the bill, in clause 8, especially directs that the specification so lodged shall

describe the *nature* of the inventions, and *in what manner it is to be performed*. In a word, it must be such a description that, from reading it, and from examination of the drawings, (if the patent relates to mechanism) a person reasonably acquainted with the subject shall be able to practise the invention.

Now, every person whose avocations have brought him much into contact with inventors of mechanism of any degree of complication, knows full well, that the six months during which, under the present law, it is allowed to the inventor, after he has got his patent sealed, to expand the provisional into the final specification, are not one day too much for the task.

During that period the inventor must prepare his drawings and his description. It may be frequently necessary for him to make models, as before observed, two or three times over; he may have to construct actual machines before he can describe satisfactorily how to *carry into effect* the invention, of which his preliminary specification describes only the *nature*. All this cannot always, nor even often, be done in secret. Inventors cannot always have a secret lock-up place, where they can deposit their drawings and models, and make experiments. And the result may frequently be under the proposed new *regime*, under which the process above described must be gone through *before* a patent can be granted: that when the inventor gets his patent allowed, he finds out that his secret has got abroad; that his invention was known weeks or months before the patent was sealed, and that the patent is not worth the parchment on which it is written. Surely, if ever a plan was proposed for exposing an inventor to the danger of losing the fruits of his industry, a better one than that proposed by the bill could hardly be conceived. Under the present system no such danger exists, but, under the new system, the inventors of inventions requiring

much to be done before they can produce a satisfactory specification, but requiring also that it shall be done with absolute secrecy, will, it is apprehended, be rather shy of risking time and money under a system, which will not protect them, till *after* they have lodged a complete specification.

There is also, as I submit, another serious objection to the proposed Board of Examiners—namely the extreme difficulty of determining, *a priori*, what may be the difference between a proposed invention, and something previously known, and what may be the practical result of the invention. There have been many patents for inventions, of which the value and the distinctive characters were scarcely perceptible on paper; and the merit and utility of which have been only demonstrated by actual practice; and there always will be, from time to time, such inventions. The probable result of the new system will be, that the Board may have to choose between granting patents blindly, in which case it would be useless; and occasionally rejecting some invention, apparently infinitesimal, but in reality important; in which case, the Board would be simply mischievous. Further, the Board will be necessarily without means of judging of the *utility* of an invention, of which there can be no proof, till the invention is put in actual practice. And it is well known that *great utility* is taken into account by the Courts, in determining whether a patent can be supported. But *utility* cannot be easily foreseen.

The clauses regarding the partial abolition of prolongation of patents will, it is submitted, have also the effect of diminishing the supply of *really important* inventions, while they will be nugatory as regards trivial inventions.

The Bill confines the power of granting prolongation to patents granted only for seven years (clause 28). Now the seven years' patents will almost invariably be patents for inventions of a comparatively trivial and slight kind; firstly, because a seven years' patent will be most sought by the

inventors of slight inventions; secondly, because such inventions rarely keep a hold on the public for more than five or six years; after which they are superseded by some new little invention, which takes the fancy of the public. At the end of the seven years, the patentee will not care about a prolongation; and if he does, he will be unable to show any merits, giving him a claim to prolongation. But the 14 years' patents (to which the power given to the Lord Chancellor by sec. 28 does not extend), are precisely those in respect of which the power of prolongation is requisite; because it is for that class of inventions that a 14 years' term will be most frequently sought and granted; and it is also precisely in respect of that class of inventors, that the patentee may find it impossible, from circumstances which he cannot control, to obtain a fair return for his talent and exertion, till his term is nearly running out.

The cases of applications for prolongation, reported in "Moore's Privy Council Reports," which the writer has carefully examined, show most distinctly, the extreme caution with which the Judicial Committee of the Privy Council exercises its jurisdiction. A careful perusal of these cases will show, that to entitle a patentee to a prolongation, he must prove not only *merit*, but *public utility* in his invention; he must also satisfy the Court that he has not reaped adequate remuneration, and that his failing to obtain such remuneration, arises, not from any default or neglect of his own, but from circumstances which he could not control. As to what is held by the Privy Council to be *adequate remuneration*, it seems from the authorities, that the Court looks, not at the profit made by the patentee as an individual, but at the profits made by him out of and by virtue of the patent. And, in ascertaining what the profits have been, the Court requires a strict and clear account from the patentee.

A Tribunal thus acting, may safely be trusted to protect the public, while it also protects a patentee who has materially contributed to the advancement of manufacturing

industry; and there seems fair ground for anticipating, that if the jurisdiction of that Tribunal is abolished, and no prolongation of a 14 years' patent can be obtained, except by an Act of Parliament, a material discouragement of the best class of inventors will be the result.

So much as regards, what I venture to consider, the dark side of the proposed legislation. On the other hand, there are many clauses which seem likely to be very beneficial.

The abolition of patents for a communication from abroad, (sec. 19) is a clear abolition of a clear abuse; for what possible merit can there be in a man who has invented nothing himself, but simply imports an invention made by a foreigner? The clause most justly confines the grant of a patent, to a foreigner who declares himself to be the inventor; and if he has already a foreign patent, he alone can obtain a patent, and must, in order to obtain a foreign patent, apply within six months after the date of the patent, (sec. 19, No. 3.)

Section 42 is also a material improvement, giving to the judge who tries a patent case power to call in an *expert* to advise and assist the Court. This clause will, it is apprehended, very materially diminish the frightful expense attendant upon trials of patent cases.

Under the existing system, as a judge, however eminent as a lawyer, cannot be expected to be an accomplished mechanician or chemist; he is more or less at the mercy, in a case of alleged infringement of the scientific witnesses; and, as a consequence, it becomes necessary for each of the belligerents to endeavour to weigh down his adversary, by a superior mass of evidence. The result is to the suitors, on both sides, the necessity of bringing in a perfect army of scientific witnesses, and consequently a frightful expense. But if the judge is assisted by an *expert* of reputation, who will hold a *quasi* judicial character, then counsel will know perfectly well that, on any disputed scientific point, the judge

will listen to his own assessor in preference to the retained witnesses of the parties; and the result will be, that one or, at the outside, two witnesses on each side, merely to explain the scientific parts of the case, will be sufficient in general.

Another excellent feature in the bill, is sec. 34, which abolishes the right of the Crown claimed and exercised in *Feather* v. *The Queen** to use a patent without making any return to the patentee (section 34), and places the Crown in the same position as a subject would be, with the reasonable right reserved, that the officers of the Crown may use a patented invention, if the service of the Crown requires it, on terms to be agreed upon; and in default of agreement, to be settled by the Treasury. This clause, therefore, does away with the absurd, and at the same time unjust doctrine, that the Crown who grants the patent may derogate from its own grant, and use the very invention for which it has granted an exclusive privilege to the inventor.

On the whole, bearing in mind that the very object of a Law of patents is to benefit the public, namely, to improve manufactures of all kinds, by encouraging the production of useful improvements in manufacturing processes; bearing in mind also, that such a result can only be obtained by legislation, which will give a fair inducement, to persons of an inventive disposition to exert their inventive faculties; and, bearing further in mind, that persons possessing such inventive faculties are just like other men, and will not labour without adequate protection and reward; it is submitted to the reader, that though there is in the proposed amendment of the law much of substantial improvement, yet, on the other hand, the clauses principally discussed in this paper, namely, 1st: those relating to the process of obtaining patents (clauses 6 to 11 both inclusive), 2nd: those relating to prolongation; and, 3rd, those relating to licenses; are more likely to retard and contract than to advance and

* 6 Best & Smith, 217.

extend the production and practical application of inventions of the class most useful to the public.

It may be added, however, that one does not often see a Parliamentary Bill drawn in language so terse, so clear, and so definite.

C. STEWART DREWRY.

III.—THE PARADOX IN THE LAW OF TRADE UNIONS.

By ALEX. TAYLOR INNES, Advocate.

THE law of trade unions is on one point in a peculiar and almost paradoxical state. The Act of 1871, by which they are now regulated, provides that "the purposes of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful," either criminally, or so as to make void any agreement. But with regard to all the chief agreements peculiar to trade unions, or usually undertaken by them, (a short list of which is given in the statute,) it is added, that "nothing in this Act shall enable any court to entertain any legal proceeding," either to enforce them, or to recover damages for their breach. The statute, therefore, which declares trade union purposes refuses to enforce them. It grants no action to the union against its members for contributions due to it; none to the members against the union for benefits due to them; and none to any party in respect of agreements fixing the rate of wages to be accepted, or the hours of work to be done. Yet it had already been declared that these and the like agreements are to be neither void nor voidable; and to make it quite certain that the statutory

paradox is deliberately and advisedly made part of the law, the section refusing action upon such agreements ends with the provision, that nothing in it shall constitute any of these agreements unlawful. Since the beginning of 1874, two cases, decided unanimously one in each division of the Court of Session, have settled that this statute, (conceived in terms that might possibly relate rather to the previously existing law of England,) applies in the fullest sense to Scotland. These cases both referred to a man who, having paid all his contributions to his Society, claimed the benefit-money provided for an accidental loss of an eye—a kind of agreement, which, in itself, our law looks upon with all possible favour. Yet, being a trade-union agreement, it was held that the statute refuses, and consequently forbids, all enforcement, even of this. The doubts which had been previously expressed, as by my learned friend Mr. Sheriff Guthrie, in his "Notes upon the Law of Trade Unions in England and Scotland," are thus set at rest, and we may now deliberately consider the strange, and, indeed, anomalous relation which these societies in this respect hold to the law.

With a view to such consideration I propose to put the question: How did they come into this curious relation? For the answer to it is remarkable. They came into it upon the demand and recommendation of the representatives of Trade Unionism in England, but against the protest of Trade Unionism in Scotland.

The Legislation of 1871 was, as is well known, founded upon the Report of the Royal Commission appointed to enquire into the Organisation and Rules of Trades Unions and other Associations. Their final Report was presented in 1869: but a dissent and relative statement were appended to it by two well-known members of the Commission, Mr. Thomas Hughes and Mr. Frederick Harrison. These two gentlemen had been generally accepted as the representatives in the Board of the views and interests of the working men or the unions; and their ability and eminence made it

natural that it should be so. In their elaborate statement appended to the Report, they take up the question of the Legislation as to Trade Unions; and while agreeing with the Commission generally that combination should be made lawful, and that the union funds should be protected from embezzlement, they go farther and consider the question whether agreements between the union and its members should be enforceable at law. And on this their recommendation is, that the union should not be, on the one hand, "capable of *suing* as a corporate body, or of recovering at law contributions, arrears, or fines against its own members, or of otherwise *enforcing* at law or in equity any of its rules, resolutions, or contracts as against any of its members;" and that it should not be, on the other hand, "capable of *being sued* as a corporate body, and should not be *accountable* in law or equity to its members in respect of any rule, agreement, resolution, or act of the Society." And this is not intended as a mere technical rule with regard to the *persona standi* of trade unions, (which, they say, should remain that of "clubs or purely voluntary associations;)" but, as appears from the arguments used, was intended to come up to the provision of the resulting Act of 1871, by which Courts are barred from enforcing these pecuniary obligations against the unions, or in favour of them.

Now I am far from holding that there is not much to be said for such a state of the law as this, anomalous as the position of the societies under it may be. But I am afraid the reasons adduced for it in the Blue-book by Mr. Hughes and Mr. Harrison, (for the zeal and ability of both of whom I beg to profess my admiration), are by no means conclusive. And I desire now to draw attention to the fact, that the legislation here recommended was carried out against the expressed opinion of the Trade Union Societies of Scotland. In 1869 a Bill was prepared by Mr. Hughes and Mr. Mundella, embodying the above recommendations as to non-enforcement of agreements, almost in the words I have

quoted from their previous statement. This Bill or its draft was sent down to Edinburgh by its authors to be laid before a conference of the trades or unions of Scotland, which assembled there, and the result of their deliberations was that (while of course approving of the general provisions of the Bill), they nearly unanimously negatived this part of it. Not only so, but when the subsequent measure, now become the law of the country by the Act 1871, was introduced into Parliament, the great majority (as I am informed), of the Scotch unions, inserted into their Petitions to Parliament the following clause with reference to Section IV (that recently proceeded upon by our courts in refusing to entertain actions :)

"Your Petitioners believe that the Unions should have the power of enforcing all agreements which would, under other circumstances, be legal, and that the members of the Unions should have the power of legally recovering benefits that may be withheld."

The clause, therefore, disabling members of Scotch Trade Unions from legally recovering benefits due by their Societies was made law against the desire of these bodies ; and I am informed, on good authority, that the recent course of the Masons' Association, or its Greenock Branch, in pleading this disability in its own defence, in the case *McKernan*, has been regarded by the Societies generally with grave disapprobation. The view, therefore, expressed in the Royal Commission Report, by the two members of it already referred to, must be taken as being, at best, the view of the English Unions alone, as distinguished from those of Scotland. And in any case, the arguments by which that view is there supported seem to me (I say it with great deference) to be confused and unsatisfactory, singularly deficient alike in the powerful common-sense characteristic of Mr. Hughes, and in the sword-like logic usually wielded by Mr Harrison. With regard, in the first place, to the refusal to give action against the unions for benefits, the argument chiefly relied

on seemed to be that it would be impossible to separate the funds of the society intended for this purpose from those intended for supporting the men when on strike. "Since the funds of every union may be devoted in unascertained portion or in bulk to the purposes of a strike, no Trade Union can possess that scientific security of solvency which belongs only to cases where the liabilities are calculated by tables of average;" and, therefore, you cannot give members a legal claim for benefits when no benefit money may be left to pay it with. And then a good deal of illustration is devoted to shewing the impossibility of calculating the amount it would be necessary to set apart for strikes, and the absurdity of expending any fixed amount on that object, year by year.

But no argument is bestowed upon the other plan, which one would think the more obvious, of setting apart, in the first place, the money necessary for benefits, of making that a "first charge" on the funds of the society, and of calculating a reserve which for this purpose will give to the members the ordinary security of an insurance society. The true way of putting the question is that taken by the majority of the Commission: "It is obvious that there can be no security for the solvency of any society which mixes up the funds designed as a provision for sickness, old age, or burial—objects for which the expenditure may be calculated with certainty—with the funds for supporting strikes, for which the expenditure must necessarily be uncertain and incalculable." But this separation of funds, the laying aside of a sum to *secure* to members who have actually paid their contributions, benefits in cases such as sickness, old age, and burial—is opposed in the strongest way in the dissenting report of Messrs. Hughes and Harrison, and that for reasons which the Scotch societies seem to have been puzzled to understand. *They*, indeed, were disposed in perplexity to find the explanation of it in a fact which crops up in another part of the report with regard to the English Unions—namely, that they, and even the richest and best

organized of them, were at that date (1869) already in a state of insolvency, even as benefit societies. The "Amalgamated Society of Carpenters and Joiners" and the "Amalgamated Society of Engineers," were selected from among the English societies as "two of the largest, best organized, and richest in existence;" and the report derived by the Commission from the experienced actuaries employed to examine them was, that these two "are, as regards their engagements, as benefit and friendly societies, already in a state of insolvency; and that a continuance of the present system of keeping their accounts and conducting their affairs, must necessarily end in their being unable to keep faith with those members of the union who have subscribed to the funds, in consideration of the superannuation and burial allowances promised to them."

It can scarcely be denied that this is an unfortunate state of matters, and it is equally plain that it could only be remedied by keeping separate and sacred the money necessary to meet these engagements and pay the benefit allowances. The answer made to this in the dissenting report, is, that such a separation is *impracticable;* and that insolvency of trade unions, even as benefit societies, however unfortunate, can never be certainly avoided. The Scotch societies, as we have seen, did not believe this reasoning and they refused to admit that the separation was impracticable. But in order to prove their case they have been reduced to a very prosaic but conclusive form of arugment—*they have actually separated their benefit funds.* The more important Scotch Unions have thus, as I am informed, made themselves, as far as benefits are concerned, safe and solvent societies; and they have entitled themselves to be heard with very much more attention if they should be disposed now to take up the position which they stated in 1870, that "the Unions should have the power of enforcing all legal agreements, and that the members of the Unions should have the power of legally recovering benefits."

But the fact that the Trade Unions are not unanimous

about making their agreements enforceable at law, and that the question of practicableness seems to have decided itself in favour of the Scotch societies, does not settle the question of public law, Which way is more expedient? And this general question must embrace, of course, not only the obligation on unions to pay benefits, but that upon members to pay their subscriptions, at least as long as they continue members. Are we prepared to enforce this? Here again I profess myself quite unable to understand the reasons given by Mr. Harrison and Mr. Hughes for a conclusion in the negative. (Page 60 of Eleventh and Final Report.) They say, 1st—that this suggestion "does not come from the societies" themselves—*i.e.*, the English societies. Well, but why not? 2.—That the objects of Trade Unions are wholly objected to by many of the public. That may be a good reason for those who so object, but scarcely for those who strongly approve of them, as both these writers do. 3.—That before you could enforce contributions to unions, they would require a "complete and definite machinery" of organisation, as in the case of trading companies. (I do not see that that is in the least necessary; and in point of fact the organisation of the unions is both more complete and more definite already than in the case of innumerable trading companies. These reasons are not satisfactory. We can only therefore take them as indicative of a determined desire on the part of representatives of the unions, a desire shared in by distinguished and disinterested men, that these institutions should be absolutely free from either the inspection or the control of the law. Trade unions are, Mr. Hughes says repeatedly, "essentially clubs and not trading companies," and as such must have all their own affairs in their own hands. For this the English societies are willing to sacrifice, as we have seen, not only a legal hold on their contributions and fines, but also the great popularity which they would derive from making their "benefits" financially and legally sure to their members. But let us remember that the

Scotch societies also, while perfectly willing to have their obligations made legal, do not believe that that would prevent their keeping most of their own affairs in their own hands. It is, I believe, part of the rules of some of them—it was certainly pleaded as such in the recent cases in the Court of Session, as to the Masons' Association, that the decision of the Association itself is to be final, in the matter of benefits as in other things, and that consequently the Court cannot, in fairness, admit appeals against what the parties themselves have agreed to hold as conclusive. That this is the rule also of the English societies, I have no doubt; but, there of course, the rule works so as to cut out from a share in benefits all who disobey the Association in other matters—all who, for example, refuse to contribute for the purpose of a strike which has been agreed upon. In some, at least, of the larger Scotch societies, those which have taken much pains to separate their benefits from the trade or strike purposes, I am assured that the right to benefits is considered indefeasible, and that even resignation or expulsion from the society does not deprive them of. Either way may be all right, provided that the parties distinctly understand the nature of their bargain, and of the institution which they join. But this brings us back to the consideration that in every case the Trade Union claims great power over the whole internal affairs of the Society. This power is, I believe, in most cases, exerted very constitutionally, with a regular gradation of local and central authorities in dealing even with minute individual cases, and with considerable fixed majorities necessary for changing the more important rules; but it is or may be an absolute power, including, and intended to include, all interference from without. It would be, therefore, an *imperium in imperio* of the most important kind; and it makes still more startling the provisions of the statute which, while declaring such an association lawful, refuses to allow the civil courts to take any cognisance of its bargains and agreements. Is the statutory provision one really against

the Societies, and intended to limit their power; or is it one in their favour, intended to carry out their idea of finally deciding their own concerns themselves?

I have said that the present law on this matter is anomalous, and almost paradoxical. It is so for this reason. When an association of the lieges is declared lawful, the ordinary result is that its obligations are lawful, and cognisable by the courts of law—provided, of course, that these obligations are deliberate and involve matters of serious pecuniary—(or, as we say in Scotland, "patrimonial")—value. With some peculiar associations there has always been a difficulty. Ever since the founding of Christianity, the courts have had a difficulty in meddling with the internal affairs of Churches. But the theory of the Scotch Churches, (who objected to such internal meddling more than any others,) has always been that the civil matters of churches, their pecuniary emoluments and privileges, are perfectly appropriate for the decision of the courts of law. But in the present case we are confronted with associations intensely secular, which deal exclusively with trade interests, and pecuniary contributions, and patrimonial benefits. And it is their contracts that the law shrinks from meddling with. It is quite clear that this abstention must be based, not on the ordinary rules of contract or commerce, or partnership, but upon those general considerations of public and constitutional law, which overrule everything.

Whether our public law is wisely applied in the statute of 1871, or whether and how that should be modified, is a matter on which I offer no opinion. I have rather sought to lead up to this question, and to prepare for discussion, by recalling the present state of the law, and the difference of opinion, even among the unions themselves which preceded its enactment.

IV.—ARCHAIC LAW AND OUR NEWEST COLONY.

THE cession accomplished on the 30th September, 1874, as the result of the negotiations carried on between Sir Hercules Robinson and King Cacobau, not only added to our Empire some of the most beautiful islands of the Pacific, but also brought us into direct relations with a people still living under archaic conditions such as we are, for the most part, acquainted with only through books. It is well that we should thus learn the practical value of studies which stand much more risk of being under-estimated among us, than among those nations whose jurisprudence is so largely based on Roman law as to compel some attention to ancient law-systems, and the sooner this fact is realised the better will be the prospects of our successful administration of Fiji.

King Cacobau and his chiefs, in giving their country "unreservedly to the Queen of Great Britain and Ireland, trusted and reposed fully in her that she would rule Fiji justly and affectionately, that they might continue to live in peace and prosperity." And in their further memorandum of the reasons that determined the cession, the King and chiefs recite the fact that, "divers subjects of her Majesty have, from time to time, settled in the Fijian group of islands, and have acquired property and pecuniary interest therein, and that it is obviously desirable in the interests, as well of the native as of the white population, that order and good government should be established."

Now, one of the very first points that will have to be considered in establishing that "good government and order," which we must be no less anxious than King Cacobau to see flourish in Fiji, is clearly the adjustment of the Land

Question,* and we are glad to perceive that the suggestions of Sir Hercules Robinson, on this head, are in accordance with the course which the study of Primitive Institutions would dictate. The Fijians are still in the Tribal state, and their conception of ownership vests the property in the Tribe, from which, before the arrival of European immigrants, it was held that no land could be absolutely alienated. It appears that the advent of Europeans, and their settlement in the islands, has already effected a certain amount of change in the native view of ownership, and the tendency of the closer intercourse that must now be opened up between the races will inevitably be towards modern conceptions, and individual ownership. The difficulty of effecting a peaceful and gradual transition from so archaic a condition to that which we have reached through many centuries of Roman and Feudal Law, must needs be great, and it is sincerely to be hoped that the patience and learning of the administrators of our Colonial Government will be equal to the demands that cannot fail to be made upon them. It will be something if the important series of works to which Sir H. Sumner Maine lately added a fresh value by his "Early History of Institutions," be carefully studied by those who may be responsible for the welfare of Fiji. So far as we can gather from the public press in its comments on the cession, and its account of the suggestions made by Sir Hercules Robinson, and approved

* Since the above was written we notice that Sir T. F. Buxton, as one of a numerous and influential deputation which waited on the newly-appointed Governor of Fiji, expressed his hope that an early opportunity would be taken to simplify the land-laws of the colony. We do not know what may be the view entertained of simplification by the honourable Baronet, but we agree with the *Standard* in considering it evident that "the idea of a cession in Fee-simple is but dimly apprehended by Fijians, and that herein, as in New Zealand, lies the germ of future difficulty in dealing with the natives." Under the circumstances it is encouraging to know that Sir Arthur Gordon informed the deputation that this subject had already engaged the attention of the Government, and had been a matter of interest with him since his connection with tropical colonies commenced.

of, in principle at least, by Lord Carnarvon, there is every hope that an equitable adjustment of European and native customs will be arrived at; but it will long require much tact and caution, and much careful application of the methods of comparative jurisprudence to the needs of our newest Colony. We shall ourselves be the gainers by such a course, for, as in the case of India, we shall find fresh illustrations of early systems brought to our very door, and our knowledge of primitive society will be sensibly increased. We have gone to the Teutonic and Slavonic races for our knowledge of the Mark system, and of Village and House Communities; we have found mines of wealth for the study of Ancient Law in our Indian Empire; and it is not too much to say that we have yet another interesting addition to our stores of information provided for us in the cession of Fiji. Whether the "Joint Undivided Family" of India will be found there we cannot at present say, for our researches into the state of Primitive Society represented in our new Colony are still imperfect. It is certain, however, that we find ourselves face to face with a system from which the individual, with his rights of adverse possession, has yet to emerge, in which the Family and the Tribe are the owners of the soil, and in which it is trusted that we shall "rule justly and affectionately, that the Fijians may continue to live in peace and prosperity."

V.—ABOLITION OF FIRST FRUITS AND TENTHS.

By Rev. Daniel Ace, D.D.

THERE is prevailing in English society a refined poverty of a class to which public attention is being directed with a view to its alleviation. It is the sad heritage of an educated class of gentlemen who, by State restrictions, are

prohibited from all speculative or commercial transactions, to ameliorate their pecuniary condition. They are styled the "poor beneficed clergy," who, through no fault of theirs, but their misfortune—*res angusta domi*—are obliged frequently to supplicate for eleemosynary aid, or, without such relief, are content to pine away their wretched existence in concealing their griefs, under the pallium of a respectable profession.

It must be admitted that the evil is chronic; it has existed for some few centuries; it has been recognized even by royalty. Who has not read of the remedy proposed by an English queen, by what is styled "Queen Anne's Bounty?" But what jejune results have issued from the royal fund? The impoverished, suffering beneficed clergy are themselves the best exponents of this incontrovertible fact. The whole history of the case demands, not only public investigation, but also legislative redress. Other subjects may be more stirring; probably in the Senate House, the scheme for the multiplication of bishops may be more interesting as a topic of discussion; but no consideration can be more weighty, or of greater consequence to Church or State, than the required alleviation of clerical poverty—this demand for equity in the import levied on the impoverished, inferior beneficed clergy.

Doubtless, the subject is now more within the province of the State than the Church. Be it so; nevertheless, the Bounty Fund is the legacy of a Protestant queen to the Protestant bounty of the Church of England. Her Majesty, Queen Anne, in her first interview with her Privy Council after her accession, assured the high officers of State, that it was her firm intention to maintain intact the Protestant religion; and in order to benefit the poor clergy of the Church of England, established by law, she sent a message to the House of Commons, desiring that her revenue of the "Tenths" and "First Fruits," might, by an Act of Parliament, be appropriated to the maintenance of the poor clergy,

which was accordingly so enacted by the 2 and 3 Anne, c. 11.

More than a century and a half has passed away since this enactment; but with what results? The Ecclesiastical Commission has entered upon the work with greater success; and it is a grave question for the legislature, whether the two boards, namely, the Ecclesiastical Commission and Queen Anne's Bounty Board should not be amalgamated? Certainly, it would greatly economise ecclesiastical funds. Yet to the scheme of amalgamation, our prelates are the most sturdy of opponents. But *ab initio*. The whole collection of "First Fruits" and "Tenths," as now exacted, form a gross anachronism. The designation is very odd: the *primitiæ* of rich benefices. All very fair if really it was the case, that a portion of wealthy livings were actually set apart to improve the impoverished ones. But, in the sequel, we shall demonstrate that such is not actually the process.

Odder still is the designation *annats*, or *annates*, from "annalis," lasting a year, the First Fruits which, in ancient times, were paid out of spiritual benefices to the Pope, being the value of one year's profit; a tax levied on preferments when they became vacant. Now the origin of such imports is very interesting. Doubtless they grew up with the encroachments of the Papal See. They were an irregular demand paid on those benefices only in the gift of the Pope. But his patronage became extended when he claimed the high prerogatives of the vicar of Christ, and Universal Chief Bishop in Christendom; the source and centre of all episcopal authority.* Others have thought that a year's income was surrendered at ordination and consecration. Practically this was the case.

Historians do not agree as to the date of their early origin. According to Hume, the historian, the Pope levied the import of first-fruits in the reign of Edward I. But, according to Blackstone, they were the usurpations of the Pope in this

* Lewis Pecock p. 45.

country in the reign of King John, or in Henry III's reign, from 1216 to 1273. Most likely in the latter reign, 1222, when Pandulph, Bishop of Norwich, the Pope's legate, exacted this tax from his clergy on the plea of incumbrances with which he found himself burdened. Subsequently, about the commencement of the fourteenth century, those *primitiæ*, or first-fruits, were attempted to be made universal by Popes Clement V., 1305 to 1315, and John 22, 1316-34. But their import was complained of as a very great grievance at the Council of Vienna, 1315. Antecedently, in the year 1307, in the 34 Edward I., at a Parliament held in Carlisle, complaints were made of the Papal exactions of *Annates;* at which Parliament, the monarch, by the assent of his barons, rejected the Papal claims to first-fruits of spiritual promotion within England which were founded by his progenitors, and the nobles, and others of the realm, for the service of God, alms, and hospitality. And to this effect he wrote to the Pope; whereupon the Pope relinquished his demand of first-fruits of abbeys; in which Parliament, also, the first-fruits for two years more were granted to the King.*

Those *Annates*, however, for a considerable period, had been one of the chief sources of the Pope's exchequer. But these *Annates* were not the only imposts. *Decimæ*, or the tenth part of the yearly value of all ecclesiastical livings, a tithe of the tithe, the Pope claimed from the clergy, as due to himself, in imitation of the same proportion being paid by the Levites to the High Priest. This tribute was also yielded to the Pope by ordinance in 20 Edward I. 1292, who granted them for six years to Edward I., under the pretence of his undertaking a crusade† but they had been long antecedently paid. Indeed, they had been granted by Pope Innocent IV. to Henry III., in 1253, for three years. The reason that canonists assign for their exaction is, that they were designed for the Pope's own proper dignity—that they

* 12, Co. 45.

† Short's History of England.

who had the care of all the churches, may be supported by all the community.* Both the *Annates* and *Decimæ* had been levied according to a rate or *valor* made under the direction of Walter, Bishop of Norwich, in the 38 Henry III., 1254, and, therefore, called sometimes the Norwich Taxation, and sometimes Pope Innocent's *valor;* but upon fresh grant made to Edward I, 1292, a new valuation took place, which was advanced in value, and which is now generally denominated Pope Nicholas's valuation. This is still preserved in the Exchequer, and used in estimating the value of benefices in some colleges.

A third valuation of a part of the province of York took place in 1318—11 Edward II—2nd year of Pope John 22, in consequence of the invasion of the Scotch, entitled *nova Taxatio.*

Such origin and continuation of these imposts are very amusing; quite antiquarian and mediæval; unsuitable to the times in which we live. These contributions and exactions were exacted for the Pope; notwithstanding in the 50 Edward III., 1377, the House of Commons complained of the Pope's collector, as he had taken the first-fruits of every benefice to Rome, a thing never before done, only of benefices vacant in the Court of Rome, as being a very great grievance. Nothwithstanding similar repeated remonstrances and partial restraints, monies drained from such sources found their way to the Pope's exchequer until the year 1533-4, when an Act of Parliament, 25 Henry VIII., cap. 20, deprived his Holiness the Pope of "First Fruits and Tenths," and enjoined that such payments to the See of Rome should "utterly cease." The next year, a new Act of Parliament, 26 Henry VIII., cap. 3, annexed those *Annates* and Tenths to the Crown, to whom all spiritual dignities and incumbents were enjoined henceforth to pay them. Under this Act, Commissioners were appointed to make a new *valuation* of all

* *Pro conservando decenti statu suo, ut qui omnium curam habet de communi alatur.*

ecclesiastical estates, hereditaments, manors, and benefices, and, according to this valuation, contained in a book called *Liber Regis*, or the King's Book, the "First Fruits and Tenths" have continued to be paid up to the present time, nor does there appear to be any legal provision for any other *valor beneficiorum*, as this Act of Parliament does not regard prospectively any other valuation for re-adjustment.

In the first year of Elizabeth, (1 Eliz. c. 4,) the First Fruits and Tenths which had been resigned by Queen Mary, were restored to the Crown, by an Act of Parliament which released all vicarages under £10 a year, and all parsonages under 10 marks, from First Fruits. Between the reigns of Henry VIII. and Queen Anne, a period of 155 years, a surrender of some of these First Fruits and Tenths was made to bishops and others in exchange for manors and lands, whereby some bishops are exonerated from paying those imposts.

In the year 1704, Her Majesty Queen Anne graciously appropriated, by means of an Act of Parliament, 2 & 3 Anne, c. 11., this portion of her hereditary revenues of the Crown, to a Board, designated "Queen Anne's Bounty Board," to give permanent effect to Her Majesty's most gracious intention of augmenting poor livings that were not a competent and suitable subsistence for their respective incumbents, so as to make an independent provision for the clergy; it being stated in the preamble of the said Act "that divers mean and stipendiary preachers are in many places depending for their necessary maintenance upon the goodwill and liking of their hearers, and are thereby under temptation of too much complying and suiting their doctrines and teaching to the humours rather than the good of their hearers, which hath been a great occasion of faction, schism, and contempt of the ministry," &c. But who were appointed to remedy this state of things? Chiefly the Bishops, with the Speaker of the House of Commons, the Judges, Privy Counsellors, and other laymen, who practically do not now attend to this business.

The surrender of property, by the generous gift of Queen Anne, for the augmentation of poor livings, was then about the value of £10,000 a year, and those First Fruits and Tenths became vested in a corporation of clerics and laymen, styled "The Governors of Queen Anne's Bounty." Two years after this generous donation of Queen Anne, one of the earliest measures of the governors of her bounty was to procure the passing of an Act of Parliament, 5 Anne, c. 24, to discharge all benefices from their First Fruits and Tenths not exceeding the clearly improved yearly value of £50 a-year. The consequence of which Act was that about 9,000 livings were made exempt from these payments, and the revenues arising from Tenths were reduced by about £3,000 a-year. No doubt this was a great boon to the indigent clergy.

By an Act, 1 Geo. I. c. 10, the bishops were empowered, and required, from time to time, to ascertain the true and clear yearly value of every benefice; but this is only for purpose of augmentation, not for assessment; consequently the greatest hardships are inflicted upon the poor beneficed clergy. There are no less than 527 livings, each under £200 a-year, which are liable to Tenths. One benefice, value £108 a-year, paying £3 10s. 7d.; and another of the value of £164, annually, pays £4 5s. 3d.; whilst a benefice of £1,700 a-year only contributes 17s. 8d.; and another of the value of £2,600 a-year, only is required to surrender the moderate sum of £1 15s. 5d.

In the year 1837, a Committee of the House of Commons thus reported: "It is impossible not to perceive that the *Liber Regis*, though still the legal, is no longer an equal rule, and the committee cannot but be of an opinion, that it would be neither unwise nor unjust to correct the inequalities arising from the changes which have taken place since that valuation was made." But these First Fruits inflict such a hardship upon the poor beneficed clergy, that their abolition is imperatively called for. Those are due on institution,

when presentation and other fees, not by any means inconsiderable, have at once to be paid. And in addition, frequently, cost of removal, payment for clerical duty during the vacancy, charges for sequestration of the benefice, and dilapidations of the benefice resigned, have all to be met and defrayed. How is the poor incumbent to emerge from this sea of pecuniary difficulties, without private resources? Should the new incumbent die before the First Fruits are paid, they are legally constituted, as a debt, to be paid out of his estate: and if he survives, those First Fruits must be despatched to their exchequer in London, before the new incumbent receives any proceeds from his new benefice.

Again, according to a return made to Parliament in 1862, it appears that, in case of an income of £75 a-year, that benefice is charged—startling intelligence—with First Fruits amounting to the sum of £19 17s. 3d.; and from another of an income of £111 yearly is exacted a payment, under the same designation, of a sum amounting to £36 7s. 8d. So great is the hardship of such exactions, as to be notified by the Committee of the Lower House of Convocation who made their Report in 1869. A clergyman recently had to pay twelve guineas as First Fruits; when a not very distant neighbour holding a more valuable benefice—a bishop's living—was entirely exempt. Such things are unjust, and inequalities are contrary to equity.

But their Lordships, who form the Episcopate, have not been slow to remedy their own grievances; and it cannot be impertinent, or premature, for the impoverished beneficed clergy to refer to and imitate the example of their bishops, as to the reform they claim.

In 1836 an Act of Parliament was passed to carry into effect the Report of the Commissioners respecting Episcopal Dioceses and Revenues. The 6 & 7 Will. IV. c. 77, is the Act referred to. Under its provisions an Order in Council was published on 17th December, 1852, which requires that

"in lieu of all sums payable as First Fruits, whether exacted or otherwise, the sum of £1 should henceforth be paid by the Bishops for every £300 of the income of their respective sees; and, instead of Tenths, they should pay an annual sum, calculated at 17s. 6d. per cent., on their respective incomes."

The consequence of this new arrangement is, that our bishops do not pay any First Fruits, but an annual sum calculated at the rate of £1 4s. 2d. per cent. on their income, as fixed by law. As to the First Fruits and Tenths of Prebends, now vested in the Ecclesiastical Commissioners, they are paid under the provisions of 4 & 5 Vict. c. 39, s. 4, whereby one-twentieth part only of the Old First Fruits is paid annually in lieu thereof.

But the burdens of the poor benefiçed clergy are still unmitigated. The Report of the House of Commons in 1837 should be enacted. What says the Report of 1837? "It appears to your Committee that First Fruits are an oppressive burden, because they are co-incident with the expenses of taking possession of a benefice, which are always considerable. Your Committee, therefore, are disposed to think that First Fruits should be totally abolished; and something in lieu of present Tenths, a moderate and graduated impost, according to a valuation more nearly representing the actual income, should be charged upon all future holders of benefices above the yearly value of £300."

It is understood that this is what Mr. Monk, M.P. for Gloucester, is prepared to submit to the Legislature. The Lower House of Convocation is in favour of the scheme; but the Upper House of Convocation, consisting entirely of episcopal members, do not seem to be quite so liberal as the Lower House, whose Report is the most practical, and more satisfactory.

Both Houses of Convocation agree. 1. To abolish First Fruits and Tenths from the 1st of January next after the passing of the Act for commuting those imports, which are a perfect anachronism. 2. To extend the principle of com-

muting First Fruits for an annual payment legalized in reference to Bishoprics by 6 & 7 Will. IV. c. 77, to other dignities and to benefices. 3. To apply those benefices, which are now exempt from the payments of First Fruits and Tenths, liable to such annual payments. 4. To apply some, at least, of the increased income received by the Governors of Queen Anne's Bounty towards providing for infirm incumbents. 5. To enact that the value of each benefice, for the purpose of assessment to Tenths, be ascertained by the Governors as they now do for the purpose of making loans or grants. But the Bishops would tax all clergy, whose incomes are above £100 per annum, at the annual charge of 1 per cent. instead of 1½ per cent, after deducting £300 from the income of the benefice. Our surprise is that their lordships have not shown more consideration, for possibly they could sympathise with those inferior oppressed clergy. But the Lower House of Convocation rejoin, that the clergy are already taxed beyond their ability, and it is not fair to take advantage of a change of First Fruits and Tenths to put another heavy burden upon them. The remedy proposed by their lordships is more oppressive than the disease. No wonder that the Lower House of Convocation prefer their own scheme of taxation, as the scheme of their lordships would ease the wealthy, as it would correspondingly oppress the poor.

It is to be hoped that Parliament will only sanction the scheme of the lower House, in favour of the poor, oppressed working clergy. We reserve to a future occasion all argument as to the desirableness, economy, expediency, and policy of amalgamating Queen Anne's Bounty Board with the Ecclesiastical Commission; the latter doing the same work as the former, and both could be done, Sir J. Chalk stated to the House of Commons, by the addition of a few clerks, and, thereby £5000 a-year, one-third of the present annual income of the Bounty Board, be nearly saved, now expended in working expenses.

The benefit sought for, is in the interest of the distressed, impoverished clergy; that is, in this incidence of clerical taxation there should be an equality: that the abundance of some should be a supply for the want of others, so that, "He that had gathered much should have nothing over; and he that had gathered little should have no lack."

It is desirable—the progress of the age demands it—that the sores of every clerical Lazarus, if possible, should be healed. The "old clo'" system is a scandal to the cloth, and may be superseded by a wise clerical contributory taxation, levied on the richer benefices. Then, no longer will a poor incumbent gratefully receive a strip of cloth for a new coat, to hide his poverty from the world. His poor benefice augmented without oppressive taxation, he will be a contented, happy man, expecting his reward in another sphere of existence.

VI.—RECENT LEGISLATION ON THE LAW OF CONTRACTS COMPARED WITH THE AMERICAN LAW.*

TWO editions of works, on the Law of Contracts, have fallen from the press at almost the same time. The American work of Mr. Story was first published in 1844, and has now reached its fifth edition, whilst the English work of the late Mr. Addison has now reached its seventh edition. The first edition having been published in 1847.

* "Addison on Contracts"; being a treatise on the Law of Contracts. By C. G. Addison, Esq., Barrister-at-Law. Seventh Edition. By L. W. Cave, Esq., of the Inner Temple, Barrister-at-Law, Recorder of Lincoln. London: Stevens & Sons. 1875.

"A Treatise on the Law of Contracts." By William W. Story. In two volumes. Fifth edition, by Melville M. Bigelow. Boston: Little, Brown & Company. London: Sampson, Low & Company; 1874

The work of Mr. Story is now well recognized as the highest American authority on the Law of Contracts, and although up to the present time, "Addison on Contracts" has well shared the same reputation in this country with "Chitty on Contracts." the present edition of "Addison on Contracts," for several reasons, under the able editorship of Mr. Cave, bids fair to surpass its former rival.

A glance at some recent legislative alterations of the Law of Contracts may not be unprofitable. There have been several of these alterations of late, which must, in time, have a very wide influence.

To begin with, let us take the Judicature Act, which (if not further suspended) will shortly be the law of the land. By sec. 25, clause 6, a *chose in action* is now assignable at law, so as to pass and transfer *the legal right* to it, provided that such assignment be in writing under the hand of the assignor, and be an absolute assignment, not by way of charge only, subject to all previous equities, and provided notice be given to the debtor. After this Act comes into operation, it will no longer be necessary for such an assignee to sue in the name of his assignor, in which provision, so far as *legislation* is concerned, we seem to be in advance of the American law, where the assignee cannot, even now at Common Law, maintain an action in his own name against the original debtor—(Story, sec. 465,)—though we are told that the rule has practically lost all its force and has degenerated into a mere form, and this view of the law is more fully illustrated in a subsequent paragraph, s. 565, where we are told "Courts of Law, however, now follow the doctrine of Equity, as far as possible, without infringing upon established principles of Common Law; and the beneficial interest of the assignee is so far protected, that it has even been held the defendant may set off a debt due to the assignee, in like manner, as if the suit had been brought in his name." That is to say, that if a debtor A should happen to be an assignee of a *chose in action* which has been

assigned to him by B, and if A should be sued by D for a *chose in action* owing to C, and assigned to D by C, that A may set off his claim as assignee against the claim of D as assignee.

It will be observed that the Judicature Act requires the assignment of a *chose in action* to be *in writing*, in order to pass the *legal right*, so that the old rule of common law will remain, that the name of the assignor must be used in proceedings by the assignee to recover a *chose in action* assigned to him, where the assignment is not in writing, unless this is obviated by clause 11 of section 25 of the Judicature Act, which provides that the rules of equity are to prevail where the rules of equity and those of the Common Law conflict. The Judicature Act makes no provision requiring anything more than mere writing, where the *chose in action* is secured by a higher obligation than a parol contract.

Another provision is, however, to be complied with, in order to vest, under the Judicature Act, the *legal right* to a *chose in action* in the assignee, namely, that the assignee give *express* notice *in writing* to the debtor of the assignment, but the Judicature Act does not require any consideration for the assignment, in order to vest the *chose in action* on the assignee, so that an assignee, who has given no value, will be able to recover in his own name, providing that his assignment is complete and followed by notice. The only conclusion to which the consideration of clauses 6 and 11 of section 25 of the Judicature Act leads us, is that clause 6 might as well have been left out of the bill, so far as the bare effect of an assignment goes, as clause 11 will do all for those assignments not specified in clause 6, which that clause does for those which it specifies. It must also be further observed that the legal right only passes in cases of absolute assignment, and not in the case of those by way of charge only.

Not only has the law of procedure on contracts been

recently altered by legislation, but the Infants Relief Act, 1874, (37 & 38 Vict. c. 62) has introduced a very material alteration of the capacity to contract. A certain class of contracts were always considered voidable when entered into by infants, and the courts have always inclined to hold the contracts of infants voidable rather than void where there was any good reason for their so doing. Thus much opportunity arose for those persons who had designedly and fraudulently dealt with infants to obtain an affirmance of the contract entered into during infancy as soon as the infant had completed his majority. By 9 Geo. IV. c. 14, s. 15, every ratification of a contract made during infancy is required to be in writing and signed by the party to be charged therewith. It was often an easy thing to obtain such a ratification, as the statute required from an infant contractor shortly after he had attained his majority, and if a deed could be secured, of course, many questions and difficulties might be avoided. Designs of this nature are no longer possible. By section 1 of the Infants' Relief Act, 1874, all contracts, whether by specialty or simple contract, to repay money lent or to pay for goods, other than necessaries, and all accounts stated with infants are declared void; and by sec. 2 no action can be brought on a promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of a contract made during infancy, although there may be a new consideration for such new promise or ratification.

On this branch of the Law of Contracts we have made a greater difference between our law and that of America than formerly existed. The provisions of 9 Geo. IV. c. 14, have not been adopted in America, and a verbal ratification after full age is all that is required by the American Law to charge a person with a voidable contract entered into during infancy. The last step of English legislation on this subject is in the same direction as the one last preceding—namely, in that direction of giving greater protection to infants. We cannot

here, in noticing the fact, compare the reasons for the increasing dissimilarity in the laws of the two countries.

Perhaps, however, the most considerable change which has recently been made in the Law of Contracts in this country has been made with reference to the contracts of married women. Up to the passing of the "Married Woman's Property Act, 1870," a married woman could in no case appear in Courts of Law in England to sue or be sued alone on her contracts; the husband must in all cases have been joined. That Act for the first time introduced a different principle, and allows a married woman to recover by action, in her own name, property thereby declared to be her separate estate.

It is, however, not so well known as it should be that the "Married Woman's Property Act, 1870," is an Act affecting the right of a married woman to property only, and not generally her right to sue on her contracts, and also her liability to be sued on them. That Act, although it gives a married woman a right to sue alone in respect of property declared by that Act to be her separate estate, yet does not make her in any way liable to *be sued* alone in respect of such property; the only liability imposed on a married woman by that statute is the liability to keep her husband and children from becoming a burthen on the poor-rates. No disposition has yet clearly appeared to demand that the right to sue shall also be universally accompanied by the liability to be sued.

It has, however, in the last Session of Parliament been found necessary to amend the "Married Women's Property Act, 1870," so far as that Act exonerated the husband from liability for the debts of the wife contracted before marriage whilst it allowed him to take her property. The Act of last Session, the "Married Woman's Property Amendment Act, 1874," like the Act of 1870, however, is a property Act, and not one directly altering the Law of Contract. By this Act the husband is rendered liable for the wife's debts incurred before marriage to the extent to which he has received, or by

reasonable diligence might have received, property from her on the marriage or subsequently. In case the husband has paid debts, he is allowed to set these off in diminution of his liability, if he should be sued; and in case he proves his plea, that he has not received any property with his wife, or that he has expended in the payment of her debts all that he has received, he is allowed his costs in the same manner as an executor who pleads *plene administravit* or *plene administravit præter*.

The American law on the subject of desertion, and the right of the wife thereon to sue and be sued on contracts as a *feme sole* is stated as follows:—"Another exception obtains in cases where a husband utterly abandons his wife and leaves the country without making any provisions for her support. Such an abandonment will be implied whenever the husband deserts the wife and leaves the country with a declared intention not to return, or under circumstances which unequivocally indicate such an intention. Going to California to reside, and never returning, enables the wife to sue and be sued, as a *feme sole*. So also when the wife is compelled, by the cruelty of the husband, to flee his house, and she quits the country, and he provides no means for her support and maintains no relation with her, she will be entitled to sue and be sued as a *feme sole*. In the United States this rule, also, would apply to cases where the wife was forced to leave the husband, and live in a different State, the States being considered in lieu of this rule as foreign countries. The presumption in all such cases, however, is that the husband will return, in case he have ever resided in the country; but it may be rebutted, the real intent of the husband being the criterion of the right of the wife to contract as a *feme sole*. This exception is but an extension or new application of the old Common Law rule, that whenever the husband was banished or had abjured the realm, his wife could contract as a *feme sole*." (Story on Contracts, ch. ii., s. 149.) It is needless to observe that our law has

not gone this length, but that it requires either judicial separation or a protection order to give a *feme covert* the right to sue and be sued as a *feme sole* in case of desertion, except in cases within the provisions of the Married Women's Property Act, 1870, so far as respects her right to sue as before noticed.

In conclusion, we have only to say that we are glad to see these two works on the English and American law of contracts. Mr. Cave states that, in preparing this seventh edition of Addison, he has been assisted by his friend Mr. Horace Smith, a gentleman already favourably known as the editor of the last edition of Roscoe's "Pleading and Evidence in Criminal Cases." Mr. Cave's edition has been greatly improved by being printed in larger type, and by a re-arrangement in the order of certain chapters, which scarcely requires any justification. The decisions of the Courts of Equity have been inserted and noticed with discrimination, a necessity to a good modern practitioner's law book, when we consider the recent English legislation. The new chapter on stamps is a valuable addition to a practical work, such as this aims to be, and is. We consider this work the most complete collection of authorities on the English Law of Contracts, and a necessity to every legal practitioner. It has a great advantage in being without long foot-notes, the effect of the recent decisions having been carefully worked into the text. Whilst, however, we recommend this work to practitioners, we think it right to observe that we cannot recommend it to students; it is not the book for them; and we caution students against the growing evil of the use of books of this character. A student's book and a practice book are very different things. The edition which is before us of "Story on Contracts" is much better fitted for the student than the edition of Addison, the more elementary character of the former work having been preserved in the text; and a careful student of English law will find great advantage in

consulting this last edition of "Story on Contracts," chiefly on account of its clear and simple style, a merit which will render it all the more acceptable to a practitioner desirous of comparing English and American law. The notes are very copious, and perhaps in the case of this book the matter is better in the notes than in the text. Some English judgments, however, might have been quoted with a little more brevity. We much approve of the work being arranged in paragraphs consecutively numbered throughout the work. Mr. Bigelow deserves the thanks of the profession for the manner in which he has produced for them this edition of "Story on Contracts."

VII.—RIGHTS OF AUTHORS.

THE unsatisfactory state of the law as regards literary property has given rise to an Association for the protection of the interests of authors, of which several writers of distinction have already become members, and of which Mr. Tom Taylor is Chairman of the Executive Committee. Among the objects immediately in view is the improvement of the law of copyright and stage-right, domestic, colonial, and International, with regard to which immediate action in Parliament is contemplated. The introduction of the Government Bill for amending the law relating to International copyright and stage-right offers a favourable opportunity to point out the many and serious defects which exist in the various statutes which at present deal with these rights, at home and abroad, and to suggest remedies of a practical kind. Availing himself of this opportunity, Mr. Moy Thomas, the honorary secretary of the Association, has presented us with a report dealing with the defects of the

whole law of copyright and stage-right. He first commences with the law of rights by first production, out of the United Kingdom :—

"The International Copyright Act of 1844 (Sec. 19), incidentally deprived the English author both of copyright and stage-right where his book or play shall have been first published in a foreign country not having any Copyright Convention with us ; though this indeed was no new principle.

"Even first publication in a British colony appears to destroy the English author's copyright, and reduce his work to the condition of a foreign publication ; for it has been laid down by the judges, that first publication in the United Kingdom is an indispensable condition of copyright, which, however, when it once exists here, extends to all the British dominions.

"As a practical example of the working of the principle, it is only necessary to cite the case of Mr. Boucicault, who, having first produced a certain play in New York, was held by an English court of law to have thereby forfeited all property in it in this country. The object of the legislature in this case, according to Vice-Chancellor Page Wood, was 'to secure to this country the benefit of first representation.' In other words, it was designed to inflict punishment on the English author for first producing his work abroad. The effect is, of course, to hamper the English author in the disposal of the fruits of his labour ; to constrain him to adopt a course which may be inconvenient ; or to forego arrangements which might be very advantageous to him, and this in the presumed interests of his country.

"On this it is obvious to remark, that the Legislature has, long since, given up the principle, both of prohibiting Englishmen from selling their property abroad, and of granting bounties to them, or to foreigners, for bringing their commodities to our markets. The clause complained of, however, seems to have been based on some remnant of this exploded commercial policy. It is unjust and injurious to the English author, and there appears to be no reason why it should not be repealed, although an English judge—who it is to be hoped, was better acquainted with law than he appeared to be with political economy—has in recent times defended it on the old-fashioned ground that it tends to furnish employment for English industry. The notion that the Legislature can know better than the author where his book or play can be most beneficially produced, or that his

countrymen have an interest in compelling him to come out first in London, every time that he wishes to come out first in New York, seems to have no good foundation. Many reasons, of course, govern the production of a play. It may, for example, be of a kind for which there is, at the moment, no vacancy at any London theatre. It may be that the actors or actresses to whose powers it is particularly fitted are, for a time, in the United States. But, in any case, if it is a good play, it may be assumed that it will be performed in London, as soon as ever there is a favourable opportunity for it; and it is clear that it will be none the worse for having already seen the light in New York. Similar remarks apply to copyright in books; and there, again, many striking examples might be given of the injustice of the law. One, however, will suffice. Mr. Dickens contributed to an American paper a story, which, not having been previously published in England, was at once reprinted here without his authority. It is clear, indeed, that the effect of the principle must be to prevent English authors, whose writings have any permanent value, from contributing to American periodicals, and thus to deprive them of what might be an advantageous market for their labour.

"It is worth remarking that the Supreme Court of Judicature of the United States has recently interfered to restrain the unauthorized performance of an unpublished play by an alien author, even though that play had been first produced abroad. The piece in this case was the late Mr. Robertson's *Caste*, which had not been published, but the American pirate had surreptitiously obtained a copy, either by indirect access to the manuscript, or by planting a shorthand writer in a private box during the performance. This decision, which is one of great importance to English dramatists, appears to have been based upon cases (somewhat obscurely reported in our law books) in which our Court of Chancery has more than once—but only, it is believed, on behalf of English authors—restrained the performance of unpublished plays, although they had been represented on the stage."

Having thus set forth the present unsatisfactory state of the law, the author is of opinion that—

"In order to amend this defect in the law, it would, probably, only be necessary to repeal the 19th section of the Act of 7 & 8 Vict. cap. 12, and after reciting that Act, and the Act of 15 Vict. cap. 12, to re-enact the clause referred to, with the omission of the negatives throughout, with some slight modifications, and the addition of the words, "Any-

thing in the said recited Acts to the contrary thereof notwithstanding." It would, however, be also proper to add the condition that the English author first publishing abroad must affix to his book or article a notfication of his claim to British rights, and at the same time register these facts, with his name and address, and a declaration of his nationality, at Stationer's Hall, where a wilfully false entry is punishable by law. These formalities would, no doubt, be troublesome; but they could not be dispensed with without encouraging fictitious claims to copyright in England on the part of a country which, as yet, unhappily, declines to grant us reciprocity. In the case of a play represented abroad, but not printed, it would be sufficient to require that the title under which it had been so represented, with a declaration of nationality and such other formalities as are required in the case of an English author's play first represented in Great Britain, but not printed, should be registered at Stationers' Hall."

As regards stage-right or right of representation of dramatic works, the report goes on to say:—

"Copyright, or the right of multiplying copies of a literary work, has always been protected more or less—at first by an assumed common law right, and afterwards by statute. Stage-right, or the right of representation, was, on the contrary, practically only protected while the dramatic piece remained in manuscript. A dramatist, who published his play, was perfectly safe against the unauthorized multiplication of copies; but he was virtually without remedy against an unauthorized representation of the same on the stage.

"Stage-right was first effectually protected by the Act of 1833, known as "Sir Bulwer Lytton's Act." By this Act, the right of representation was conferred for a term co-extensive with the then existing term of literary copyright. In 1842, the copyright term was extended by the Act known as "Talfourd's Act" to the lifetime of the author, and seven years after, with the proviso that the term should in no case be less than forty two years from the day of publication. In the same Act, stage-right was extended in conformity with this extension of literary copyright; but, in other respects, the Act of 1833 remains in force.

"Since then, there has been no change in the law as regards pieces first published or first represented in this country, and the provisions of the two Acts (1833 and 1842) have been found sufficient for the protection of domestic stage-right in dramatic works.

"After the passing of these Acts, however, it was discovered that they fall considerably short of justice towards authors, because they contain no provision for preventing the unauthorized dramatization of narative works of fiction, and the representation of the same on the stage. In brief, the operation of the Act of 1833 applies to nothing but dramatic works, and these are defined in the words "any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment." Hence, when the author of a tale finds his scenes and incidents substantially presented, and his actual words spoken on the stage without his authority, his complaints are met by the inquiry, "What right have we violated? Not your copyright (it is argued), for that is defined as the right of multiplying copies, and we have not multiplied copies. Not your stage-right, for that only applies to a dramatic piece, and your novel is not a dramatic piece." In accordance with these views, it has been decided that the novelist, in such cases, has no remedy.

'Yet the legislature clearly intended to protect authors fully against stage-piracy, and the definition of dramatic pieces in the Acts is so wide that it may well have been supposed that every possible injustice of that kind had been provided against. Unfortunately, however, several kinds of works, besides dramatic pieces, are capable, with more or less modification, of being presented on the stage. The whole range of Sir Walter's Scott's novels had, in fact, been thus presented by hack play writers of that day. It may be admitted that an adaptation of a novel may have, and frequently has, qualities which entitle it to rank very little below an entirely original work; but, still if it is clearly founded on the novel—and, above all, if it adopts the title of the novel—the consent of the novelist ought to be necessary. In the case of the early dramatization of the works of "the Author of Waverley," the characters and the dialogue were substantially the characters and dialogue of the novels, and the very scenery and stage directions were derived from the novelist's descriptive passages. Nothing, in fact, but literary labour of the humblest kind was required for putting the Waverley Novels on the stage. Yet, while the playwrights, or, rather, their employers, reaped large rewards, not one shilling in recognition of stage-right was, we believe, ever received by Sir Walter Scott. In those days, it is true, stage right in a published play did not exist; but though it was created by the Act of 1833, that Act, as we have seen, left the question of the dramatization of novels where it was before. That this was so was shown very

soon after the passing of the Act in the case of Mr. Dickens; and many distinguished novelists have since suffered great injustice and annoyance from the same cause."

For this state of things the author suggests the following remedy:—

"These defects in the law may, I believe, be remedied by a simple bill, wherein, after reciting the Act of 3 and 4 Will. IV. cap 15, and such provisions of the Act of 5 and 6 Vict. cap. 45, as relate to dramatic works, and also reciting that it is expedient to extend the benefits of those Acts to works of fiction other than dramatic pieces, and also to other literary works, it shall be enacted that the before-recited provisions shall apply to novels, tales, poems, or other works capable of being adapted to the stage, as publicly recited for profit, and that the sole liberty of dramatizing such works, and of representing, performing and publicly reciting the same, or any version of the same, shall endure, and be the property of the author thereof, and his assigns, for the term in the said Act of 5 and 6 Vict. provided for the duration of copyright in books.

"It has been objected that this would throw upon juries the onerous duty of comparing the novel with the play alleged to have been founded on it: and this is perfectly true; but it is an objection applicable to all cases of alleged plagiarism. Our courts of law have frequently been called upon to determine whether one work so far resembles another that it may be regarded as a piracy. Practically, it is no more difficult to determine whether a dramatic piece has been manufactured out of a novel than whether one play has been manufactured out of another play, or one novel out of another novel. In point of fact it would be easier, because, as it is the popularity of the novel which is generally relied on to attract attention to the dramatic version, few playwrights presumptively would care to exercise the privilege of dramatizing a story if they were not allowed to use both the title and the names of its personages; but this they could not possibly do without at once affording the strongest presumption that they had also appropriated more substantial features of the work. On the whole, there seems little ground to fear that the time of judges and juries would be much occupied with such questions. If the author's right to dramatize his own story were once made absolute, the certainty of detection would probably be enough to discourage piracy, and would certainly suffice, as a rule, to deter a pirate from attempting to defend his dishonesty in a court of law."

The report then proceeds to discuss International copyright and stage-right which are regulated by the Act of 1844 (7 & 8 Vict. cap 12), and the Act of 1852 (15 Vict. cap. 12) :—

"The former Act (1844) empowered the Queen by order in council to grant copyright and stage-right in books or dramatic works first produced abroad for a term not exceeding the term of English domestic copyright; but on the condition that reciprocal protection had been afforded to our authors. The latter Act (1852) extended the powers of the Queen to the protection of translations of books and dramatic pieces, and empowered Her Majesty in a like manner to confer copyright and stage-right in such translations, but only for a limited term, and under burdensome and vexatious conditions.

"The provisions of the Act of 1852, empowering the Queen to make international conventions for conferring copyright and stage-right in the case of translations, stand greatly in need of improvement. The protection is unjustly limited to five years, which is believed to be the shortest term ever conferred by copyright law in any country or at any time. It is unreasonable to ask that Her Majesty be empowered, on the sole condition of reciprocity, to extend the time to the full limit permitted by the International Copyright Act of 1844 —namely, to a term not exceeding that of English domestic copyright.

"The 8th section of the Act provides, as a condition of protection in the case of dramatic pieces, that translations sanctioned by the author must be published within three months after registration of the original work. This has been held to mean that a literal translation must be deposited within that time. But the foreign author has generally no desire to publish a literal translation, and would have no need to do so, but for the unnecessarily harsh condition of the Act. As a rule, he does not desire to publish at all. What he does desire is to 'adapt,' that is alter, the original work to suit the tastes and ideas of English audiences. The publication of a literal translation is, moreover, useless, as well as expensive. The idea of the Legislature appears to have been that the English playwright had a fair claim to be warned of what it was that he was not to translate or adapt without authority. But he could not possibly adapt unless the play were already published, or, at all events, unless he had got hold of a copy of it in the original language; and, in this case, he would be sufficiently warned both of the reservation of rights (which the author

is bound to put on the title-page), and of the nature of the work—unless, indeed, we are to suppose that the would-be translator is ignorant of the language from which he proposes to translate.

"It is clear, therefore, that it would be sufficient, in the first place, to compel the foreign dramatist to register the title, the date, and place of first production of his play, and such other particulars as are required in the case of an English author registering his play here. For it is worthy of remark, as another illustration of the ungenerous treatment of the foreign dramatist, that the English author is not compelled to publish his play in order to protect it. It might be expedient to provide that the foreign author should exercise his right, and should bring out on the stage in the British dominions an adaptation or translation of his work, and should register the title of the same as an adaptation or translation of such original work within three years—the time allowed for publishing a complete translation of a book. This suggestion, however, is rather a concession to the tendency of the Legislature to limit the rights of the foreign author than a proposal founded on justice, which seems to require that the foreign author should enjoy such a term as is granted to the native author—always having regard to the principle of reciprocity on which all International Conventions are very justly based.

"It is well known that the 6th section of the Act of 1852 provides that nothing therein contained shall be "so constructed so as to prevent fair imitations or adaptations of any dramatic or musical compositions published in any foreign country." The difficulty of defining a fair "imitation or adaptation" is so great, that practically that insidious proviso has been found to defeat the very object of the Act as regards dramatic works, and has been a fruitful source of tedious and expensive litigation.

"There seems to be no more reason why a pirate should be permitted to make a play out of another man's play than a novel out of another man's novel. It is worth remarking that, in our domestic stage-right law, no artificial difficulty of this kind has ever been created. In other words, no English author is permitted to manufacture a play out of another English author's play under pretence that he is making a 'fair imitation or adaptation.' The 'fair adaptation' proviso has, in fact, a manifest tendency to shelter a form of piracy abroad which is discountenanced at home, and there is a discreditable meanness about the clause, because the dramatic genius of the French nation being (at present,

at least, for there have been times when it was far otherwise) more fruitful and inventive than our own, there is temporarily more to be gained by pillaging our neighbours than we can possibly lose by a system of reprisals. It would be just to authors, creditable to the national character, and, in the long run, conducive to the public interest in good dramatic literature, to remove this blot upon our law.

"The remedy would at once be provided by adopting the words of the present Government Bill—a measure unobjectionable as far as it went—simply repealing the 6th clause in the Act of 15 Vict. cap. 12.

"International copyright with America is one of the most important objects of the Association; but this is a matter not connected with any defect in our law. In fact, by empowering Her Majesty to make conventions for granting both copyright and stage-right to foreign countries, not exceeding the full extent of the rights enjoyed by British authors under our domestic copyright laws, on the sole condition of reciprocity, our Legislature has shown a favourable disposition, which it will be for us to bring to a practical issue, by acting in concert with American authors, who are, equally with ourselves, sufferers under the present system."

With reference to Colonial Copyright, the present anomaly of the law is stated thus:—

"The Imperial Copyright Act of 1842 (5 & 6 Vict. c. 45) is in force throughout the British dominions, for the protection of works first published in the United Kingdom, with certain modifications, mentioned below.

"The chief of these relates to the importation of piratical copies of English works into certain English colonies, of which Canada is the most important.

"By a provision in the Imperial Act of 1842, no such piratical copies could be imported into any part of the British dominions; but the Act of 10 & 11 Vict. c. 95, enabled Her Majesty to suspend this prohibition in the case of any British possession which should be disposed to make due provision for protecting the rights of British authors. The Canadian Legislature accordingly passed an Act imposing a duty on piratical copies for the benefit of the English author; subject to the payment of which duty such piratical copies were permitted to enter into Canada; and upon this Her Majesty, by Order in Council, as empowered, suspended the prohibition against such importation. Other colonies have adopted a similar course with similar consequences.

"Unfortunately, the system thus established has been

found in practice to be destructive of the English authors' rights. In Canada, the duty imposed is trifling in itself; it is frequently assessed on fictitious values; and it is systematically evaded. The sums handed over to the English author, moreover, are, as a rule, ridiculously small. Yet these are his only recompense for the injustice inflicted on him by permitting piratical copies of his works to circulate freely in British dominions.

"The law in Canada, therefore, stands thus. A Canadian publisher cannot reprint an English work without the consent of the author: but he may, subject to the payment of a trifling duty, bring in piratical reprints from anywhere over the border, and, once in Canada, there is absolutely nothing to distinguish a copy which has paid duty from one which has been surreptitiously imported.

"The Canadian law of 1868 has also imposed additional hardships on our authors. Among others it makes registration at the Canadian Ministry of Agriculture indispensable. It denies protection in the Dominion to every English work which is not 'printed and published in Canada.' It substitutes a shorter term of copyright than our English term, though with the privilege of renewal under certain circumstances; and it directs a deposit of two copies. On the other hand, however, it grants to English authors who have fulfilled all these conditions an absolute prohibition of the importation of piratical copies.

"It is doubtful whether any of these additional hardships have really the force of law, although they are all embodied in the Canadian Act referred to, for, notwithstanding the mention of copyright in the Act of the Imperial Legislature by which the Dominion of Canada was constituted, it appears clear that the Imperial Copyright Act of 1842 is in force throughout our colonies and possessions, except in so far as it has been modified by Order in Council (see opinion of Sir Roundell Palmer and Mr. Herschell, November 7, 1871). The Act, however, which empowers Her Majesty to issue such Orders (10 & 11 Vict. cap. 95), is limited to the admission of piratical copies under the condition before mentioned, and it appears, therefore, to follow that no Order in Council could give effect to anything beyond that.

"On the whole, the conditions imposed on English authors' rights in Canada, are so onerous that, practically, he derives no benefit from his work, other than a payment for the favour of early sheets; and even this he obtains, as a rule, only through some United States house, or some Canadian publisher, who has transferred his business just over the

border, in order to be able to supply the United States market without payment of any duty on the frontier, and who generally stipulates for right to send his reprint freely into Canada. This latter concession is indeed merely nominal on the part of the English author, as may be inferred from the fact that English novelists, whose works are widely read both at home and in America, have occasionally been presented with eighteen pence as the fruit of the labours of the Canadian Custom House Officers, in collecting duty on piratical copies of their productions for an entire year."

The following is suggested for improvement:—

"If it be found impracticable now, to withdraw the Orders in Council by which the admission of piratical copies has been legalized, the Colonial Governments and Governors of British dependencies should, at least, be called upon to take steps for preventing the introduction of copies which have paid no duty. The practical way seems to be to establish a system of stamping all copies passing through the Colonial Custom Houses. With regard to the other conditions imposed on English authors, by the Canadian Act, it is, of course, open to any one to test their legality if it is thought worth while.

"In any case the injustice of issuing any further Orders in Council sanctioning the admission of piratical copies into British Colonies or dependencies under so feeble a protection for the British author, is clear; and to this the Association would do well to direct the attention of the Government."

Copyright in newspapers and periodicals are commented upon as follows:—

"It is probable that articles and essays contributed to a newspaper are sufficiently protected under the 18th section of the Act of 1842 relating to periodical works; and it has indeed been decided that the proprietors thereof may prohibit any other person from republishing such contributions. Nevertheless, as the Act nowhere mentions newspapers, doubts have been expressed by high judicial authority whether there is such a thing as copyright in a newspaper; and if these doubts are well founded, the laws in this respect would certainly stand in need of improvement. It is generally conceded that, however unjust it may be to allow a journal to be plundered of the fruits of its enterprise and expenditure, in the way of collecting early intelligence, it is simply impracticable to give protection to mere news: but newspapers every day contain articles of a substantial literary kind; and collections of such articles have again and

again been productive of profit and reputation to their authors. It is not desirable, therefore, to leave this question in any degree obscure, particularly as it may easily be set at rest by simply enacting that the 18th section of the Act referred to shall be deemed to apply to newspapers, which would thenceforth stand on the footing of other periodicals. In effect this would only be declaratory of the law as it is now generally believed to stand; but if it were creating the right for the first time no trouble would probably arise from the custom that has long prevailed of quoting freely from newspapers. A practice so well established will rarely be complained of, at least where the source of quotation is duly acknowledged, as it ought always to be; nor would any newspaper, whose strict rights had thus been invaded, be likely to gain much by legal proceedings unless the appropriation were really of a substantial kind.

"With regard to articles in periodicals with which the Act associates cyclopædias and reviews, the law gives precisely the same term of copyright which it gives to a book, but, in the absence of any special arrangement between the parties, it accords to the proprietor of the periodical an exclusive right to publish such contribution (he having paid for the same), for twenty-eight years only, with the limitation that the contribution cannot be published in any other than the original form. The twenty-eight years having expired, the property in the contribution reverts to the author or his representatives for all the residue of the ordinary copyright term.

"These provisions have been objected to on the ground that as periodicals are generally of an ephemeral character, and cease to be saleable very soon after publication, the operation of the Act is to tie the hands of both parties for the greater part of twenty-eight years without any advantage to either. On the other hand, there are periodical works which are certainly not of an ephemeral character, and that such cases were present to the minds of the framers of the Act, is evident by the mention of cyclopædias. On the whole, the clause does not seem to be one of which authors can justly complain, and they have, of course, power in their own hands to modify it by special arrangement. In the case of publications of an ephemeral kind, it is clear that proprietors are not likely to insist beforehand very strongly upon a privilege which will presumptively be of no value to them, and as a fact, even where there is no special arrangement, it is the custom of the proprietors of periodicals to allow the author to reprint his contributions after a reasonable time."

The report concludes with the following on registration:—

"There can be no doubt that the public interest would be consulted by not only making registration of literary works compulsory, but by removing the duty of keeping the registers from Stationers' Hall to some public office, under an officer to be appointed for that purpose, as in the case of patents and designs. This is, however, not a matter much affecting authors' interests, and the reform of registration would be so serious an undertaking, that it may be expedient not to attempt to disturb existing arrangements as regards registration of domestic copyright and stage-right.

"Under the law as it stands at present, an English author's copyright is his, not, as is sometimes assumed, because he has registered at Stationers' Hall, but because his work is the production of his own mind. Registration, however, is made a condition precedent of any legal proceedings for infringement; but this formality may be postponed, if thought proper, till the very day before commencing proceedings.

"On the other hand, in the case of international copyright and stage-right, the Act prescribes registration and deposit of copies at Stationers' Hall, with certain formalities, without which, within a limited time, international rights become forfeited.

"By the International Copyright Act of 1844 (section 6), it is directed that where the work is a published work, one copy must be forwarded to Stationers' Hall, within a time to be named in the Order in Council, establishing comity between the two countries.

"It has been suggested, by a member of this Association that the English and foreign author should reciprocally be relieved from this obligation, as well as from the obligation of registering anywhere, save in his own country—the Government in each country, however, undertaking to give due notice to all nations associated with us by copyright treaty.

"There can be no doubt that the troublesome duty of international registration could be got rid of in this way, without any practical inconvenience. But it would be even better to abolish it altogether, which might be done without inflicting any injustice, because the foreign translator is sufficiently warned against pitfalls by the reservation of the right of translation which the author is compelled to affix, in some conspicuous part to each copy; and as the original author's right is forfeited, if not exercised partially within a twelvemonth, and completely within three years, and, moreover, the time when a book is first published is

easily ascertained, it would always be known when the restriction upon unauthorized translation had expired.

"The case is different, however, as regards the copy of each book which is required to be deposited by the foreign author, and *vice versâ*. The authorities of Stationers' Hall are directed within a certain time to forward each such copy to the British Museum, and similar arrangements exist in other countries. Thus the foreign author is put under a similar obligation to that which is imposed on the domestic author, and the national libraries become possessed of copies of all the more important works produced in countries having reciprocal copyright conventions. The regulation is of the nature of a tax on books in the presumed interests of the public, and as such is, in principle at least, no more unjust than any other tax on productions. This obligation is certainly troublesome to authors, and in the case of illustrated works, it is occasionally costly; but it is attended on the whole with great advantages, and it does not seem probable that the Legislature would consent to abolish it, or even desirable that it should be asked so to do."

In our next we shall have occasion to discuss these problems more in detail. For the present we can do no more than to assist in giving this excellent report of Mr. Moy Thomas all the publicity we can.

VIII.—THE LUNACY LAWS.

THE case of Miss Wood has been the means of calling attention to a department of our legal system, whose working cannot be too carefully watched by the public. Miss Wood seems to have been seized in a somewhat irregular manner as a lunatic, having been certified as such by two medical men. After she had been apprehended, questions were raised in the House of Commons, and Mr. Cross stated that she had been released by order of the Commissioners. But it would seem that two hours after her release she was again arrested and placed in confine-

ment; and this re-arrest must have taken place before Mr. Cross made his statement.

Now, we do not wish in any way to commit ourselves to an opinion on the merits of this particular case. We know nothing of it, except from the public press. It seems, however, to be undisputed that Miss Wood was arrested as a lunatic, was discharged by the Commissioners, and was re-arrested within two hours of her discharge. These are facts which urgently call for enquiry. Nor must it be forgotten for a moment that the notoriety of this case is due to adventitious causes. It is due to the fact that the Shakers, to whom Miss Wood has attached herself, happen just now to be exciting a good deal of public attention. It may, therefore, with no great improbability be inferred, that whatever abuses may have been committed in Miss Wood's case, are not confined to hers, but are fairly chargable against the general administration of the Lunacy Laws.

The solution of the question seems to have been that the first certificate on which Miss Wood was arrested was informal; and that she was discharged temporarily until a more formal certificate could be procured. This solution implies that Miss Wood was a fit person to be under confinement, and is therefore, the supposition most favourable to those who procured her confinement. But if this be the case, ought not the facts to be more clearly stated for the satisfaction of the public? and are we not compelled to infer that this is no exceptional case, but that alleged lunatics are constantly placed under confinement on informal certificates? Let no one say that this is a mere matter of form, and therefore is not material. The forms prescribed by the Lunacy Acts were intended to secure proper guarantees against the detention of sane persons as if they were insane. The neglect, therefore, of the statutory formalities implies dangerous recklessness in dealing with the liberty of the subject, and should on no account be treated as a venial

offence. Moreover, by the 73rd and 74th sections of the Lunacy Act of 1853 (16 and 17 Vict., c. 97) any one receiving a person into a lunatic asylum, or detaining him therein, otherwise than under the provisions of the Act, is guilty of a misdemeanour.

By the 74th section of the Act it is provided that, subject to the provisions in the Act for the removal of patients, no person, not a pauper, may be received into any asylum, without an order signed by some person, generally a relative of the alleged lunatic, in a form given in one of the schedules to the Act, with a statement of particulars as therein given, nor without two medical certificates, signed respectively by two medical men, not in partnership with each other, and who must separately have examined the alleged lunatic. The previous section of the Act provides for the case of a pauper lunatic, the proceeding in which is slightly different.

Now there are three points which, in connection with the Lunacy Laws and their administration, demand the most serious attention on the part of the public:

1. The danger of confining such persons, or of detaining persons in confinement after they have become sane.

2. The theory on which confinement is justifiable.

3. The treatment of insane persons while under confinement.

Now, on the first point, it may be well to consider, whether the requirement of the certificate of two medical men is a sufficient guarantee for the liberty of the subject in this respect. No one can read the Lunacy Acts (8 & 9 Vict. c. 100, 16 & 17 Vict. c. 97, and 25 & 26 Vict. c. 86, s. 11), without perceiving the extreme anxiety on the part of their framers to guard against the improper confinement of the sane; but have they effectually done so? It is a startling thing, that any person whom an interested relative can procure two doctors to certify insane, may be locked up in an asylum. True it is, that various safeguards are provided by

the Lunacy Act against an abuse of this power; but we venture to regard them as more nominal than real. The medical certificates are intended to be entirely independent. In Miss Wood's case, and doubtless in scores of other cases, the signatures were, in fact, simultaneous. Again, various facts indicating insanity are to be stated in the certificates. But these facts are often stated in the loosest manner. Among other things, the question "how, when and where," under previous case and statement, to be signed by the relative in making the order, seems to be held sufficiently answered by the statement that the patient had been under treatment at various times during the last twenty years. Again, if the facts required to be stated in the certificates are stated insufficiently, the certificate is euphemistically styled "informal," as if these were mere empty forms exacted by the caprice of the legislature. Now something might be done by a more rigorous observance of the precautions required by the statute, and a systematic prosecution by the authorities for anything done in contravention thereof. But this would be, in many cases, impracticable, owing to the difficulty of obtaining trustworthy evidence. It would be better, (we submit), to make the verdict of a jury necessary in case of a detention beyond a given period, just as in criminal cases the summary jurisdiction of magistrates is confined to a limited term of imprisonment. No detention, beyond what may be required by urgent necessity, should be sanctioned without an order of a magistrate. It is a great fallacy to assume that medical men are the best judges in such cases. A medical man may be a good witness without being a good judge of evidence. And sometimes the "facts indicating insanity" are facts which do not necessarily imply anything of the kind. For instance, the commonest indication of insanity is the existence of "delusions." Hence it frequently happens, that the medical certificate states that a person is subject to such a "delusion," whereas nothing is added to

indicate that the idea referred, even if entertained by the alleged lunatic, was a delusion. Of course, where a person imagines himself to be a tea-pot, or the prophet Elijah, this addition would be wholly unnecessary. But we refer to such statements as "that A. B," (a married woman) "is under the *delusion* that her husband committed adultery with C.D." Such an idea may be perfectly correct; or, even if incorrect, it is no evidence of insanity. Such certificates show the utter incompetency of the persons signing them. And no amount of purely *medical* education on the part of the signers of certificates will guarantee the liberty of the subject against such preposterous mistakes.

But secondly, we ought seriously to determine on what principle persons ought to be confined as insane. It has been laid down by the Court of Queen's Bench, in *Fletcher* v. *Fletcher*, 28 L. J., Q.B. 134, as the Common Law of the land, that no one can be incarcerated as a lunatic except one who is dangerous to himself or others. And this seems a sound doctrine, and, if strictly adhered to, will obviate many abuses. But it is said that there can be no security that a lunatic may not become dangerous. That may be; but independently of the fact that many lunatics are now at large it may be observed that, if lunatics, as such, are to be liable to detention, the danger of confining a sane person as insane, will be at least as great, and at least as prejudicial to society, as any evil to be apprehended from lunatics at large.

It is impossible here not to animadvert on the gross abuse of allowing any control over the liberty of an alleged lunatic of persons interested in his confinement. It often happens that an alleged lunatic is confined, mainly on the ground that he is playing ducks and drakes with the family estate, is applying it in a way which his "next of kin" do not approve. Of course they have a pecuniary interest in checking his eccentricities. Now secs. 83 & 84 of the Lunacy Act, 1853, give the person who signed the order for admission, power to

discharge the lunatic Such person is generally a relative, and must not be confounded with the persons who sign the medical certificate. We submit that it is highly improper to allow such persons any authority whatever over the person or property of the alleged lunatic.

There is another serious abuse to which it is necessary to advert. By statute 25 & 26 Vict. c. 86, s. 11, the Lord Chancellor may order the costs incidental to any petition for a commission in the nature of a writ *de lunatico inquirendo* to be paid as he shall think fit. A case occurred in March, 1873, in which a Mr. C. was admitted into Worcester County Asylum as a lunatic under the order of two justices. The question of Mr. C.'s sanity was, on his demand, referred to a jury, who returned a verdict that he was of sound mind and capable of managing his affairs. Nevertheless, on a petition being presented by the official solicitor of the Court of Chancery, Mr. C., was ordered to pay the costs of the proceedings in lunacy and of the enquiry. It seems that the petition was served on Mr. C., but he did not appear. The case is reported L. R. 10 Ch. App. 75. Surely some explanation is here necessary. Is it seriously meant that where a man is confined as a lunatic without a sufficient cause, and is discharged by the verdict of a jury, he is nevertheless to be liable to pay the costs of those who have instituted the inquiry and deprived him of his liberty? We are entitled, of course, to assume that the verdict of the jury was correct; and there is nothing in the report to indicate that Mr. C. had given any ground for the imputation upon his reason; and therefore, whether he had done so or not, the precedent is one of the most dangerous description.

Passing on to the question of the treatment of undoubted lunatics, we submit that that treatment should not be harder than is absolutely necessary for the safety of society. It is necessary to insist on this, as the fact of lunacy seems to many persons to put the unhappy subject of it beyond the pale of human sympathy or consideration. The reckless

brutality which is exhibited by attendants, and the difficulty of detecting abuses in lunatic asylums, owing to the want of trustworthy evidence, is well illustrated by the following extract from Appendix D to the Twenty-Eighth Report of the Commissioners in Lunacy, pp. 153, 154, with reference to a case in the county of Durham.

"The case of John Coates having already been the subject of a coroner's inquest, and a further special investigation by the visiting justices on the day preceding our visit, we have not thought that any good object would be obtained by another formal inquiry on our part; as in all cases of this description there is great difficulty in obtaining any satisfactory proofs of how or when the injuries were inflicted. The attendants, being the persons implicated, are not likely to criminate themselves, and it is very rarely that the statements of patients can be safely relied on, the more intelligent of them being often deterred from stating what they have seen, for fear that they themselves may be afterwards ill-treated. We have, however, had five of them before us, and questioned them closely, and have also made a variety of inquiries in reference to the general accommodation and treatment of male patients of the more violent and impulsive classes. The result has been that, although no such evidence can be obtained as would be likely to secure a conviction of the attendant G. in a prosecution against him, we have a very strong impression that it is to his violence the injuries are due, and we agree with the visiting justices that there is every probability that they were inflicted on the morning when G., with two other attendants and a patient, took Coates from his single room in No. 1 or No. 4 ward, where he died. The patients we examined were seen separately, and, making every allowance for the untrustworthiness of such evidence, their statements coincide so nearly in all matters relating to rough usage, that it seems impossible to doubt that harsh and violent treatment on the part of some of the attendants is a matter of common occurrence. One patient says, 'He (G.) punched him with his knee on the breast; then, when he got up again, he took his feet from under him, and sent his head on the floor; then he gave him a bit of choke like with the necktie. Then, when Coates pulled off one of G's buttons, he kicked him again on the right side. The next morning he got as bad as he did the day before, every bit.' Another says, 'I was kicked in the stomach and thrown down. Then the

attendant put his left foot on my chest and kicked me with his right.' A third said; 'I am pretty comfortable; but I am badly used by C., C., and M. I have been punched. They come unawares and trip you up. I have often been punched and knelt on. I have seen Coates badly used; they would not let him alone; they kicked and punched him.' Another, after describing the struggle with Coates, when the injuries probably took place, said, 'I have seen a score of such things since I have been here, and have felt them myself.' Another: 'I remember Coates, he was a very troublesome man. I have often seen him thrown upon the floor, or upon a seat to quiet him. This was done roughly, very roughly. Yes, I have seen him knelt upon to keep him down. It was necessary.'

"It was stated that, upon the *post-mortem* examination, John Coates' ribs were found to be unusually brittle; but, allowing for this, it is not probable that twelve of them, as well as the sternum, could have been broken without very considerable violence. The visitors, in their summary of the evidence taken by them, state their opinion that the fatal result was entirely owing to the abnormal state of the bones, and that the attendants did not intend to inflict injury; but we cannot agree in this view, and we were glad to learn from Dr. Smith that he intended to dismiss the attendant G. forthwith. We should assuredly have advised our Board to enter a prosecution against him, had we been able to obtain better legal proof."

VIII.—THE RIGHT USE OF BRACTON.

By H. S. Milman.

IN the 13th century the Civil Law of Imperial Rome and the Canon Law of Papal Rome were recognised as *prima facie* rules of law throughout Christendom, subject, within every nation, to national laws and customs. Henricus de Bracton, having before him on the one hand the books of that Civil Law, the Sum of Azo to the Code and Institutes (being the received interpretation of them), and the books of that Canon Law, and on the other hand the traditions and

records of English laws and customs, devised a plan (partly after that of the Institutes), and set therein materials derived from both sources, so as to show, in one view, the laws and customs then settled in England, and to confirm their authority by exhibiting them as, for the most part, appealing to legal principles universally acknowledged. Those legal principles, set forth originally in writing, had been brought through ages of study and of use to a wonderful order and maturity, while the English laws and customs were of various and obscure origins, and at various stages of growth. The work betrays in its composition these diverse characters of its elements.

Bracton doubtless first came forth as a sum or code of English laws and customs as they stood about 43 Henry III., 1259. But every extant copy, printed or MS., (so far as the writer knows), appears to be something more, to be the original text *plus* many later judgments, statutes, and opinions absorbed therein. Several such absorptions betray themselves by internal evidence, want of assimilation, or by external evidence, comparison of MSS.; or by both. They have obscured the clearness and impaired the consistency of the original, and suggest caution in using the work as we have it. They form an early example of the unhappy process, since and now prevalent, of "bringing down to the present time," a treatise of established fame. Under this process, the once lucid original suffers partial, sometimes almost total, eclipse, and casts but a flickering, if not a false, light on the studies of succeeding generations. The simple terse and strong voice of a great lawyer of old is drowned among the confused long-drawn and feeble tones of ill-advised editors, or, worse still, is taken to be faithfully re-echoed by them. Reference, which should be used in its strict sense, as a carrying-back of the treatise in hand to earlier authorities, is rather used to crowd the page with notices of subsequent changes in the law, and with the names of later cases and treatises of various value, or of no

value at all. Bracton, and indeed every treatise, should, if possible, be printed not otherwise than as last corrected by its author, and with no reference on its page other than to earlier law or history. Editorship, having provided the best attainable text and references according to these rules, should modestly confine its own comments, and its own guide to later statutes, cases and treatises, within a distinct supplement.

The ordinary use, the mis-use, of Bracton is, as a half-obsolete law-dictionary, a crowd of propositions, any of which may be adopted if favourable, or overlooked if unfavourable, to the question in hand, "an ornament to discourse where it agrees with the law,"* a mere *monumentum adorandæ rubiginis.*†

The right use of Bracton is, as an orderly treatise, composed of the materials, in the manner, with the object, and at the period, above described, and as a starting-point of English law from that period, subject to the caution above suggested.‡

Every derived proposition should be viewed at its source and throughout its descent. Every proposition should be viewed relatively to that part of the plan in which it occurs. All the propositions occurring in one book should be viewed together as *primâ facie* consistent.

The application of these rules to Bracton is difficult and tedious, not necessarily, but by reason of that treatise wanting proper editorial care.

For centuries the books which the author used for his work have been carefully edited and printed, in proper order, with references, tables, indices, and a variety of illustration.

* Per Saunders, C.B., in Stowel *v.* Lord Zouch, 10, Eliz., 1567. Plowd. Com. 357

† Fulbeck's Study of the Law, 1600, cap. 3, f. 27.

‡ In this latter character it is prefixed to a collection of early English Statutes, writs, and tracts in the National Library at Paris.—*Law Mag. and Rev.*, N.S., vol. II, p 400.

At this very day critical science, with all its modern advantages, is being brought to bear upon those books in MSS. long unknown or inaccessible; and typographical art, in all its modern beauty and accuracy, is exhibiting the best possible texts; while the same science and art, applied to more ancient monuments of Roman Law, are elucidating the history, and so the meaning, of Justinian's compilations.

Nearly three-fourths of the 19th century have passed. Clearer ideas of the growth of the English constitution, of the progressive steps in the condition of the English people, have been and are yet being developed. Much attention has been and is yet being drawn to the sources of the English Common Law, to its place in constitutional and popular history, as well as in professional practice. Several valuable *Monumenta Juridica* have been and are yet being published in the authorised series of *Chronicles and Memorials of Great Britain and Ireland during the Middle Ages*. But the primary sum or collection of the English Laws and Customs, at once a monument of historical value and a possession of practical use, still remains locked up in two old editions, a bad print and paper of 1569, and a worse reprint and paper of 1640, a text of origin unknown, in substance notoriously incorrect, in form abbreviated, crowded, mis-punctuated and mis-divided, a few only of its derived materials referred to their sources, its parts mis-entitled, its whole mis-indexed.

The citations of Staundeforde and Selden, having been made from MSS., may supply a few corrections of the print. But the analysis of Bracton given by Reeves,* in a note to his *History of the English Law*, represents the whole care bestowed upon it at home since 1640. Abroad, Bracton is valued by nations ancestral to, and descendant from, the English. External aids to the study of it have been provided by the zeal of German and American lawyers.* Their

* Gterbock and Coxe.

collection and verification of the links which connect it with the books of the Civil and Canon Laws, their comparison of many passages of it with the originals in the Sum of Azo, their analysis of it, more clearly drawn than that of Reeves, are, or ought to be, in the hands of all; but, far from meeting the want of a new print, increase the desire for it. Time, space and trouble are still wasted in discussing difficulties of Bracton as we have it, which would have no existence in Bracton as we ought to have it.

The right use of Bracton will become a ready and easy process after the full application to this our greatest "Monumentum Juridicum" of that historical method, which, as applied by eloquent lecturers and judicious writers to "Monumenta" of every shape and kind, is now delighting and instructing the literary world.

THE CLAIM OF PUBLICANS TO COMPENSATION.

A NEW era was inaugurated in British legislative discussion by the late Home Secretary, Mr. Bruce, now Lord Aberdare, in the speech that he made when introducing his License Reform Bill. This new era is distinguished by the application of the term "confiscation" to the regulation of a trade in the interests of the nation, and by the responsible advisers of the Crown acknowledging, on the part of the dealers in liquors, a title to compensation, in the prospect of interference with what are called their "vested rights." Mr. Bruce, in asking leave to bring in the Bill, said, "He admitted, and no person, he thought, could deny, that the number of licenses in most parts of the country was too great. Temptation was thereby thrown in the way of the population. But the question, how was the number of

licenses to be reduced, was a very difficult one to solve. He did not think that the House was prepared for any general system of *confiscation* of public houses."

There is no sense in which the term "confiscation" can be applied with the least show of accuracy to the restriction of the profits of the liquor trade. To confiscate is to transfer private property as a forfeit to the State, but here is no transfer whatever, nor even the withholding of a right. The State acknowledges no right on the part of any citizen to sell intoxicating liquors. It strictly prohibits the practice to the whole community, because of its acknowledged tendency to produce grievous social wrongs, and then grants a special permission to individuals selected here and there, for the purpose of ministering to the supposed wants of society, at the same time that they are expected, in return for this privilege, to put an effectual check upon the abuses so notoriously and inseparably connected with the common sale of intoxicating liquors.

All kinds of trades are liable to fluctuations seriously affecting the profits of those engaged in them, in consequence of legislative and other changes which the good of society demands, or the uncontrollable force of circumstances occasions. When railways threw stage coaches and horses off the road, and diverted the traffic from country roads to the great ironways, no compensation was offered to coach proprietors, or road-side innkeepers. Every reduction of the duties on tea and other articles embarrasses the trade for the time; the ribbon manufacturers of Coventry were seriously damaged by the extension of free trade principles to France. The paper manufacturers suffered severely from the same cause. No compensation was offered to the grocers when they were forbidden by law to sell essential oil of bitter almonds, because of its dangerous properties. In short, there is no trade or industry that does not, at one time or other, suffer seriously from national changes, and that from no fault of those engaged in the trade, like that

charged to the liquor sellers. If one trade is to receive compensation when suffering for the public good, then simple justice would demand that the principle should be applied to all. This would, indeed, be "borrowing from Peter to pay Paul." One half the thought and time of the nation would be absorbed in the consideration of endless claims for compensation—claims which could never be settled, and which would occasion a constantly aggravated state of perplexity and confusion.

But there is no need for such arbitrary adjustment of claims. Whatever is for the public benefit is, eventually, advantageous even to those who are compelled to suffer by the change. Everything that promotes the general prosperity, either by checking waste, or by lessening the cost of production, eventually benefits every class of the community; while, by the maintenance of profitable abuses, and the consequent impoverishment of society, that very interest eventually suffers, in favour of which the abuse has been maintained. These remarks apply equally to the traffic in intoxicating liquors. However small may be the title of ordinary trades to compensation, when injured by Legislative action, that of the liquor sellers is infinitely less. The very reason which they bring forward in defence of their claim, is, in fact, its strongest condemnation. They are licensed to sell. Whatever seeming consideration they are entitled to on this ground, will utterly vanish, if it is borne in mind, that the reason for which they are licensed is not that their trade is specially good and needs to be encouraged, but that the abuses of the trade are so notoriously productive of grievous wrongs to the rest of the community as to render absolutely necessary those very restrictions, and that qualified permission to sell, out of which the supposed right would seem to arise.

Every trade has its own peculiar risks and liabilities—and every sensible man, before embarking his capital in a given trade, investigates and calculates—weighs the probabilities

of gain against the possibilities of loss, and decides accordingly. All holders of licenses, when they embark in the liquor trade, know full well what are its peculiar risks, liabilities and dangers. They know well that, however improbable the mistaken leniency of the magistrates might render such an event, they were, nevertheless, liable at the end of any given year, if not at shorter notice, to be prevented from carrying on that branch of their trade any longer. There has seldom been a brewsters' session, when some magistrates have not done their duty, and some licenses been withheld or refused. The relative number of cases in which the law was faithfully executed, or culpably set aside, forms a very inadequate ground on which to rest a claim like that of the liquor sellers. Every holder of a license knew himself liable to this sudden check. If, knowing this exceptional risk, and balancing against it, the prospect of exceptional gain which the trade affords, in consequence of the effect of the liquor sold on the self-control and prudence of the purchaser, the fact that he has thus long been allowed to reap a harvest from the vices and follies of mankind, is the very worst possible reason why he should expect this immunity to be continued for his special benefit, or should imagine that injured society is to bribe him into acquiescence, when sufficiently roused to a sense of the injury so long complacently borne, as to demand that the wrong shall cease.

It would be a dangerous precedent in legislation to accept the accumulated evils or the accumulated profits of vice, rendered possible by the supineness or the complicity of Government, as a reason for offering compensation to those who have thus been allowed to grow rich at the expense of every other interest. Never, in all the legislation on this subject, has such a principle been admitted before. That it can be taken up seriously by any of our public men, only proves how wide-spread and how deeply-seated is the evil to be encountered, and how grossly the minds of public men

have been warped by long familiarity with the most flagrant of social wrongs.

This trade has been, in all times, specially liable to legislative interference. Many times the distilleries have been stopped, when, from scarcity of grain, famine was imminent. The duty on spirits has been raised or lowered as the case may be—new police regulations have been introduced—exceptional vigour on the part of magistrates and police in certain localities, has, in a very short time, and without notice, ruined the trade of half-a-dozen public houses—and yet no cry has been raised for compensation. A few years ago, an Act was passed, giving new powers to the magistrates in connexion with beer-houses. The result was an extensive closing of houses of this description, many of them not one-tenth so mischievous as thousands of the dram-shops and public-houses that are still tolerated. In some cases a single bench of magistrates swept off more than seventy of those beer licenses at a single sitting, and, in all, more than nine thousand were withheld, and yet there was no demand for, nor any offer of, compensation. In fact, it is perfectly well understood that there was no claim.

But the full force of the objection to compensation can only be realised when it is borne in mind that it is in order to abate an acknowledged nuisance, that the legislation in question is required. Mr. Bruce acknowledged this patent truth. He said :—"Every public-house tends to aggravate the public rates, and to create disorder; and it also creates additional necessity for the police."

Now no thought of compensation is ever entertained in cases of nuisance, unless, indeed, on behalf of the injured party. A nuisance is anything that is injurious to the health, the property, the comfort, or the morals of the neighbourhood in which it is found. It matters not how profitable it may be to its owners, or how useful or agreeable to society. If it produces injury in the neighbourhood where it is carried on, it is a nuisance, and must be abated. Chemical works

are very useful, but they sometimes poison the air and injure health. In this case, they become a nuisance removable by law. The expense of removing the works, and the possible ruin of the proprietor, all go for nothing in the impartial eye of the law; and, in addition, the proprietor may be compelled to pay damages on account of injuries already inflicted.

At the time when Mr. Bruce was giving the cue to the liquor sellers, by raising the cry of "confiscation and compensation," the following case was reported in the press:—

"Vice-Chancellor Bacon has recently decided that Sir Joseph Whitworth must stop the working of his great steam hammer near a Roman Catholic chapel in Manchester, on the ground of the noise proving a nuisance to the persons connected with that place of worship. It does not appear from the evidence reported, whether the works were placed near the chapel, or the chapel near the works; it was sufficient, in the view of the learned judge, that the operations of the one were prejudicial to the legal use of the other, to draw from him an order restraining the action complained of. It would not, in his opinion, have been a valid answer to the allegation, that Sir Joseph Whitworth's steam hammer is a very ingenious invention, and of great industrial value, not that Sir Joseph's vested interests would suffer largely from the issue of the restraining order. The plaintiff's case having been proved, the conclusion was legally irresistible."

There is another consideration, however, which still more forcibly proves the unreasonableness of the liquor-seller's claim for compensation. The licence is simply equivalent to a contract between the Government and the liquor-seller. This contract is valid for one year and no longer. If it is *held* for the good of the publican, it is *granted* only for the good of the public. The permission having been continued to the end of the licensing year, the Government has fulfilled its part of the contract; and is no more bound to renew it, than the owner of a house or farm is bound to renew a lease or a yearly tenancy, simply out of consideration to his tenant, or to give him compensation because he may be inconvienced by not being retained any longer as a tenant.

It was for the public good that the license was granted—the securing of public order and well-being. The publican knew the conditions, and the speciality of his trade that led the Government to render his tenure thus insecure. He had no right to calculate on a leniency on the part of his judges, which could only be extended to him at the expense of those sacred interests for which he and the magistrates were supposed to be acting. He has already had full value for all that he has paid. If, as the liquor-sellers plead, they pay double rent for a house with a license, they do so because they realise exceptional profits during the year of license. If the rent of a house is raised by the acquisition of a license from £40 a-year to £80, then the owner of a house has had his compensation in the additional £40 a-year that he has received while the license was held, and the tenant is supposed to have profited in equal proportion, or he would not have consented to pay the exceptional rent. Thus in ten years the owner of the house will have received £400 extra by virtue of the license, and the tenant, if the fault was not his own, has profited in proportion. But this very fact of exceptional profit from liquor selling, proves that the purpose of license has not been answered, namely, the protection of other interests in the neighbourhood of the licensed house. Those exceptional profits have been secured at the expense of other trades and other properties in the neighbourhood. It would be monstrous to defend the perpetuation of this state of things, as the right of the publican.

It is a notorious fact that house property in the immediate proximity of public houses is very materially injured in value by their existence. In numbers of instances, the rents of houses on both sides have been lowered by the granting of a license where none existed before. If the publican is entitled to compensation because his license is withheld, then is every tradesman and every property holder in the neighbourhood entitled to compensation when a license is granted, and so long as it remains in force. Instances are known of owners

of houses who have been compelled to sell them at great loss, and of shopkeepers who have been compelled, at great loss and inconveniences, to remove their business to other localities, for no other reason than the presence of a public house or more in their immediate neighbourhood.

Not only is house property thus seriously lowered in value, but all other trades suffer in proportion, and socially, morally, and physically, the multiplying of public houses is a great blot upon our system, and as a nuisance ought to be dispensed with without compensation. S. F.

XI.—LORD CHIEF JUSTICE COCKBURN.

THE Lord Chief Justice dined with the members of the Southampton Chamber of Commerce, on Wednesday last The Chairman, Mr. G. Dunbar, proposed the health of Sir Alexander Cockburn, who, in reply, said:—I am wholly at a loss for words to express my sense of this reception, and of this cordial and kindly welcome. It is now 17 or 18 years since I had the honour of meeting the members of the Chambers of Commerce at Southampton. It is now nearly 20 years since my public relations with the town of Southampton ceased, and nearly 30 since my public relations with it commenced. I associate the name and recollection of Southampton with the happiest epoch of my life. The year to which I have just referred are the transition from manhood to old age, and nothing could by any possibility have afforded me a more heartfelt and sincere gratification than to come back after this chasm of years to Southampton and meet with such a reception as that which I have received from you to-night. I believe you have watched my career since my old association with you, and that you are not ashamed of having been represented in

Parliament by me; and that, looking at the course of my public life, you are still prepared to give me such a welcome as constitutes the highest reward which public life can assure. The happiest and best portion of my life was that which I passed in your service. I look back upon it as the happiest period of my active public life. My professional life, of which I always have been proud, and to which I hope I have done no dishonour, was in itself an occupation pregnant with energy and pleasure. Combined with that, the position—the high position—of an officer of the Crown and the being representative for Southampton appears to me to be the height of any ambition to which I could possibly aspire. Bitterly do I lament the time I had to abandon that position; but a man must go on with the stream of professional advancement, and does not deserve to belong to a noble profession if he hesitates to avail himself of the promotion in it which circumstances offer. I nevertheless bitterly regret having had to sever my connexion with the House of Commons and Southampton. I can conceive no greater charm in life than to hold at once high judicial office and to be a member for this borough. I could not do both in the position I had to step into, but there is a man who now does, and never was Southampton more worthily represented. I say so in all sincerity, and I tremble when I think that I am Lord Chief Justice, but knowing the seat which I occupy and the men who have gone before me, if there is anything for which I would change, it would be to be Recorder of London and Member for Southampton. I have the misfortune to differ politically from my most respected, worthy, and honourable and venerated friend, but I must admit I would rather see Southampton represented by one of my own kidney. But if it is to be represented by a Conservative, let it be by my right hon. and learned friend. Gentlemen, I am most deeply sensible of the honour which you have done me this day in asking me to attend at this meeting upon the revival of those former anniversaries

of the Chamber of Commerce, and in giving me an opportunity of meeting so many old friends, but, alas, that is painfully tempered, as your President has observed, by the absence of so many who, in that long lapse of years, have disappeared from the scene, yet is fraught with the most exquisite satisfaction and pleasure to think I am again in this room, in this place, and in this presence addressing a body of the inhabitants of the place I so long represented. Your approbation—your reception—is to me a gratification past all power of expression, for it tells me that calumny and abuse has not altered your opinion of me. Gentlemen, the viper-tooth of calumny is sharp, and its poison is deadly, and the fable tells us that the viper does not fix its fangs in you with the less deadly hostility because you have cherished it in your bosom; and the fable tells us also that there are things upon which the teeth of the viper are spent in vain. One of these is the confidence, however it may be wanting in deluded, infatuated, ignorant multitudes—the confidence which, in this country, all classes of thinking and educated men entertain in the integrity of the Judicial Bench. You have toasted to-night the Sovereign, the head of these realms and the foundation of all power; you have toasted the Army and the Navy, and the Volunteers, those gallant fellows who are ready to risk their lives at any moment in the defence of our country and the maintenance of its honour and of its glory, but there is an element in the State not less important than these. It is the administration of justice, and one of the great safeguards of the Constitution has been the confidence of the people in the purity and the integrity of its administration. Woe to those who seek to undermine that confidence, to those who by calumny and vituperation of the most detestable and the most villanous kind, seek to shake the confidence of the people in the administration of the justice of this country. Gentlemen, I ought to apologise to you for trespassing so long upon your patience, but in this room it seems so natural for me to talk to the inhabitants of

Southampton that if I did not put the restraint upon myself, which I am about to do, I believe I should go on all night. I pray you to forgive me, and receive my most cordial and sincere thanks and acknowledgments for the honour which you have done me.

To the toast of "The Houses of Parliament," Mr. Russell Gurney responded. He said he was surprised to find he was the senior member of Parliament present that evening. Of the House of Commons he knew comparatively little, of the House of Lords he knew less; but of both he believed it was safe to say that neither could very well get on without the other. If, as was sometimes imagined, there was in the case of one somewhat too great a desire to yield to the wishes and the passions of the people, it was pretty certain that tendency would receive a considerable check from the other. The House of Lords would be themselves the first to admit that, if they stood alone, our legislative progress would be apt to be rather slow; but it had no doubt great advantages in its *prestige*, and in the recollection of the eminent services which had been rendered to the country by many of its members, which naturally acted as a stimulus to exertion. But the members of the House of Commons had also something of an ancestry. He, for instance, as a member for Southampton, might be allowed to express the pride which he felt in the knowledge that the borough had formerly been represented by one whose services the country would never forget—he alluded to Lord Elgin; while he could never forget that it had also been represented by a man who had by his abilities won for himself the highest position in the profession to which he belonged, and of whom, as he had just said, he was proud; since he had occupied his present position on the Judicial Bench he had displayed qualities as distinguished as was that eloquence with which he used to charm juries and electrify the House of Commons. Though it was impossible not to feel pride in following such a man as the Lord Chief Justice in the

representation of the borough, he could not but feel rather humbled when reflecting on the inferior position which was occupied by himself. No one could feel more pride than he did at the kind way in which his name had been mentioned He knew how unworthy he was of such praise. So long as the constituencies were represented by such men as those to whom he had been referring, so long would they be sure of receiving the confidence of the public at large, without the possession of which confidence all their exertions to serve their country would be in vain.

LEGAL TOPICS.

ASSOCIATION FOR THE REFORM AND CODIFICATION OF THE LAW OF NATIONS.—This Association was founded in October, 1873, at Brussels, by a number of Jurists and others, who then formed themselves into a Society for the Reform and Codification of the Law of Nations. It has since been joined by many distinguished men, both in Europe and America. Its objects, as its name indicates, are to arouse attention to the difficulties which prevail through the conflict and variance, in and between different countries, as well of public International Law as of the laws affecting private rights, with a view to promote assimilation and uniformity in matters susceptible of such treatment. The subject necessarily divides itself into the two heads of "Public" and "Private International Law." The first head involves matter such as Arbitration, Maritime Prize, Extradition of Criminals, and other similar questions. These will form an important part of the subjects for discussion at the next annual Conference. The second head

embraces so vast a number of questions that it was, at the last Conference, determined to direct attention primarily to the following subjects: 1. Bills of Exchange; 2. Foreign Judgments; 3. Copyright; 4. Patent Law; 5. Trade Marks. The consideration of the existing state of the law in different countries on these questions, and the best plan for adopting some systematic mode of obviating the conflicts existing with regard thereto, was then entrusted to a Special Committee nominated for that purpose. This committee has, after mature consideration, felt the necessity of devoting attention to these subjects one by one. In the belief that no question affects so large a section of the commercial community as that of Bills of Exchange, and that public opinion is already ripe seriously to consider the importance of the assimilation of the laws and practice relating thereto, this Committee has determined that its first efforts should be directed to the best mode of bringing about a uniform system of law and custom in regard thereto. With a view of preparing some practical measure to carry out such uniformity, the Council feel it essential to seek the opinions of Chambers of Commerce, bankers, jurists, and others in various countries, alike as to the difficulties now found to exist, and the best method of providing a remedy. In order to elicit such opinions, a series of questions have been framed and circulated. Branches of the Association have already been established in France, Belgium, Italy, and the United States. Other questions, equally important with those already alluded to, will necessarily have to be dealt with in due order, and as this Association desires to become a centre for the intercommunication of opinions bearing on subjects of International Law generally, the Council will gladly welcome any communication with reference to any of its objects, and invites your active co-operation and support. The next annual Conference will be held at the Hague, in the first week of September next.

The following questions are submitted to chambers of

commerce, bankers, bill brokers, jurists, and mercantile houses in different countries, in order to elicit their opinions as to the desirability of adopting one uniform system in the laws, usages, and forms as to the bills of exchange:

1. Do you find such diversity in the laws, customs and regulations affecting bills of exchange in various countries with which you have intercourse, as to cause complications in commercial business, and create questions of legal difficulty in establishing and enforcing your rights and remedies?

2. Do you consider it desirable to adopt one universal form of bill of exchange, and one uniform system of laws regulating the rights and liabilities of parties to a bill of exchange?

3. What difficulties do you find in the present fiscal regulations respecting stamps on foreign bills, and in the laws relating thereto; and what suggestions do you make for the removal of such difficulties?

4. Do you consider it desirable to establish one uniform form and system of indorsement, which shall only be limited in case of express directions by an indorser?

5. Do you deem it desirable that the usances now varying in different places and countries should be altogether abolished, and that the adoption of one uniform period of time would be preferable?

6. Having regard to the great diversity of custom, at present leading to great complications, do you consider that days of grace should be abolished entirely, or if not, that a uniform term should be established, and if so, what term?

7. Have you experienced difficulties from diversity in the practice, laws, and customs of various countries, as to presentation for acceptance, and the consequences arising on non-acceptance, refusal, or undue delay?

Do you consider it desirable that there should be a uniformity of practice, custom, and law in regard thereto?

8. Do you find difficulties in the present system of notice

either as to form or law, or as to the parties upon whom it should be served; and can you suggest any simplification or alteration in regard thereto, or in the proof of due notice?

9. Is noting and protest as to foreign bills of exchange compulsory under your law?

Have you in your country any regulated scale of charges on noting and protest? If so, please give full details thereof, both as regards inland and foreign bills?

Do you find that the expenses of noting and protest, and incidental charges on foreign bills return dishonoured, are variable and burdensome and what changes (if any) in the present system and rate of charges do you deem desirable?

10. What rights and remedies are, under your laws, secured to a holder of a foreign bill of exchange by due notice and protest?

Is there any limitation as to the election of parties, or the time for inception of legal proceedings?

Have you any suggestions to make for the better securing the rights and remedies in other countries of holders of foreign bills?

11. What is the limit of time in your country in which a suit must be brought, and do you consider it desirable to fix a uniform period?

12. Is the law or custom of Aval in force in your country?

Do you find difficult questions arising in countries where no such law or custom exists, and do you consider it desirable generally to adopt a system recognising the validity of Aval.

13*a*. Does the law in your country sustain the right of a *bona fide* holder for value of bills of exchange, lost or forged? Is this right upheld even in those cases in which loss is caused by gross neglect, such as a want of due care and caution on the part of a person losing a bill or from whose possession a bill has been abstracted?

b. What diligence do you deem necessary on the part of bankers issuing circular notes and letters of credit—and of

the holders of bills of exchange, to prevent the circulation of lost and forged notes and bills?

c. What alteration in or assimilation of the laws of commercial countries generally do you suggest as a protection to the banking and commercial community in respect of lost or forged bills of exchange and letters of credit?

The last three questions have reference particularly to letters of credit and circular notes, since large frauds are being continually committed upon, and losses sustained by bankers, money changers, and others, either by the production of forged letters of credit or letters of indication, or by passing off lost or stolen bank and circular notes?

Answers to these questions may be addressed to the Honorary International Secretaries, H. D. Jencken, Goldsmith Building, Temple, London; and J. Rand Bailey, 8, Tokenhouse Yard, London.

BOOK REVIEWS.

THE LAW CONCERNING THE REGISTRATION OF BIRTHS AND DEATHS IN ENGLAND AND WALES AND AT SEA. Edited by Arthur John Flaxman, of the Middle Temple, Barrister-at-law. London: Stevens and Haynes. 1875.—This book has been prepared with much care, and with a thorough knowledge of the subject of which it treats. The twenty-two statutes or part of statutes, which affect the practice of registration have been placed by Mr. Flaxman in their chronological sequence. This method of arrangement was probably the best for some purposes; but it necessitated the putting last in order that which is actually first in importance, and the interspersion amongst enactments which are essential to registration of those which own only collateral relations with it. No mode of disposition, however, would have been without inconveniences of its own; and there is little reason on the whole for finding fault with that which Mr. Flaxman has adopted.

The expository notes in reference to the Registration Act of last session, are copious and valuable. This Act has altered the registration system on many and important points, and the Editor's main efforts have rightly been directed to the elucidation of its provisions. We have been struck with the general soundness of the deductions which he has drawn from the several clauses; with the appositeness of the items of practical information which he has introduced among them; and with the clear and concise manner in which he has expressed himself.

We are not, indeed, always able to accept his inferences. For example, with respect to the burial of more than one body in the same coffin, he supposes that the undertaker's notice will be passed on to the Registrar, apparently overlooking the fact that this notice will not stand *in the place of* the Registrar's certificate of registry or notification of death, or of the declaration as to still-birth, but will, under the specified conditions, be necessary in addition to those documents. Again, the statement as to the distinction between errors of fact or substance in registers, and those that are styled clerical, would appear to be somewhat too broad. It is clear that a clerical error may be committed as well by the person who attests the entry of a birth or death as by the Registrar who makes it; and this is recognized in the regulations of the Registrar General upon the subject. Some other defects of a like kind might be pointed out.

But to refer to such minor imperfections is to give high praise to the main body of the work. Such praise it undoubtedly it deserves. We trust the book will find its way largely into the hands of those whose duty it is to carry out the provisions of the Registration Acts. They will find it a valuable addition to their means of learning what they required to do; and its admirable index will enable them so to augment their information without trouble.

SIMPLIFICATION OF THE LAW. Practical Suggestions. Reprinted from the *Quarterly Review*. By Sir Henry Thring, K.C.B., the Parliamentary Counsel. London: R. J. Bush, Charing Cross. 1875.—The time being more opportune at present than a twelvemonth ago, now that Parliament itself is moving in the direction of revising and super-revising its own Acts, the further publicity of a valuable contribution to the *Quarterly Review*, a-year ago, becomes a public acquisition. Sir Henry Thring, of whom no one is able to speak of greater experience in the drafting of Bills in Parliament, went fully into the subject, and pointed out how the

simplification of the law of expurgation, consolidation, and amendment may be effected. When it is considered with what a mass of matter there is to deal when you come to codifying and digesting, it is no wonder that the progress is slow. Sir Henry Thring says:—

"The Statute law is, *par excellence*, the written law of England, and is comprised in about 100 octavo volumes, containing more than 18,000 Acts of Parliament. These statutes are placed in chronological order, without any systematic arrangement. A considerable portion of this mass of law is obsolete; another portion relates to local and private matters; while the subject-matter of the effective legislation is as varied and extensive as the social and mercantile life of England.

"The Reports contain the decisions of the Judges on important cases brought before them for a period of 566 years. They consisted in 1866 of 1,308 volumes, and they increase at the rate of from twenty-five to thirty volumes a year. In 1866 the reported Common Law cases amounted to more than 60,000, and the Equity cases to 28,000. The series begins with the year-books, which are written in law French, and extend over a period of about 200 years, from the beginning of the reign of Edward II., in 1307, to the latter years of the reign of Henry VIII., and it ends with the last number of the 'Weekly Notes,' to be continued *ad infinitum:*

> "Rusticus exspectat dum defluat amnis, et ille
> Labitur et labetur in omne volubilis ævum."

The upshot, says Sir Henry Thring, of his observations is briefly as follows:

"1. A Code is the most complete form in which the law of a country can be presented.

"2. A Code is the ultimate aim of all Law Reform.

"3. The bulk of English law is so vast, that it does not admit of being codified as a whole until it has previously been collected, sifted, and otherwise put in a form adapted for codification.

"4. These preliminary processes can only be effected by competent men under competent control.

"5. The first practical step is to establish a department of the Government charged with the duty of putting in shape the existing law and superintending current legislation.

"6. The second practical step is to consolidate the existing statutory law.

"7. The third practical step is to consolidate the common law and judiciary law, by publishing an Institute of common-law axioms, a collection of Leading Cases, a Digest of other cases arranged on the principle of separating legislative or leading from illustrative cases—of eliminating from each leading case its maxim, and placing under it, in the shortest possible form, the cases illustrative of that maxim.

"8. Current reporting must be conducted by official reporters.

"9. A Code may be readily constructed on any branch of law, by adding to a consolidating statute maxims found in the Institute of maxims or the Digest of cases.

"10. Finality must not be aimed at in a Code.

"11. An improvement in legal education is required."

Though admitting the question of law reform is not now a "burning" one, the author presses all alike, both Liberals and Conservatives, who may be in want of a policy, to unite in adopting the policy of the simplification of the law. Singularly, this proposition has been to some extent exemplified, for we find Mr. Forsyth, Q.C., applying for the appointment of a Select Committee, to be assisted by a legal officer, to whom all public bills should be referred after they have been read a second time, and again, after they have been reported with amendments, and to report upon each bill as to the necessary consistency of provisions and harmony with existing legislation. Whereupon a committee was appointed on the motion of the Attorney General, "to consider whether any and what means can be adopted to improve the manner and language of current legislation." The principle of establishing some supervising body was acquiesced in by Mr. William Rathbone, who had also a motion on the subject. We may, therefore, what between the Statute Law Commission and this Committee, expect shortly that the language of the law will be improved and simplified.

THE PRINCIPLES OF ECONOMICAL PHILOSOPHY. By Henry Dunning Macleod, Esq, M.A., of Trinity College, Cambridge and the Inner Temple, barrister-at-law, Fellow of the Cambridge Philosophical Society, second edition, Vol. II., part I, completing pure economics. (London: Longmans & Co. 1875.) Mr Macleod's economical writings are valuable in several respects. First of all, he places in a clear light the keystone of economical science, which is, that value depends on demand and supply. Cost is only an expression for the difficulty of adding to the supply. Our author is also an admirable analyst of the opinions of others, as his opponents often experience to their cost. Economists, however, do not suppose as Mr. Macleod seems to think, that there is more than one fundamental law of value. For, though commodities are divisible into three classes, according as they are non-monopolised, monopolised, or partially monopolised, yet these three distinct kinds of laws all operate through the single primary law of demand and supply. This is the general equation of economics; every case of exchange is one

of demand and supply, or of reciprocal demand. The study is therefore, strictly scientific, as its terms are homogeneous, though our author regards it as inductive. He sometimes too, falls into the error he so much deprecates, of introducing a variety of laws to account for similar phenomena. For, he says, "it is a greater service done to a landlord to take a farm than it is to a tenant to let it to him," chap. XI, sec. 12-14 Mr. Thornton on the contrary, would say that the landlord *may* sell, but that the tenant *must* buy, if he wishes to have a roof over his head. In truth, the mutual demand is exactly of the same kind, and *cæteris paribus* of the same intensity. The landlord is just as ready to sell as the tenant is to buy. It is not the necessity of either that regulates the price, else raw produce would always fetch an enormous price, but it is the necessity of either landlord or tenant, acted on and modified by competition. There are several owners of land who will let their ground. The rent, therefore, is determined by demand and supply; there are several tenants in like manner bidding against one another. The question is finally worked out by the mutual competition of all the landlords and tenants of the district. However, Mr. Macleod is, in the main, true to his first doctrine, that demand, and not cost, regulates price. This is an important and correct statement of the most general law of value and price, although no doubt market or demand price always tends to conform to cost or natural price.

Our author does some good service to the cause of economics, by showing that the price of provisions has no effect on the rate of wages, when these are above the minimum. It is strange that the contrary doctrine is adopted by almost every economist. Adam Smith says the rate of wages or the real reward of the labourer depends on the demand of labour and the price of provisions. But all he meant was that the same amount of wages goes further, as the saying is, when food is cheap, and not that the cheapness of food beforehand can make wages less or diminish the demand for labour, although when cheap food has led to an increase of population, no doubt wages then become lowered. But this reduction of wages cannot happen until the supply of labour, that is, the number of labourers, is increased. Value is never, in short, affected except by a change of demand or of supply. Mr. Macleod gives this truth all its due prominence.

On the Bank Act of 1844, he is, of course, quite at home, having already in his treatise on banking, shown Mr. Mill's ignorance of the fact that all banking is necessarily an evasion of

the Act of 1844, or the creation of credit without that basis of cash, which the Act of 1844 requires. The defects of Mr. Macleod's work are, that he quotes legal authorities on points of economic science, and that he is sometimes unnecessarily diffuse, though, we must add, rarely or never in error.

APPOINTMENTS.

Mr. J. W. De Longueville Giffard, of the Equity Bar, has been appointed a County Court Judge; Mr. Daniel, Q.C., and Mr. Serjeant Tindal Atkinson, joint Judges of the Leeds County Court; Mr. J. Morgan Howard, Q.C., of the Home Circuit, Recorder of Guildford; Mr. Staveley Hill, Q.C., Counsel to the Admiralty and Judge Advocate of the Fleet; Captain Gossett, to the office of Sergeant-at-Arms; Mr. Charles Lennox Peel, Clerk of the Council; Sir William Rose, K.C.B., Clerk of the Parliaments; and, Mr. Richard Durnford, barrister, Private Secretary to the Lord President of the Council. The Cambridge Chancellor's Medal for Legal Studies has been awarded to Dr. Kenney, Downing College. Mr. William Liverton Donaldson, barrister-at-law, has been appointed by Mr. Humphreys Deputy Coroner for East Middlesex; Mr. Edwin John Harvey, solicitor, Coroner for the Fareham Division of Hampshire; Mr. Hesketh Booth, solicitor, Clerk to the Magistrates for Oldham; Mr. Hubert Gough, Clerk to the Magistrates for the Edmonton Division of Middlesex; Mr. Richard Footner, Town Clerk of Andover; Mr. Matthew Folliott Blakiston, solicitor, Town Clerk of Stafford; Mr. Francis Sanders, solicitor, Registrar of the Wolverhampton County Court; and Mr. Henry James Walker, Registrar of the Great Yarmouth County Court. *India*—Mr. John Shaw, solicitor, has been appointed Registrar of the High Court of Jurisdiction in that presidency; Mr. Robert Hill Pinkey, barrister, a Judge of the High Court of Judicature at Bombay; and Mr. Justice Macpherson, officiating Chief Justice of Bengal.

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The Conference for 1875 will be held at THE HAGUE, the first week in September. Communications with reference thereto, may be addressed to the Hon. Secs. as above, or to G. I. TH. BERELAERTS VAN BLOKLAND, LL.D., Advocate, (Hon. Sec. for Holland) 9, Koninginnegracht, The Hague, Holland.

EXTRACTS

FROM THE

CONSTITUTION OF THE ASSOCIATION.

NAME.

The name of the Association shall be "The Association for the Reform and Codification of the Law of Nations."

OBJECTS.

The objects of the Association shall be the Reform and Codification of the Law of Nations. Its relations with the Institute of International Law, founded at Ghent, in September, 1873, shall be such as were determined by the Conference at Brussels, in October, 1873.

CONFERENCES.

There shall be an Annual Conference of the Association, to be held at such time and place as shall have been appointed at the preceding Annual Conference, or by the Council, and also such other Conferences as in the opinion of the Council circumstances may render expedient.

LANGUAGE.

The language in which the discussions shall be carried on, and the minutes kept, shall be that of the country where the Conference is held, unless the Conference otherwise direct; but each member may write or speak at his option in his own language.

TRANSACTIONS.

After each Annual Conference its Transactions shall be published in a volume, under the direction of the Council, which volume shall contain the Minutes of the Conference and such papers as may be ordered to be printed.

CONTRIBUTIONS.

Each Member of the Association shall pay to the Treasurer an annual sum of One Pound sterling or its equivalent, or a sum of Ten Pounds sterling or its equivalent, for life membership.

EXPENDITURE.

No expenditure shall be made nor liability incurred, beyond the amount of funds in the hands of the Treasurer.

Prospectuses of the Association, in English, French, and German, will be forwarded by the Assistant Secretary, to whom also applications for Membership and remittances should be addressed.

THE

LAW MAGAZINE AND REVIEW

No. V.—Vol. IV.—May, 1875.

I.—THE LAW OF FOREIGN JUDGMENTS.

By Henry D. Jencken, Barrister-at-Law.

IN the beginning of last year, notices appeared in the Journals of the Continent that the King of Holland had addressed a letter, or Memoria, to the different Cabinets of Europe, inviting them to send delegates to The Hague, to attend a Congress to be held there* on the important subject of foreign judgments. Many of the European States have, it is understood since then, consented to be represented. This fact takes the question it is now intended to discuss out of the sphere of speculation, and extends to it the elements of practical usefulness.

To understand, however, the scope and effect of the proposed reform, it may be, perhaps, advisable to map out, in merest outline, it is true, the present state of the law in regard to foreign judgments†; and then to compare the law as it now exists with the intended reform, and consider in how far the remedy proposed will prove effective.

Judgments are, it is well known, either *in rem*, *in personam*

* "Journal du Droit International Privé," Paris. Mai-Jui, 1874.

† Story's Conflict of Laws, ss. 594, 595. Phillimore International Law, Vol. IV, p. 727. Bar *v.* ss. Endurtheil und seine rechtliniliche Kraft und Follstreckung.

or *inter partes*; that is, those *in rem* are adjudications upon the status of some particular subject matter by a competent tribunal, such as Admiralty cases, land or moveable property within the jurisdiction of a tribunal, marriage, divorce, foreign attachments; or they are *in personam*, to use the words of Burgundus, "*Si condemnatur ad aliquid dandum aut faciendum aut non faciendum, patiendum.*" A distinction arises in the latter class, that is, different rules apply where the judgment is sought to be enforced, or where it is set up, by way of defence only. A further distinction is made where the judgment is given in contentious matters, either between subjects, or between a subject and a foreigner, or a foreigner and foreigner, defended or by default, sustaining or dismissing a decree. A further difference is made, where the party pursued was the plaintiff in the foreign court; in which latter case, he is stopped from questioning the jurisdiction of the court he has voluntarily set in motion, or the justice of its decree; unless fraud, or gross irregularity be proven; or unless the record (the judgment itself) contradicts the law to which it seeks to give effect.

A glance at the groups under which foreign judgments are thus classed will suffice to show, that unless some guiding principle be accepted authorizing their recognition, the old legal maxim of "*usu exigente et humanis necessitatibus*," becomes wholly inapplicable.

In France, the old Ordonnance (1629) allowed foreign judgments to be contested on their merits, and though the Code de Procedure Civile, art. 546, the Code Civile arts. 2,123, 2,138, permit the enforcement of the judgments of a foreign court, practically they are open to be questioned step by step even upon the merits.* In Spain the Tribunals regard foreign judgments with keen jealousy, and the enforcement of a claim based upon the decree of a foreign tribunal involves the opening up of the whole of the case,

* Sirey Code Annotés, p. 357.

that is, they are in nowise regarded as *res judicata*, but only as means of evidence. The same difficulties occur in Belgium where the Code Civil prevails. In Russia, the Ukase of 1827 only gives validity to the judgment of a foreign court after an examination into the merits of the cause of action. Whilst, in Sweden and Norway no definite rule prevails. Germany, with more liberality, arising perhaps out of the necessity of its position, has for centuries past adopted a rule of reciprocity, at least as between the German States; but the rule that a "*simple demande ou requête*" suffices, entitling the plaintiff to an *exequatur*, has never been acted upon. In the United States the framers of the Constitution have made special provision for the admissibility of the judgments of other States in the Union: the Constitution declares "that full faith and credit shall be given to each State, to the public acts, records, and judicial proceedings of each other State." This places the judgments of the courts of other States within the State in which they are sought to be enforced on the same footing as domestic judgments; it is nevertheless open to the court within whose jurisdiction the judgment is sought to be enforced, to inquire into the jurisdiction of the foreign tribunal, the rights exercised over the parties of the suit, or whether the same is not impeachable for fraud.

The history of the judgments of the English courts offers an interesting view of the varying opinions entertained by our judges on this difficult question. On the one hand we have Lord Kenyon, in *Tarleton* v. *Tarleton*, (4 Maul and Selw, p. 21), pithily saying that he (Lord Kenyon) "did not sit at *Nisi Prius* to try a writ of error upon the proceedings of the court abroad." Whilst Lord Mansfield (*Boucher* v. *Lawson*, Douglas 1. 6.), maintained that they were examinable. Of late years, our courts have adopted a more liberal policy, and have given effect to foreign judgments; or, at all events, admitted the facts at issue, and the decision of the courts abroad on the facts before

them. The expanse of trade, the ease of intercommunication, the residence of a large section of the people of any one country within the territory of another country; the wondrous British Colonial Empire, now growing up into vast proportions with giant strides; that congerie of States with laws, as various as their climates—all these facts have tended to unite the numerous and populous countries peopled by Christian races, into one great confederacy of common interests. The time has hence undoubtedly arrived to pave the way for the adoption of some guiding principles of private International Law, in regard to the conflicts of their tribunals in civil and criminal matters. Senor M. P. Mancini's paper on this question, read at the last Geneva Conference of the Ghent Institute, (1874) may be referred to with advantage.

In an admirable article, which appeared in the *Journal du droit International privé*, of Mai-Juin, 1874, an analytical statement is given of a "projet de conference internationale pour regler les conditions légales de l'execution réciproque disjugements étrangers dans les différents pays," to be held at the Hague, the framers of the Memoria, under the direction of the Minister of Foreign Affairs, M. le Baron Gericke de Hercoyen, have, with keen penetrativeness, pointed out the dangerous ground it will be necessary to explore, and the rocks and shallows to be avoided. And, first, the inviolability of the independence of a Sovereign power. To render a judgment of a foreign tribunal executory within the limits of another State, would, it is thought, be admitting a dangerous principle, unless some limitation to the exercise of this right be prescribed. This limitation must necessarily vary according to the circumstances of each case, and be subject to special conventions or treatises. The Memoria referred to further states: "that the form of the *exequatur* or *pareatis*, which ought always to accompany the judgment at a foreign tribunal, should set forth the authority of the Sovereign of the State where it is sought to

be enforced." The employment of one international form of Writ is recommended, to avoid the difficulty which change in the form of the Record would involve, that is, the mere endorsement of a Writ by a competent authority in the district of the country where the execution is sought to be enforced, is to suffice. The *judicatum solvi*, or security now required, would thus be avoided. It is further suggested that suits brought by the citizens of one State against the citizens of another should not subject the foreign suitor to find security for costs; and that undefended actions against citizens should be shielded under the protecting guidance of the crown officer, intervening *pro deo*. It is further proposed that one common form of procedure, in all suits between citizens and aliens, should be adopted in those countries which consent to become parties to the proposed reform. One moment's reflection will suffice to render comprehensible the importance of the change it is proposed to introduce, in fact no difference is to be made between domestic judgments and foreign judgments. The language of the Memoria, however, indicates only too plainly, that the framers of this remarkable document well understand the nature of the alterations in the law they propose to carry out. In speaking of this document the *Journal du droit International* says: "The indirect consequences of an international system of judgments will not be of less importance than the direct effect. The proposed reform, whilst it gives to the citizens of a State a greater facility of redress against a stranger, one more prompt, certain, and less costly, might at the same time alter several restrictions now burdening foreigners, (aliens) and thus strengthen the source of all international transactions and dealings, namely, confidence."

It is time we should draw breath; this plunge mid stream into law reform needs an expert swimmer to prevent serious accident. We can all but hear the murmur of dissent from the lips of Lord Mansfield and the able judges who, since his

day, have had to consider those very complicated questions arising out of foreign judgment cases. Jurisdiction, surprise, wrong parties, fraud, and natural justice, are all these answers to be hushed into silence, by a simple *exequatur* of a foreign court? and unless they are, how can the judgment of a foreign Court become *per se*, executory, that is, not supported by the judgment of a court of competent jurisdiction in the country in which it is sought to be enforced? The *Journal du droit International* pithily says: "We forsee grave difficulties; to prevent shipwreck they require *certaines conditions et en l'entourant de garanties reélles.*"

Two principles must, it is clear, be respected in dealing with this question: 1st. The morality of the State in which the judgment is pronounced; 2nd. The legal validity of the judgment. Under the former are included the civilization of a people and their political status; under the latter arise the *exceptions* already mentioned. Thus, the question of jurisdiction, "*ratione personæ*," opens the door to an endless conflict of laws. Before the proposed reform could be carried out, a common rule as to the *competence des tribunaux* must be established. In fact no agreement can be come to until this primary question has been definitely settled, namely, that of jurisdiction. Several attempts have, from time to time, been made to overcome this obstacle. The Convention of the 15th June, 1869, between France and the Swiss Confederacy, attempts to grapple with this question of jurisdiction. In the year 1864, M. Letieure, submitted to the Social Science Congress, at Amsterdam, a *projet de traité entre la France et la Belgique*, but the extreme difficulty of dealing with this matter has hitherto prevented any progress being made.

The applicability of the law of one State to the circumstances and laws existing in another State, brings forward questions fraught with difficulty; thus the status of the plaintiff or of the defendant, such as minority, marriage, or divorce, involve points of great complication. What, then,

will it be asked, is the course proposed by the Dutch Government to meet all these difficulties? The King of Holland proposes convening a Conference, to consist of eminent jurists delegated by their respected Governments, to determine what common rules of law might be devised to remedy the conflict of laws, of *les lois civiles et commerciales*, between those States who allow themselves to be represented at the proposed Conference. It is further intended that the principles of law agreed to by the delegates of the different States, should be submitted to the Legislatures of those countries, who have consented to be represented with a view ultimately, that the principles of law so adopted are to form the basis of a uniform Code of private international law. Such is the *projét d'une Conference*, in reference to which the King of Holland has issued a circular addressed to the different Cabinets of Europe. The need for reform, arising out of the conflict of laws within the sphere of private international law, is so universally felt, that it is reported, upon good authority, that many of the States of Europe have already given in their adhesion; at all events to this extent, that they agree to delegate representatives to consider the important question practically at issue, namely, that of the assimilation of the laws and practice, civil and commercial, of Europe.

Whatever course the Conference may pursue, or whatever results it may arrive at, no doubt can exist that some reform is needed. The uncertainty which prevails in regard to the effect and the enforcement of a judgment of a foreign tribunal, is becoming a matter so urgent, so serious, that its consideration cannot be any longer deferred.* If a suggestion might be hazarded, the rule laid down in the Constitution of the United States might serve as a guide; a defendant being

* Mr. J. Rund Bailey, Solicitor, has kindly furnished particulars of numerous instances within his own knowledge, in which his clients have been subject to serious delays, and protracted litigation, when neither the law nor the facts were in dispute.

permitted to impeach a foreign judgment for fraud, lack of common requisites of justice, or want of notice, or on the grounds of the inadmissibility and irreconcilability of the matter on the face of the record itself; or that the foreign tribunal had no jurisdiction over the subject matters or parties. But upon whatever grounds a defence is sought to to be employed, leave to appear ought, it is conceived, in the first instance, to be obtained from the judge of the Court in which the suit is brought, upon such terms as to security as the judge may think proper.

II.—JURISPRUDENCE : A REVIEW.*

By JOHN G. W. SYKES, LL.B., Barrister-at-Law, and Advocate H.M's High Court, N.W.P. India.

"Qui de legibus scripserunt, omnes, vel tanquam philosophi, vel tanquam jurisconsulti, argumentum illud tractaverunt. Atque philosophi proponunt multa, dictu pulchra, sed ab usu remota. Jurisconsulti autem, suæ quisque patriæ legum, vel etiam Romanorum aut Pontificiarum, placitis obnoxii et addicti, judicio sincero non utuntur, sed tanquam e vinculis sermocinantur."—DE AUGMENTIS. Lib. viii.

"And albeit the reader shall not at any one day (do what he can) reach to the meaning of our author—yet let him noway discourage himself, but proceed; for on some other day in some other place that doubt will be cleared."—LORD COKE.

THERE is, perhaps, no more remarkable feature in the educational system of the present age than the steady multiplication of approved text books in all departments of learning. It may, indeed, be doubted whether the student of the present day, by reason of this tendency, is, to use Strafford's term, as *thorough*, as his forefathers, but at all

* The Student's Edition of Austin's Lectures on Jurisprudence. Abridged from the larger work. By Robert Campbell, of Lincoln's Inn, Barrister at-Law. London: John Murray.

events he has the advantage of being able early to acquire a knowledge of any branch of science, upon which, with corrections and with discrimination, he may base his own individual investigations. In other words, he may commence so much sooner the real work of enquiry, and "the heir of all the ages in the foremost files of time," entering upon the labours of those who have preceded him, may the earlier carry forward the work commenced by them. Legal science, as was to be expected, has not been left without its share of such works; of which many are invaluable to the student, who may now in six months make himself master of more legal learning than in their day could Littleton, Bacon, Coke, and others, "my wise masters learned in the law," in years of toilful study. The work under review is an attempt to supply a want felt by young students of jurisprudence to whom Austin's works are set as a first book; and the best thanks of those for whom it is intended are due to Mr. Murray for adding to the number of his excellent students' books this outline of Austin's lectures. How Mr. Campbell, the editor, has succeeded in supplying the want, and how far he has accomplished his aim, we shall try to make apparent in the remarks, which follow. Of one thing let him assure himself, that, if his work will lessen in anywise the unnecessary labour of students, he will not have taken up his pen in vain.

Austin's works have always been considered hard reading, and as this, in a great measure, arises from the amount of almost verbatim repetition which they contain, there was great room for analysis and condensation. Indeed, one of the great faults of the present edition is, that the editor has shrunk too much from the labour of condensing. A students' edition of very much smaller bulk might have been produced, and there can be no doubt that, as such, it would have been much more useful than the present one; but, *diis aliter visum*, and we must be content with such fruit as Albemarle Street affords.

There have been many reviews of the larger work, and in the two with which the late John Stuart Mill and some other writer enriched the pages of the Edinburgh Review* is to be found an analysis of Austin's system of jurisprudence, which bears upon its pages evidence in each case of a master's hand; and is for any but a tyro a far more valuable production than the work before us, though lying in a tithe of the space. It would indeed appear to us almost a work of supererogation, after Mr. Mill's summary, to attempt anything of the sort, in this place, were it not that we cannot entirely concur in all his views and that it is essential to the unity of our present purpose to sketch briefly the work done by Austin; whilst the increased attention which the subject is receiving would, of itself, be sufficient apology for this further attempt to facilitate the study. Mr. Mill has said, "The popularity of general speculations, either upon law or any other subject, depends principally upon the degree of practical importance and dignity attached to them." And since he wrote those words the study of jurisprudence in England has been placed in a more fitting position by those fountains of legal education, the Inns of Court. This is no doubt in a great measure the *ratio essendi* of this students' edition of Austin, and it is the reason why we have entered on a discussion of the subject in these pages.

An idea of the life of an author whom we really prize has a value, not easily expressed, it is true, but none the less real for that. It gives a reality and life to his thoughts and draws us nearer to him and what he has written.† We well remember the zest the perusal of Mrs. Austin's touching preface to the second edition gave to our reading and re-reading of the works, and we think it is to be regretted that Mr. Campbell has not told us something more of Austin's life

* Oct., 1861, and Oct., 1863. Now republished with all advantages of typography, with the 'Dissertations and Discussions.'

† Mr. Tollemache's article on "Literary Egotism," *Fortnightly Review*, No. 80, N.S., June, 1869.

than he has done. By way of further preface let us then glance at the life of the man whose labours lie before us, and whose two volumes from which the present little book is abstracted are, "the last memorials of a remarkable man, who has left us without any, or with hardly any, public recognition of his real merits." A glance will be enough to show us that here is but another instance of the truth of the words which Sir Henry Taylor puts into the mouth of Van Artevelde, "The world knows nothing of its greatest men." If it does find out their merit at all, too generally it is when they are where its din and hubbub cannot reach them. And so it was in Austin's case. One of the first, if not the very first of English jurists, he wrought out what is now not unfrequently spoken of as a 'probably immortal work'—a fragment on the science of positive law. We are told by his widow, in no such querulous tone as mars her labour of love, as some would have us think, that the hope, the animation, the ardour, with which he had entered upon his career as a teacher of jurisprudence, were blighted by indifference and neglect; and, in a temper so little sanguine as his they could have no second spring. The events of Austin's life which were few may soon be enumerated. He was born in 1790, and died in 1859. After serving five years in the army, he was called to the Bar in 1818, and gave up practice in 1825. In 1826 he was appointed professor of jurisprudence in the then newly established University of London, now University College. He went to Germany to study for two years, before commencing his lectures. Between 1828 and 1832, he delivered the course which formed the basis of the 'Province of Jurisprudence Determined.' In 1834 he delivered another course at the Inner Temple. In 1833 he was appointed a member of the Criminal Law Commission, with a salary of £800 a year. From this he withdrew, simply because he felt the powers and views of the Commission were too narrow to effect the reforms he thought necessary. Two years later he was appointed, in conjunction with Sir George Cornewall

Lewis, Royal Commissioner, to inquire into the grievances of the Maltese. The Commission was abruptly closed by ministerial changes. The remainder of his life was passed in retirement, partly for the benefit of his health, on the Continent, and for the last ten years at Weybridge, in Surrey. Many have wondered, whilst more have regretted, that during these years he showed no inclination to devote his improved health and tranquil leisure in his cottage at Weybridge to the work he had so long projected. Perhaps, after all, this is not so wonderful. He best knew the mighty mental efforts which it would require, and, after years of ill-health, he might well shrink from the enterprise, and dread to take it up afresh. His widow, writing in another connexion, gives us a trait in his character which is one key to his conduct and makes it perfectly explicable. She says, "He usually evaded these applications;" (for writings on matters he had studied) "but to the person with whom he had no reserves, he used to say, 'I cannot work so; I can do nothing in a perfunctory manner.' He knew perfectly his strength and his weakness. He could work out a subject requiring the utmost stretch of the human faculties with a clearness and completeness that have rarely been equalled. But he had no mental agility. When he gave himself up to an inquiry, it mastered him like an overwhelming passion. Early as the year 1816, he spoke to me in a letter of 'the difficulty he found in turning his faculties from any object whereon they have been long and intently employed, to any other object.' And for the same reason, when his mind had once loosened its grasp of a subject, it could with difficulty recover its hold."* The truth is we grow out of conditions and states of mind, and leave the past, without which we never could have advanced, behind, and

> "Men may rise on stepping-stones
> Of their dead selves to higher things."

And so perhaps did Austin. Others, at all events, besides

* Works, 3rd edition, p. 15.

Austin have devoted the labour of the best years of their life and dedicated their intellect, blossoms and fruits, to the slow and elaborate toil of constructing one single work; and instead of surviving them as a monument of wishes, at least, and aspirations, and long labours, dedicated to the exaltation of human nature, in that way in which God had best fitted them to promote so great an object, it has stood and still stands a memorial of baffled hopes, of materials uselessly accumulated, of foundations laid but never to support a superstructure according to the design of the architect.* Austin has fared better than these, and his work, though a fragment, is as precious to the lawyer and the man of philosophic tastes as the fragments of the *Venus de Medici* to the artist and sculptor, if not far more precious. Now, indeed, his merit is recognized, and the complaint of his widow, on which such ill-natured and ungrateful remarks have been passed, has been justified. For whatever of complaint there is in her preface arose from the recollection of great qualities unappreciated, great powers which found no congenial employment, great ardour for the good of mankind, chilled by indifference and neglect, by the recollection of the struggles and pangs of an over-scrupulous and over-sensitive spirit, vainly trying to establish, alone and unsustained, the claims of a science which he deemed so important to mankind.'† Not fifteen years ago, Mr. Mill said of Austin's writings, 'They are exclusively speculative, and though eminently useful to every one who wishes to understand the law of England as a liberal profession and not as a mere trade, they have no direct practical bearing whatever upon it, and probably will never attain the distinction, so much coveted by most legal writers of being quoted as an authority in a court of law.'‡ But this distinction, too, Austin has won, and

* De Quincey, Works, vol. I., p. 254.

† Works p. 1.

‡ Edin. Rev. Oct. 1861 p. 460.

page after page of the law reports of the highest court in this country—and the best pages of all—are enriched with quotations from Austin's jurisprudence. He has gained posthumous fame, but to such a man what is that; or, after very early manhood, the hope of it? Far rather would he have valued the knowledge that in time to come his efforts would be appreciated and general benefit derived from his labours. Not a generation has passed away and those proud to confess their obligations to this teacher are no longer the two or three young and sincere inquirers who rallied round him and treasured up his words, as Mill and Grote, but they may be counted by hundreds. The result of Austin's life, though sad in some way for himself and his friends, was such as might have been predicted. The world does not pay the price of attention to a great mind, to hear what it cares nothing about; and, as Carlyle has said, a great writer has to create the demand which his writings satisfy; a remark which is now being verified in Austin's case.

But we must hurry on to a consideration of the work before us.* Austin's work seems, from the remarks prefixed to it, and Austin's own account of it, to be only one part of a work which he intended to write on human obligations in all their forms, whether backed by sanctions, legal, moral, or religious. Had he completed his work, we should have had institutes of jurisprudence, of morality and ethics, and of religion, and one of the noblest feats of intellect of this or any other century. One portion only was in any way completed, and it is the portion concerned with jurisprudence. And what do we mean by jurisprudence? † The term presents, even at this day, and to the scientific lawyer, ideas by no

* Those who wish for further notices of Austin's life may refer to the preface to the works, and to the *Law Magazine and Review*, for May, 1860. There are also some notices of Austin in Mill's Autobiography, and Mrs. Grote's "Life of George Grote."

† The next three pages are transferred from a paper recently furnished by us to the *Calcutta Review* on Legal Education. Calc. Rev. No. 117, July, 1874, pp. 107, 110.

means clearly determined. Austin has defined jurisprudence as 'the philosophy or science of positive law.'* This definition, though hardly fulfilling a single requisition of the logicians, is perhaps the best which has yet been given. To the difficulty of providing definitions in this science we shall hereafter advert; at present we confine ourselves to this of Austin, 'jurisprudence is the philosophy or science of positive law.' This definition does not declare the facts, and all the facts connected with the word—does not recount the essential attributes of that to be defined.† It contains the name of the thing to be defined, *juris*prudence—*law*. It is by no means precise and adequate. It is expressed in obscure language; what is 'philosophy,' what 'science,' what 'law' and what 'positive law?'‡

First, a law (*sensu latiore*) is a rule laid down for the guidance of an intelligent being by an intelligent being having power over him. And every positive law is such a rule set by a monarch or sovereign body to a person or persons in a state of subjection to its author. It would be well if we could as easily answer the question, 'What is philosophy? which, indeed, is one of the most hopeless and intricate questions and one which has puzzled and will for ever divide thinking men. We shall not enter upon it here, seeing we have the term 'science' to fall back upon, which we can far more easily explain. "A science is a body of principles and deductions to explain some object-matter."§ "To fulfil its intention, every science must have attained to true statements concerning its object-matter, so far as the nature of the case and the present means of examination allow; it must be able to define the object-matter," (Cf. Austin's Determination of the Province of Jurisprudence)

* Vol. I., p. 33, etc.

† Mill's Logic. Vol. I., p. 154.

‡ Archbishop Thomson's Outline of the Laws of Thought, pp. 88-9.

§ Idem, p. 10.

"and its several subordinate parts, with clearness and precision; and it must be able to indicate the extent of the domain, the object-matter covers; and lastly, it must exhibit these results in a systematic and harmonious shape. For the first it must employ induction and deduction; the second is the province of definition; the third is provided for by division; and the fourth may be referred to method.* A science is a body of permanent and universal facts so arranged that each part has a bearing on every other part and on the whole, arising from and being the result of observation, comparison, or experiment. Jurisprudence is a true science, for it is a body of principles and deductions, explaining an object-matter, and it deals with facts which are in one sense permanent and universal and with their logical arrangement. Jurisprudence, then, being the science of positive law, and having to do with what is essential in and common to all systems of law, the uses of it as a study are almost self-evident. To the lawyer a perfect body of jurisprudence would be a key to every system of law in the world. To the legislator it is of even greater importance. 'For only by means of it can the legislator know how to give effect to his own ideas and purposes.'† And he whose duty it is to make laws for the guidance of his fellows should know something of the effects which such laws as he is bent on introducing are likely to have. Most often he is merely adopting, consciously or unconsciously, in a modified form, a law of some other state. To see then the results of his contemplated legislation in that other country, its success, defects, or failure, is of the last importance.‡ Something of this

* Thomson's Outline of the Laws of Thought, p. 210.

† John Stuart Mill, *Edinburgh Review*, Vol. 121, p. 441.

‡ Praeterea si de lege ferenda quaeratur, neminem vestrum fugit, quam sit necessarium, aliorum populorum mores nosse atque instituta, ut intelligatur numquam ejusmodi lex apud eos obtinuerit, et utrum comprobata fuerit usu necne. Sic et imperatorum Byzantinorum leges examinasse juvat. Exempli gratia, Jurisjurandi usus restringendus ne sit necne nuper magnopere disceptatum est.

method was pursued by the learned author of the *Esprit des Lois* throughout his system of jurisprudence; a system which, with all its exaggerations, defects, and often needless indecency, still claims the attention of legislators.*

Law is constantly spoken of in all circles as a 'dry study,' and, as the lawyer has gone through it for the past half century, could it fail to be so? In England the study of law has always been mainly historical, but historical in the narrowest possible sense. The student has been obliged to familiarize himself in some degree with the successive accretions by which the irregular mass has grown. He is exhorted to fill up his odd moments with a manual written in the reign of Edward IV (an eminent conveyancer, now dead, used, as he told his pupils, to repeat *Littleton* to himself as he walked along the Strand); he is acquainted with the whole family of obsolete tenures, and can recite the pedigree of an estate tail. But he is rarely taught to connect his knowledge of these things with the general history of his country, and his range is practically bounded by the Norman Conquest and the Four Seas. Beyond these limits all is a *terra incognita* to him.† We do not hesitate to say that the only rational and enjoyable method of studying law is that scientific method which is the source of jurisprudence; and that such a method will be found reasonable and agreeable. The greatest of all political philosophers said, well-nigh a century ago, in his eloquent paraphrase of the wisdom displayed by Lord Bacon on this subject:‡ "There is scarce any object of

Jam vero extat lex imperatricis Irenæ quæ ab omni juramento abstinendum esse præcipit. Ex cujus Historia quum quæstio illa egregie illustrari possit, cur non iidem, qui, quæ in Parliamento Anglicode eadem re nuper dicta atque acta sunt, studiose legamus et examinemus, ad Irenæ constitutionem animum advertimus" (C. E. Zachariæ "Historiæ Juris Græco. Romani Delineatio; cum appendice ineditorum." 8vo. Heidelb., 1839. Preface, p. v.)

* Lord Wrottesley's Thoughts on Government and Legislation, p. 168.

† *Quarterly Review*, No. 219, p. 116.

‡ De Augmentis, Lib. VIII, in loco.

curiosity more rational than the origin, the progress, and the various revolutions of human law. Political and military relations are, for the greater part, accounts of the ambition and violence of mankind; this is a history of their justice. And surely there cannot be a more pleasing speculation than to trace the advance of men in an attempt to imitate the Supreme Ruler in one of the most glorious of His attributes; and to attend them in the exercise of a prerogative, which it is wonderful to find intrusted to the management of so weak a being. In such an enquiry we shall indeed frequently see great instances of this frailty; but at the same time we shall behold such noble efforts of wisdom and equity, as seem fully to justify the reasonableness of that extraordinary disposition, by which men, in one form or other, have been always put under the dominion of creatures like themselves. For what can be more instructive than to search out the first obscure and scanty fountains of that jurisprudence, which now waters and enriches all nations with so abundant and copious a flood—to observe the first principles of *Right* springing up, involved in superstition, and polluted with violence; until by length of time, and favourable circumstances, it has worked itself into clearness—the laws sometimes lost and trodden down in the confusion of wars and tumults, and sometimes overruled by the hand of power; then victorious over tyranny, growing stronger, clearer, and more decisive by the violence they had suffered; enriched even by those foreign conquests, which threatened their entire destruction; softened and mellowed by peace and religion; improved and exalted by commerce, by social intercourse, and by that great opener of the mind, ingenuous science." * To take an instance, we can imagine no keener intellectual pleasure than that of the student turning away from the Institutes of Justinian, Lib. I, Tit. 22, to his text-book on the Hindu Law, Tit. marriage†; and finding how a

* Burke's Abridgment of English History, Bk. III, Chap IX.

† E.g. Grady's Manual of Hindu Law, p. 20.

difficulty of the old Roman lawyers was overcome by the subtler pandits of the East, only to arise in a varied form in England in our own time.* This is but one instance of many.† We have chosen it rather than others as bearing on one of the most difficult problems in modern legislation in England; most difficult on account of the conflicting duties of the legislator. He has to legislate in a Christian and a free state. Christianity, on the one hand, tells him he must attend to men's bodies as well as their souls; on the other, it tells him that, having enjoined purity in the social relations, it cannot allow him to facilitate departures from these injunctions; and, as though the conflict were not already great enough the free spirit of the nation tells him to leave the persons of its members as free as possible.

Such, then, is the science before us. From what has been said, it is clear that the ideal system of jurisprudence should embrace the permanent and universal facts in every system of law. But the jurist need not expressly refer to every one of them. The groundwork of Austin's system, for instance, consists of Roman law and English law. In thus building chiefly upon a foundation of Roman law Austin was fully justified; for he was justified in looking for the constituent elements of universal jurisprudence where they were sure to be found; and, further, the Roman legal system was essentially *elegant*. Roman law, too, is the substratum of the laws of almost all nations of modern Europe,‡ whilst the steady multiplication of legal systems adopting the principles and appropriating the greater part of the rules of Roman law is one of the most singular social phenomena of

* Cf. Statute 29 & 30 Vict. c. 35, and the Supreme Council Act, No. 14, of 1868.

† Another instance occurs to us. Compare the rule of the XII Tables (circ. 450 B.C.) as to the conduct of females at funerals—(Tab. X, provis. 4), with the comparatively recent abolition of the Satti in India. (Reg. XVII, of 1829.) From this tenth table also, by the way, may be seen the antiquity of false teeth.

‡ *Edinburgh Review*, Oct., 1861, p. 477; Oct. 1863, p. 447.

our day and far more worthy of attention than the most showy manifestations of social progress.* Hence it is evident that to take Roman law as a foundation was to obtain a vast amount of common and essential matter at one stroke. Again, the language of Roman law is the key to numerous legal systems, and is, therefore, becoming the *lingua franca* of universal jurisprudence.† Hence Austin's evident and declared‡ preference for the phraseology and methods of Roman law over any other. The decision on this question of language one way or the other was not a matter of indifference. For one of the chief difficulties in the study of jurisprudence arises from the way in which almost every law term is loosely employed in conversation. "*Juris vocabulum valde est ambiguum.*" Hence it has been said that "a well made lexicon of the legal terms of all systems would be a complete science of jurisprudence,"§ a remark of Mr. Mill's in which we cannot concur. The statement ignores systematic arrangement and organization. The alphabetical arrangement of a lexicon cannot be considered such. This statement, too, makes jurisprudence no longer a science by doing away with its principles and deductions. Bentham, setting out on his Titanic labours in this science, saw clearly the difficulty to which we are adverting; and to this is to be ascribed that barbarous language which has repelled so many from the study of his works, and which caused such sneers, in his day, at the writings of himself and his coterie. Bentham coined a language for himself which, till recent times, kept his writings "as good as manuscript." To the same cause and to the fact of the oral delivery of his lectures and to a wonderful precision, are due the peculiarities of Austin's style, which, with all its logical clearness, is by no means attractive to the novice. The science of law, as

* Sir H. S. Maine, Cambridge Essays, 1856, p. 14.

† Idem, p. 17.

‡ Cf. Eq. Outline, 3rd Ed., p. 71.

§ John Stuart Mill, *Edinburgh Review*, Vol. 121, p. 448

indeed every other science, could never have existed had it not had its own peculiar terminology ;* for which it is in the greatest measure indebted to the Roman law and to the Latin language. One object of the science of jurisprudence is to obviate and remove this difficulty by defining the meanings of the technical terms of the law. In pursuing this object, the jurist has to contend with two difficulties : first, to define one term he must assume the meaning of many others ; and, secondly, popular moral terms are the same as law terms. To illustrate the first point we need only refer to Austin's definition of jurisprudence. An example of the second is found at once in the word 'robbery,' which, in popular language, may mean no more than theft or cheating ; but which, in English law, means larceny, accompanied with violence. If that system be taken, the terminology of which is common to many or most other systems, it is clear that the legal terms of those systems may be defined once and for all. For all these reasons it is likewise clear that a better element than Roman law could not have been taken by Austin as the basis of his system of jurisprudence.

Now, passing by the outline of the course of lectures with the mere expression of our concurrence in Mr. Mill's remark, that it indicates a grasp of mind and a breadth of knowledge almost unexampled, and of our opinion that it was a dangerous thing for the present Editor to disturb that clearly drawn analysis, and that he has not escaped the danger, let us see how Austin has determined the province of jurisprudence. We think we can make this shortly appear. We have seen that jurisprudence is concerned with positive law, and we have already suggested what is meant by positive law. To make this clear beyond the possibility of mistake, however, Austin determines the essence or nature which is common to all laws proper, and the appropriate marks by which laws of each kind are distinguished from laws of the

* De Quincey's Works, Vol. V. pp. 237-8 ; Vol. XIII, pp. 86—94, and Cf. Maine's Anct. Law, Chap. IX.

other kinds; taking them in the following, which he considers the most convenient, order. 1. Laws of God. 2. Positive Moral rules. 3. Laws Metaphorical or Figurative. And, 4. Positive Laws.

Now, laws proper are a species of commands. A command is an expression of desire issuing from a superior and enforced by a sanction, or constraint to obey. And a law proper is every command which obliges generally to acts or forbearances of a class. But not only do men make laws for the guidance of their fellows, but God sets laws to men, of which some are revealed, whilst others, says Austin, are unrevealed. Hence the question arises, how are we to know God's unrevealed commands? In answer to this question, two rival theories have been set up, and a third, an intermediate theory, compounded of the two. The first is the theory of general utility, the second the theory of a moral sense, and the third, compounded of the two, we may call the intermediate hypothesis. The supporters of the first and of the second theories say there is but one index; they differ from one another as to what that index is. The supporters of the third theory do not limit themselves to one index. They say there are two indexes; and they differ from the supporters of the others in this.

The theory of utility may be briefly summarized thus:— God designs the happiness of all his sentient creatures, Some human actions forward that benevolent purpose or their tendencies, *i.e.*, their whole tendencies are beneficent or useful; in other words, if acts of that class were generally done the general happiness would be promoted. Of other human actions the contrary is the case. The former, as promoting His purpose, God has enjoined. The latter, as opposed to it, He has forbidden. God has given us the faculty of observing, of remembering, of reasoning, and, by duly applying these faculties, we may collect the tendencies of our actions. Knowing the tendencies of our actions, and knowing God's benevolent purpose, we know His tacit commands.

And if this be the test, the acts which God enjoins or prohibits, He enjoins or prohibits by laws and rules which are general and commonly inflexible. Hence we have not to calculate the consequences of each act, but simply acting upon sentiments associated with these rules, to refer the act to its class; though we may, in exceptional cases, have to calculate the consequences of a specific act. Yet it is not every useful act that is the object of a Divine injunction, or *vice versâ*, for we are sufficiently prone to do or forbear from some acts without any command. Milton's rule may be carried to a higher point, when he says, "Impunity and remissness for certain are the bane of a Commonwealth; but here the great art lies, to discern in what the law is to bid restraint and punishment, and in what things persuasion alone is to work."*

And this is the theory which Austin would have us accept.

The theory of a moral sense may be summarized thus :— The agreement or disagreement of human conduct with the law of God is instantly inferred from our sentiments without the possibility of mistake. 'He has resolved,' adds Austin, with something of a sly irony, 'that our happiness shall depend on our keeping His commandments; and it manifestly consists with His manifest wisdom and goodness that we should know them promptly and certainly. Accordingly, He has not committed us to the guidance of our slow and fallible reason. He has wisely endowed us with feelings which warn us at every step and pursue us with their importunate reproaches when we wander from the paths of our duties.' In this hypothesis two assumptions are involved. First, that certain inscrutable sentiments follow our conceptions of certain human actions. They are neither the effects of reflection upon the tendencies of the actions which excite them, nor are they the effects of education. They are simple elements of our nature, and ultimate facts. This is the

* Areopagitica. 3rd. Argument.

negative assumption. Second, that these inscrutable sentiments are signs of Divine pleasure or the contrary. This is the positive assumption. Two arguments are used to support the theory; first, that the judgments which we pass internally on human actions are immediate; second, that the moral sentiments of all men are precisely alike. But sometimes our judgments are hesitating and slow; so much so that we are often at a loss whether to praise or blame. And forbea[r] which one man will disapprove another will heartily the guida[nce]. The great difficulty, says Austin, besetting this which some[how] the moral sense of all not being alike, God has revealed. Hence rule to men.

God's unrevealed c[ommands] intermediate hypothesis, the moral sense two rival [theories] some of God's tacit commands, but the principle of general utility to others. But this theory, says Austin, is open to the same objections as the theory of a moral sense; and, with a view to his argument, he might have added also to the further one of admitting the theory of utility, in part.

These three theories are thus stated by Austin in his 'Province of Jurisprudence Determined.' And the first question we have to ask ourselves is, 'Was it necessary to state them at all?' The answer to the question involves a reference to what has gone before. Though every page taken up in a consideration of the subject is valuable and admirably suited for the larger work originally intended by Austin, much is out of place as we have it at present. To determine the province, Austin might have told us what positive law was, and then have said whatever does not coincide with this is foreign to jurisprudence; and he need not have defined this and that, and said, these are foreign. But for his intended work, he had to tell us not only, 'this is law,' but also 'this is morality,' and 'this religion.' And for that purpose this consideration of these rival theories was not, perhaps, disproportionate, but here it seems altogether out of place. The laws of God can only enter into a system of jurisprudence, so

far as the revealed law is concerned. The positive law set by God as King in the Jewish Theocracy, and the sacred law of the Hindus and Mahomedans might, of course, enter into a system of jurisprudence, but they would fall under the ordinary definition of Austin. But he does not touch on them nor does he introduce his disquisition on divine laws and morality for any such purpose. And these theories are totally out of place in a disquisition on law proper under which they are made to fall. They are all concerned to find out the index to God's *unrevealed* commands. Now the statement of the theory of utility or either of the others, when made as strong as possible, clearly begs one question; the answer to which, in another part of Austin's work, is resolved *e contra*. The fact of certain actions promoting God's purpose and the fact of His having issued a command as to them are totally distinct. The one in no way follows upon the other. It is true we cannot reason from man to God, and say that as there are a thousand things a man wishes to be done which he issues no orders about, and even though he have power to punish in case they are not done, and his wish is not a command; so the fact of certain acts promoting God's purpose is no command with respect to them. But we may say this:—Austin, in summarizing these theories, speaks of God's *tacit and unrevealed* commands; whilst, according to his own definition, though a command may be tacit, using that term to signify that the desire is expressed otherwise than by words, yet no command can be tacit and unrevealed; every command being an *expression* or *intimation* of a certain description of wish. He says, "If you express or intimate a wish that I shall do or forbear from some act, and if you will visit me with an evil, in case I comply not with your wish, the *expression* or *intimation* of your wish is a command." * We have seen, too, that Austin says that it is not every useful act which is the object of a

* Students' Ed., p. 11, 23, Vol. I, p. 91. The italics are Austin's.

Divine injunction, or, *vice versâ*, for we are sufficiently prone to do some, and forbear from others, without any command. It is rather un-Austin-like reasoning, then, to say, with respect to these we have no commands at all, *ergo*, we have God's tacit or unrevealed commands. The discussion of these matters, then, was not only, as we have said, disproportionate, 'and filling too large a space for the symmetry and compactness of the book,*' but it was altogether out of place, and involved several serious logical blunders. And it is to be regretted that Mr. Campbell has not seen this and rectified it, so far as it was competent for him to do so, in his present edition. The reader of the larger work, if not of this edition, will probably have laid down the book, feeling that Austin, by his treatment of the question, has made out a case in favour of the theory of utility. But a little consideration will show us that he has by no means disposed of this vexed question. Though he and Bentham have perhaps done more than any other writers to place the theory of utility on a rational basis, his reasoning, in one or two places, appears to us to be defective or fallacious. At the outset, we may object with the late Dr. Whewell, "Let it be taken for granted, as a proposition which is true, if the terms which it involves be duly understood, that actions are right or virtuous in proportion as they promote the happiness of mankind; the actions being considered upon the whole, and with regard to all their consequences. Still, I say, we cannot make this truth the basis of morality, for two reasons; first, we cannot calculate all the consequences of any action," (of those specific acts, for instance, where we must make a calculation) "and thus estimate the degree in which it promotes human happiness; second, happiness is derived from moral elements, and therefore we cannot properly derive morality from happiness. The calculable happiness resulting from actions cannot determine their virtue; first, because the resulting happiness is not calculable; and,

* *Quarterly Review*, No. 219, p. 187.

secondly, because the virtue is one of the things which determines the resulting happiness.*" And we may ask, with the late John Stuart Mill,† what is the general happiness? What is utility? Bentham leaves the question most unsatisfactorily, and Austin, though he shows how important and noble an enterprise its solution would be, does not solve it. Utility, says Austin, is the test, and yet we cannot apply it, for we do not know what utility is. The possibility of applying it as a test is rendered more remote when we remember, as Austin tells us we must do, that the true tendency of an action is the whole of its tendency. De Quincey states this point so excellently well, at the same time that he brings out a distinction, insisted on by Austin, that we make no apology for giving the reader the benefit of his words in full. He says, "It is singular that Sir James," (Mackintosh, 'Progress of Ethical Philosophy') "with all his scholastic subtlety, should not have remarked the confusion which Paley, and others of his faction, make between utility as a *test* or *criterion* of morality, and utility as a *ground* of morality. Taking it even in the limited sense of a test (that is, the means by which we *know* an act to be moral, but not, therefore, as any ground or reason which makes the act to be moral) the doctrine is a mere barren theorem, perfectly inert and without value for practical application; since the consequences of all important actions expand themselves through a series of alternate undulations, expressing successively good and evil; and of this series no summation is possible to a finite intellect. In its earliest and instant effects, a given act shall be useful; in its secondary effects, which we may distinguish as the undulation B, it shall become mischievous (mischievous, I mean, now that it has reached a new order of subjects); in C, the tertiary undulation, it shall revive again into beneficial agencies; and in remote cycles travel again into evil. Take, for instance, the

* Lectures on the History of Moral Philosophy, pp. 223-4.

† *Edinburgh Review*, Oct. 1861, p. 485.

French Revolution, or any single act by which a disinterested man should have deliberately hastened on that awful event; in what blindness must he have stood at the time, say about 1789, as to the ultimate results of his own daring step! First came a smiling dawn, and the liveliest promise of good for man. Next came a dreadful over-casting, in which nothing could be seen distinctly; storms and darkness, under cover of which innocent blood was shed like water, fields were fought, frenzies of hatred gathered amongst nations, such as cried to Heaven for help and for retribution. That woe is past; the second undulation is gone by; and now, when the third is below our eyes, we are becoming sensible that all that havoc and fury, though sad to witness and to remember, were not thrown away; the chaos has settled into order, and a new morning with a new prospect has arisen for man. Yet even here the series of undulations is not complete. It is perhaps hardly beginning; other undulations, moving through other revolutions, and perhaps fiercer revolutions, will soon begin to travel forward. And if a man should fancy he would wait for the final result, before he should make up his mind as to the question of moral verdict to be pronounced upon the original movement, he would make a resolution like that of a child who proposes to chase the rainbow."*

Again, as we have seen, Austin says, 'After all the great difficulty besetting the theory of a moral sense is, that the moral sense of all men not being alike, God has not set a common rule to men.' And yet, in another place, he says in favour of the theory of utility that what one man shall approve another shall condemn, so that, it should seem that the theory of utility affords no more equal rule. The truth is, Austin's objection entirely overlooks God's great principle of transmission by inheritance, whereby He visits the sins of

* Works, Vol. XII., p. 78-4. Sir James Mackintosh has not overlooked the confusion, as De Quincey notes, on looking more rigorously.

the fathers upon the children, and whereby we find in children natural aptitudes for good or for evil, as the case may be. This, it will be said, the utilitarian can admit without at the same time admitting that these natural aptitudes will affect the view of the rectitude or depravity of the resulting actions. But we beg to deny that, for we find that the judgments which we form upon actions vary according to the whole tenor of our moral feeling at the time of making the judgment. And so thought Laurence Sterne, when he told his parishioners that, "We are deceived in judging of ourselves, just as we are in judging of other things, when our passions and inclinations are called in as counsellors, and we suffer ourselves to see and reason just so far, and no further, than they give us leave. Thus the case stands with us still. When the passions are warmed, and the sin which presents itself exactly tallies to the desire, observe how impetuously a man will rush into it, and act against all principles of honour, justice, and mercy! Talk to him a moment after upon the nature of another vice to which he is not addicted, and from which perhaps his age, his temper, or rank in life secure him; take notice how well he reasons, with what equity he determines, with what an honest indignation and sharpness he expresses himself against it, and how insensibly his anger kindles against the man who hath done this thing." * And this, we take it, is what is meant by the Prophet Hosea when he says, "Then shall we know, if we follow on to know," and by the greatest of all transcendental philosophers, when he says, "If any man will do His will, he shall know of the doctrine;" passages which clearly indicate the interdependency of moral and intellectual being.

And again, and this is the last point we shall notice before passing from this subject, Austin says, certain of our judgments are immediate, whilst others are hesitating, so much so that we are often at a loss whether we shall praise or

* Yorick's Sermon on Self-knowledge.

blame. It must strike the reader, that if we leave out of the question the origin of the views of right and wrong, this is a summary of the intermediate hypothesis compounded of the theory of Utility and the theory of a moral Sense.*

Besides these Laws of God, in whatever way they may be known, there are other laws so called by way of analogy which Austin likewise distinguishes from those with which jurisprudence is conversant, namely, rules prescribed and sanctioned by opinion, and which he calls rules of positive morality. These to be considered law proper must be set by a determinate author. If the author be not determinate the laws are improperly called laws. There is another class of phenomena called laws, probably on account of the uniformity with which certain effects follow certain causes, as

* Exactly a fortnight after despatching the manuscript of this review of Austin's writings for the press, we have received a copy of Sir Henry Sumner Maine's new book on the "Early History of Institutions." In the 12th and 13th lectures of the work we have various criticisms on the "Analytical Jurists," and notably amongst them on Austin. In justice to ourselves, therefore, this note becomes necessary, and, we may perhaps be pardoned for this explanation, which goes a long way to support the text, that any apparent coincidence of view, in our criticisms with those of Sir H. S. Maine, is not due to a perusal of that great jurist's last work. On the place occupied by the discussion of the theory of utility in Austin's "Determination of the Province," Sir Henry Maine writes as follows:—"The 2nd, 3rd and 4th Lectures are occupied with an attempt to identify the law of God and the law of nature (so far as these last words can be allowed to have any meaning) with the rules required by the theory of utility. The lectures contain many just, interesting, and valuable observations; but the identification, which is their object, is quite gratuitous and valueless for any purpose. Written, I doubt not, in the honest belief that they would help to obviate or remove prejudices, they have attracted to Austin's system a whole cloud of prejudices both from the theological and from the philosophical side. If, however, following the order I have suggested, Austin, after concluding the examination of the nature of sovereignty and of positive law, had entered on an enquiry into the nature of the laws of God, it must have taken the form of an investigation of the question how far the characteristics of the human superiors called sovereigns can be supposed to attach to an all-powerful and non human ruler, and how many of the conceptions dependent on human sovereignty must be considered as contained in his commands. I much doubt whether such an enquiry would have seemed called for in a treatise like Austin's. Taken at its best, it is a discussion belonging, not to the philosophy of law, but to the philosophy of legislation. The jurist, properly so called, has nothing to do with any ideal standard of law or morals." (Early Hist. of Institutions, pp. 369, 370.)

"the law of gravitation," "the law regulating the descent of falling bodies," "the laws of health," &c. But these are not laws at all. Again, there are other laws which Austin says are improperly so called, namely, Laws Declaring Laws, Laws Repealing Laws, and Laws of imperfect obligation. The first and second, he says, ought to be classed with laws metaphorical and figurative, *i.e.*, under a subdivision of laws improper; whilst the third should be referred to the class of rules of positive morality.* As to the third we concur. But as to the first and second it is clear that each of these quadrates fully with Austin's definition of a Law Proper. They are commands enforcing a course of conduct. True it is, declaratory laws are merely a repetition of previous commands to the same effect, but they do not the less comply with Austin's definition for that. And as to laws repealing laws, these do indirectly the work of enacting laws; for the removing one law and the rights and duties of all under it has the effect of putting the parties *in statu quo ante fuerint*, and of creating the corresponding rights and duties. These then are Laws Proper and, when issuing from the political superior with the restrictions already suggested, are Positive Laws. This, then, is an oversight of Austin's, which neither of his editors nor any of his reviewers, so far as we know, has pointed out.

We are now in a position to place before the reader at a glance Austin's division of laws. We have thrown them into two tables which must be read with the corrections suggested.

- Laws.
  - Laws of God.
    - Revealed.
    - Unrevealed.
  - Human Laws.
    - Positive Law: the subject matter of Jurisprudence.
    - Positive Morality.

* Students' Ed. pp. 81 and 17. Works, p. 219.

- Laws.
  - Laws Proper.
    - Laws of God.
      - Revealed Laws.
      - Unrevealed Laws.
    - Positive Laws, set by
      1. Sovereign one or number.
      2. Subordinate political superior.
      3. Private persons in pursuance of legal rights.
    - Positive morality which has a determinate author, set by
      1. Sovereign one or number, not as political superiors, *e.g.* International Law.
      2. Private persons not in pursuance of legal rights, *e.g.* the laws of a Debating Society.
      3. Persons in a state of non-government, *e.g.* any imperative order by a savage.
  - Laws Improper.
    1. Positive Morality closely analagous to law proper.
    2. Law metaphorical or figurative.
    3. Anomalous Laws.
       1. Laws declaring Laws.
       2. Laws repealing Laws.
       3. Laws of imperfect obligation.

The term 'positive,' as already explained, is used to show that the classes spoken of flow from human sources.

Jurisprudence is concerned with positive laws, or with laws strictly so-called, without reference to their goodness or badness; with law as it is, not with law as it ought to be. So Lord Bacon says, "For the lawyers they write, according to the states where they live, what is received law, and not what ought to be law; for the wisdom of a law maker is one, and of a lawyer is another."* The determination of the

* Advancement of Learning, Book II.

principles on which positive law and morality must be fashioned, in order that it may merit approbation, belongs to the science of ethics in its two departments of the science of legislation and the science of morals.

Every positive law being set by a sovereign person or sovereign body of persons to a member or members of the independent political society wherein that person or body is sovereign or supreme, it is necessary to consider the distinguishing marks of sovereignty and independent political society, in order to determine the province of jurisprudence. We think that Austin's investigation of these notions is one of the best portions of his work. The idea of sovereignty which he puts forward so well and so fully is shortly this :— If the *bulk* of a given society are in the *habit* of obedience or submission to a *determinate and common superior*, who is not himself in the habit of obedience to a determinate human superior, that superior, whether one or a body, is *sovereign*, and that society, an *independent political society*.* Hence sovereigns have neither legal rights nor duties, nor is sovereign power capable of legal limitation,† and hence the vanity of attempts of sovereigns to bind their successors.‡ But any one limb of the sovereignty may be bound. This Austin states as clearly as could be wished. But in illustra-

* "If a body of persons assemble together to protect themselves, and support their own independence, and make laws and have courts of justice, that is evidence of their being a state." (per Best, J. Ysseri *v.* Clements, 2 C. and P. 225.)

† I. Cor. XV., 27. And so Hobbes, "It is, therefore, manifest, that in every city there is some one man, or council, or court, who by right hath as great a power over each single citizen as each man hath over himself, considered out of that civil state; that is, supreme and absolute, to be limited only by the strength and forces of the city itself, and by nothing else in the world. For if his power were limited, that limitation must necessarily proceed from some greater power. For he that prescribes him its must have a greater power than he who is confined by them." (Philosophical Elements of a True Citizen. Works, Molesworth's Ed., English, Vol. II., p. 88.)

‡ Statute 42, Edward III., c. 2, enacted that all statutes contrary to Magna Charta should be void; yet portions of Magna Charta have been repealed, and the repealing statutes have constantly been held in force. (Jenk. Cent. 2. Cf. also 4 Inst. p. 43.)

ting this point from English Law, he falls into serious error, and speaks of the King as "absolved completely from legal or political duty,"* words after time-serving Dr. Cowell's own heart.† The statement is not correct, but it called in vain for correction from the editor of this students' edition, who prefers, sillily and fawningly, to talk of "the venerable tradition that the Queen is personally free from legal obligation.‡" Austin seems to mistake the meaning of the maxim as applied in later times. The King is not completely absolved from legal or political duty. If that were so, then, the line,

"The right divine of Kings to govern wrong,"

were no satire, but a very truism. The King is not *solutus legibus*, though ordinarily no legal remedy is available against him; and the courts would give him no aid to enforce a breach of the law. Statute 5, Edward III., c. 29, enacted "that the King shall hold a Parliament once in the year, or twice, if need be." Lord Coke told that 'English Solomon,' King James, who wished to sit as judge in the Court of King's Bench, that he could not legally do so.‖ Again the King is frequently a party in civil suits. It is true he is petitioned; this is for the sake of courtesy. The sovereign must be a Protestant.§ Here is a legal duty enforced by a legal sanction. He could never be indicted, for he would be proceeding against himself. It has been suggested to us that it is correct to say, the King is absolved from legal and political duty, inasmuch as his acts contrary to law are nonentities in the eye of the law. To this, however, we cannot assent; for if this were so, why should it be necessary for the Chancellor to cancel the King's Letters

* Works pp. 279, 280. Students' Ed. p. 110.

† Cowell's Interpreter Ed., 1607, ad. verb. 'King,' 'Parliament,' 'Prerogative.'

‡ Students' Ed., p. 121., n.

‖ 12 Rep. 65. 8 Inst. 71.

§ Statute 12 & 13 W. III. c. 2.

patent granted contrary to law; a duty which, Lord Coke tells us, is the highest point of his jurisdiction?* The meaning of the maxim is well stated by an acute modern thinker when he says, "In particular the doctrine of the King's vicarious responsibility, in the person of his ministers, which first gave a sane and salutary meaning to the doctrine of the King's personal irresponsibility ("the King can do no wrong"), arose undeniably between 1640 and 1648. This doctrine is the main pillar of our constitution, and, perhaps, the finest discovery that we ever made in the theory of government. Hitherto the doctrine, *that the King can do no wrong*, had been used not to protect the indispensable sanctity of the King's constitutional character, but to protect the wrong. Used in this way it was a maxim of Oriental despotism, and fit only for a nation where law had no empire. Many of the illustrious patriots of the Great Parliament saw this; and felt the necessity of abolishing a maxim so fatal to the just liberties of the people. But some of them fell into the opposite error of supposing that this abolition could be effected only by the direct negation of it; *their* maxim accordingly was, "the King *can* do wrong," *i.e.*, is responsible in his own person. "By this exquisite political refinement the old tyrannical maxim was disarmed of its sting; and the entire redress of all wrongs, so indespensable to the popular liberty, was brought into perfect reconciliation with the entire inviolability of the sovereign, which is no less indispensable to the popular liberty. There is, moreover, a double wisdom in the new sense; for not only is the object (the redress of wrong) secured in conjunction with another object (the King's inviolability) hitherto held irreconcilable, but even with a view to the first object alone a much more effectual means is applied, because one which leads to no schism in the State, than could be applied by the blank negation of the maxim; *i.e.*, by lodging the responsi-

* 4 Inst. p. 68.

bility exactly where the executive power (*ergo* the power of resisting this responsibility) was lodged."* This is a clear statement of the meaning of the maxim, but De Quincey is not quite correct in saying that the doctrine undeniably *arose* in 1640-48. Sir James Macintosh considers that the first conspicuous exercise of the doctrine was in the case of Michael de la Pole and others in 1386.† But there was an earlier and more remarkable exercise of it in the case of the Bishop of Norwich, Chancellor to Edward II.‡ It undeniably became settled about 1640.

Under the consideration of sovereignty and independent political society, Austin examines, clearly, the various forms these have assumed, and concludes this portion of his enquiries by pointing out that the determination of the province of jurisprudence is only an approximate one. The province of jurisprudence is positive law. But the idea of positive law involves the idea of sovereignty and independent political society. And these can only be defined in the somewhat loose way in which Austin has defined them. What is a *habit* of obedience? What proportion constitutes the *bulk* of a society? These and other questions perplex the problem, and render it insoluble except as Austin has solved it.

(*To be continued*).

III.—CURIOUS LAW EXTRACTS. PART II.

WE are gravely told by Bracton, and he is followed by Lord Coke, that the true reason why, by the common law, a father cannot inherit real estate by descent from his

* De Quincey, Works, vol. XI., pp. 314-5 † 1. Hist. Eng. p. 328.

‡ Rot. Parl. 1 Edw. III. n. 3. 2 Edw. III. n. 21. 23 Edw. IV. n. 4.

son, is, that inheritances are heavy, and descend, as it were, by the laws of gravitation, and cannot re-ascend.—Co. Litt. 11. 2 Bl. Comm. 212.

In the course of the argument in *Lincoln* v. *Wright*, 4 Beav., 171, Lord Langdale observed: "All interrogatories must, to some extent, make a suggestion to the witness. It would be perfectly nugatory to ask a witness if he knew anything about something."

"The sparks of all sciences in the world," says Sir Henry Finch, "are raked up in the ashes of the law." Law, p. 6.

A writer in the *Edinburgh Review*, No. 96, p. 491, thus speaks of the admirable reports of Saunders: "The example set by the special pleaders, of whom that tun of sottishness and quibbles, Chief Justice Saunders, is the delight, &c."

"The King being God's Lieutenant cannot do a wrong." 11 Rep. 72 a.

Sir Walter Scott says of Baron Fortescue, that "*though* a lawyer, he was a man of great humour, talents, and *integrity*."

"Let one devil torment the other," said my Lord Keeper Egerton to a question asked him, what should become of the broker: both broker and usurer had conspired to cot in a young gentleman.

The head note to *Blackman* v. *Bainton*, 15 C. B. N. S. 432, is quaint: "Twenty-five witnesses and a horse on one side, against ten witnesses on the other. Held, not such a preponderance of 'inconvenience' as to induce the Court to bring back the venue from the place where the cause of action (if any) arose."

"Sic utere tuo ut alienum non lædas." This maxim was once discarded unceremoniously by Mr. Justice Erle. "The maxim," he said, "is mere verbiage. A party may damage property where the law permits, and may not where the law prohibits, so that the maxim can never be applied till the law is ascertained, and when it has been, the maxim is superfluous."—*Bonomi* v. *Backhouse*, 36 L. J. Q. B., 388.

Shower reports a case of sharp practice, in which "the

attorney and *counsel* both were checked for this mapping practice"; and they were told by Scroggs, Chief Justice, that "since you have gone so vigorously to work we will use the rigour of the law against you."—*Harwood* v. *Wheeler*, 2 Show., 79.

Serjeant Maynard, who died in the reign of William III., is said to have had "the ruling passion strong in death" to such a degree, that he left a will purposely worded so as to cause litigation, in order that sundry questions which had been "moot points" in his lifetime, might be settled for the benefit of posterity.

Baron Bramwell once observed: "Every person of any experience in courts of justice, knows that a scintilla of evidence against a railway company is enough to secure a verdict for the plaintiff, and was once, in a case before a most able judge, the late Chief Justice Jervis, in which I was beaten, and dare say rightly, in consequence of an observation of his: "Nothing is so easy as to be wise after the event."—*Cornman* v. *The Eastern Counties R. R. Co.*, 5 Jurist, N. S., 658.

In the "Table of Abbreviations" in that very excellent work, Bruton's "Compendium of the Law of Real Property," we find the following: "Bac. Tr. The Law Tracts of Lord *Byron*."

"In some of the cases brought against Lord Bacon, implying corruption, the sums of money received by him were not gifts at all, but money borrowed, and recoverable as debts. Three of these cases gave rise, after Bacon's death, to a curious question. Being claimed by the leaders as *debts* due to them from the estate, the executors pleaded that they had been decided by the House of Lords to be *bribes*." Bacon's Works, vol. xiv. p. 264, note, ed. Spedding.

That acute judge, Mr. Justice Maule, in summing up a case of libel, and speaking of a defendant who had exhibited a spiteful piety, observed, "One of these defendants is, it

seems, a minister of religion: of *what* religion does not appear; but, to judge by his conduct, it cannot be any form of Christianity."

In the year 1598, Sir Edward Coke, then attorney-general, married the Lady Hatton, according to the book of Common Prayer, but without banns or license, and in a private house. Several great men were then present, as Lord Burleigh, Lord-Chancellor Egerton, &c. They all, by their proctor, submitted to the censure of the archbishop, who granted them an absolution from the excommunication they had incurred. The act of absolution set forth that it was granted by reason of penitence, and the fact seeming to have been done *through ignorance of the law.—Middleton* v. *Croft*, Cunningham, p. 103, 3d ed.

In the case of *Musselman* v. *Musselman*, in the Indianna Reports, vol. 44, p. 107, 1873, we find, among others, the two following head notes:

"Where it does not appear, on appeal, how smoking in Court by the judge and attorneys prevented a party from having a fair trial, and the party assigning such conduct as a ground for a new trial does not appear to have objected to it, there is nothing for the Supreme Court to consider in relation to such conduct."

"The assignment as a reason for a new trial, 'that the Court erred in sleeping or sitting with his eyes closed during the reading of the written evidence on the part of the plaintiff at the trial of the cause,' is too vague and indefinite. If the judge were asleep, the party should have ceased reading or awakened him; if he sat merely with his eyes closed, it is presumed he did so to hear the more acutely."

The nicety and technical precision required in criminal pleading, have often been the subject of remark. The policity and tautology of Equity Pleadings likewise have often been animadverted upon. "I remember," said the late Lord-Chancellor Campbell, "when Bills in Equity told the same story over and over again, and each time more

obscurely than on the previous occasion. When the *answer* came, the great object in drawing it up was, that however long it might be, it should form only one sentence in order that if a part of it had to be read, it should be necessary to read the whole! But I am happy to be able to say, that both the Bills and Answer, which I have lately read, were simple, reasonable, grammatical, and perspicious." Hansard N. S. vol. 154, col. 1032.

This passage occurs in Sir Vicary Gibb's* argument in the Banbury Peerage†: "Age may not be proof of impotency, but it is evidence of it. The probability of the Earl's begetting a child at eighty is very slight, and it is not increased by the appearance of another child two years later. Instances have been adduced for these extraordinary births, but none have been cited, in which a man at eighty-two, having begotten a son, had concealed the birth of such son. Would not he seek publication rather than concealment? Besides, at the birth of children in families of distinction, it is generally an object of much anxiety to have the event authenticated. Some registry is made of it. None has been found here after the most diligent search. If the register is lost, the date may always be supplied by the banquets and festivities with which it is contemporaneous. Why! the whole country would have resounded with the ringing of bells; you would have had processions of old men upon the anniversary of such a prodigy. It would have excited as much surprise as if a mule had been brought to bed? It reminds me of the lines of Juvenal:—

> Egregium sanctumque virum si cernis, bimembri
> Hoc monstrum puero, vel mirandis sub aratro
> Piscibus inventis, et fœtæ comparo mulæ.
>
> Sat. XIII. 64.

In no register, in no will, in no document, is there any notice of this wonderful production. And then, not content

* At the time Attorney-General.

† Reported in an Appendix to Le Marchant's Gardner's Peerage, pp. 427, 428.

with one, the miracle must be multiplied. It was not enough that one child should be born to a man at eighty-two; he must have another when he was eighty-four. And nature consummated her prodigality, by lavishing on these children the strength and vigor which she usually denies to the offspring of imbecility."

In a case in the Year Books, 22 and 23 ed. I., p. 448, a counsel makes a very apposite Scriptural quotation. Metingham, Chief Justice, says: "If my vilein beget a child on my land, which is vileinage, and the child so begotten go out of the limits of my land, and six or seven or more years afterwards return to the same land, and I find him in his own rest, at his own hearth, I can take him and tax him as my vilein; for the reason that his return brings him to the same condition as he was in when he went." *Heiham* of counsel responds: "He fell into the pit which he hath digged."

An indictment charging that the defendant *forged* a certain writing obligatory, by which A. is *bound*, is void for its manifest inconsistency and repugnancy. The Court:—"That is a wheel in a wheel, and can never be made good." *The King*, v. *Neck*, 2, Show, 472, 3rd. ed.

IV.—OUR COMMON LAW RECORDS. No. II.

By Pym Yeatman.

IN an article upon this subject which appeared in the February number of this Magazine, an estimate was made of the probable number of documents which we possess relating to the Common Law Courts, with a view to arriving at a solution of the question whether it is feasible to utilize them by means of transcripts and indices so as to bring them within reach of the general public, and an endeavour was made to shew the practical worthlessness of

the only portion that has been printed, the two volumes of the *Rotuli Curia Regis*, published by the late Record Commission, owing to the fatal course pursued by the late Sir Francis Palgrave, who edited them, in following without investigation the arrangement which it was conjectured he took from Arthur Agarde, who, some 300 years ago, made an attempt to extract from these rolls certain entries in an abreviated form chiefly relating to genealogy. The writer then proved conclusively that owing to this faulty arrangement Sir Francis Palgrave had omitted from his work a considerable number of membranes shewn to be at least as many as thirty, which were then attributed to the reign of John, but which were truly of the reign of Richard I., five membranes being proved to be earlier in date than any Sir Francis Palgrave had published. The writer also proved that thirty membranes which Sir Francis Palgrave and the present Keeper of the Records attribute to the reign of Richard I., were in reality of the later period. This faulty arrangement, of course, still continues to be adopted, as any searcher may find for himself, only notices in pencil of the writer's corrections being attached to the indices in order to warn the public of these grave errors.

This estimate proceeded upon the supposition that the arrangement of the membranes into bundles was accurate, but the writer suggested that another and a greater difficulty remained, and that was whether the bundles of membranes were arrranged in proper order; and he asked on what principle and by whom and when were they so arranged and tied up? Enquiries have been made at the Record Office for information upon this question, but of course none can be given, nothing is known upon the subject; however, a search has proved, on tolerably clear evidence, that some memoranda exist. These the writer discovered accidentally amongst the books, rightly or wrongly (probably oftentimes the latter) attributed to Mr. Agarde, and these notices are worth attention.

In a volume, said to be written, 1610, by Agarde himself, and which is called his "Repertory," is to be found a minute description of the Public Records in their then various depositories; and, after describing their exact position in the rooms of the Chapter House at Westminster, the contents of a chest called A, are stated to be the *Pedes Finium et Placita temporibus*, Ric. I & Johannem, and in a chest marked B, are the *Pedes Finium*, *Placita de Banco*, *Plita Cora Duo Rege et Plita Cora Juslicias Itinerantibus Temporibus*, Henry III, to which is added this note, "put into order by me in a summer spent only therein." It does not appear whether this only applies to the *Rotuli* of Henry III, but as they are chiefly dated, it would seem that it must include also chest A, in which case, it is tolerably clear that they owe their present arrangement to Mr. Agarde. Other notes to other items speak of Agarde's labours in other departments, and, turning to them, we find this fact, that he undoubtedly used the same numbering that exists at present, so that when Mr. Caley had them reunited, for it would appear that he was the person who conducted this work he undoubtedly did not interfere with their numbering and arrangement; for his numbers also exactly correspond with the numbering found in Agarde's manuscript. It would seem that Agarde's Repertory was subsequently copied on parchment, and in this volume are notes by Peter le Neve, his successor, who gave evidence, unhappily, of a great destruction or loss of records: amongst others we have to mourn the loss of bundles of records relating to the French territories whilst England had them. The Pope's bulls, whilst this country was so many centuries (nearly 1500 years) popish, others touching lands and Kings' affairs, no doubt very edifying; the paper relating to the "treasons" of Sir Thomas More and other martyrs of that date. The books found in Bishop Fisher's study, bundles of evidences relating to the battles in the West country, and also others relating to Irish affairs from Henry IV's time, papers of the greatest historical value. What can have become of them?

It is clear, therefore, from the fact that Agarde spent a complete summer in putting these documents into order that, prior to 1610, they must have been in utter confusion, and it is also tolerably-clear that, if this was the case, he did not take nearly sufficient time for the purpose. Indeed, the amount of mere writing that Agarde performed, is something appalling. Volume after volume testifying to his enormous industry and indefatigable perseverance, it is not too much to say that this one writer has accomplished vastly more real work than has been done by the whole staff of the Record office during the last half century. It is clear that he had not time enough to devote sufficient for this purpose, and hence we must not be surprised to find that, in some respects, the arrangement is very imperfect; indeed, this appears from the Rolls themselves. Few of them are dated, except by reference to a saint's day, and this, of course, supplies no help to indicate the year. No entry occupies a portion of more than one roll, so that no help can be gained that way. The hand-writing is various and informal, some of it exactly like that of the Fines of Henry II, leading one to a hope that we may yet discover some rolls of that date.

There are, unfortunately, but few of the rolls which are numbered, and these are sometimes clearly written by Arthur Agarde; for instance, Roll 9 Rich I. has contemporaneous numbers on membranes 1, 2, 3, 5, 6, 7. 4 has none, whilst 8, 9, 10, 11, 12 are clearly in blacker ink, obviously of a more modern date. So that it is doubtful whether they really belong to the bundle. Against certain entries in this roll are to be found crosses, in others marks of another kind. What these are meant to convey it is difficult to determine; possibly they are the work of Arthur Agarde; his books shew that he used hieroglyphics; probably the first seven rolls are in their proper sequence, but 8 and its followers are apparently quite out of order. None of the first seven rolls have any headings; the 8th is, however, headed "Octav Rotul," tri sept. p. pasch; the 9th is headed "Non Rotulus," the 11th

"Apud Northampton," the 12th "2 Rot. apud Northamp:;" so that, at any rate, these last two rolls are wrongly added to this bundle. Indeed the handwriting is dissimilar, and there is no kind of similarity apparently between them. Moreover, there is evidence of the termination of the bundle at Rot. 9, for, attached to this roll, is an ancient piece of parchment with an entry of the date, probably of Edward III., to the effect that it was unknown to which king's reign that roll belonged, whether to King Richard or John. A day is given in the Northampton Roll in Trinity, so that its place in the ecclesiastical year is probably correct, though it may belong to quite another civil year.

In Rot. 1 Richard I. there are no headings except "In crast St. Trinity," Rot. 1. "In the Octave of St. John at Westminster," Rot. 3. And "Ass. crastino St. Trinity" for Roll 7; and it must be noted that the numbering of these Rolls is in the handwriting, probably of Agarde, certainly not contemporaneous. Here there is a clear case of wrong arrangement, as the Octave of St. John could not possibly precede the morrow of Trinity.

In Rotli 2, Richard I., Rot. No. 1 is clearly dated the 6th year of Richard, after the feast of St. Michael at Westminster; and Rot. 3 is dated "All Saints at Westminster;" whilst Rot. 4 is the feast of St. Michael, clearly an erroneous arrangement. Rot. 5, "Wednesday past the Octave of All Saints;" Rot. 8, "Wednesday before the feast of St. Michael;" again clearly a wrong place. There are no numbers of any kind to this bundle, proof probably that they were only arranged as to feasts, and that only partially; and that it was not pretended that they all belonged to the same year; indeed, the hand-writing of some membranes is very much like that of Henry II.'s time; there is also a Roll of essoins dated 6 Richard—Michas, No. 7, Richard I., published by Palgrave as of the reign of King John, is most clearly wrongly arranged. Rot. 1 is for essoins from Pasc to Trinity, and John is clearly written in the corner; on the

back appears "the morrow of the ascension." Rot. 3, Octave of Trinity. Rot. 4, *essoins de malo lecto*, fifteen days from Trinity and Octave of John the Baptist. Rot. 5, also *essoins de malo lecto*, fifteen days from Trinity and fifteen days from St. John the Baptist, clearly showing that two different years are included. The last has a very strong resemblance to the writing of the reign of Henry II. The next Roll is conclusive, it is again *essoins de malo lecto a die Pasc*, for the 10th year of Richard I. Sir Francis Palgrave, in printing this Roll, states that "it is said to be 10 Ric. I." The entry is clearly contemporaneous, and there can be no question as to its date; and it cannot be contended that the rest of the roll is in its proper order, so that it is clear that the work of arranging these records had yet to be commenced. No doubt some of them are in order, but probably very few. The next membrane jumps up to the feast of St. John, the next goes back to four weeks after Easter, but this is in writing of a later addition, the ink is much darker, and obviously at some period some one has gone over the ground again and erroneously, for a little further on in the same membrane it appears that they had only reached three weeks after Easter. The next date is a month after Easter; the next the Sunday after the Octave of the feast of St. Peter and St. Paul (6th July); then three weeks after the feast of St. John the Baptist (15th July); then Roll 13 refers as to a future date to the Octave of St. Trinity, shewing clearly that it precedes and cannot succeed the last one; then at Roll 21 appears an entry of the morrow of Trinity, clearly showing the impropriety of the arrangements. At the back of 22 appears the date of the Octave of St. Trinity, which is followed by Roll 27, dated the Octave of St. John the Baptist, the entries of which refer to the 2nd coronation of King Richard, so that this portion of the Roll may be of course assigned to the reign of King John. This may be consistent with the Roll dated 10 Rich., but the former portions were of John. It may be noted that not one of the

whole of this large number of rolls has any number at the foot except those of modern date.

Roll 5 Rich. I. This Roll is dated Richard, 10, but the 2nd membrane clearly does not follow the first; the third also contains entries of a different nature, dated the Octave of Michaelmas, the next membrane again does not appear to belong to the series. Roll 6 is clearly the commencement of the assizes at Stratford, of 10 Richard I; and the last Roll relates to the assizes at Clerkenwell for Middlesex of the same year. Not one of the Rolls have any connection with the other, except that they are of the same year. This Roll clearly shews that the contents of the rolls has not been enquired into, so long as the dates apparently fitted: of course none of these Rolls are numbered.

Roll No. 4, Rich. I., is headed *Placita apud.*, Westminster, octave of St. Hilary, at Roll 2, 15 days from St. Hilary; on the back of this Roll it is stated that it is of the reign of 10 John, and Agarde so dates it.

Roll 3 John is again an example of erroneous arrangement; about the middle of the bundle are four Rolls which are clearly part of a series, but which do not seem to belong to the others. Roll 9 is marked "1 Jud." Roll 10 also 1 Jud. Roll 11, 4 Jud.; and Roll 12, 3 Jud., shewing, at any rate, that they are in wrong sequence, and probably in a wrong place altogether.

It seems quite clear that Sir Francis Palgrave was wrong in crediting the existing arrangement as correct, and this unfortunate result follows, that exceping some half-dozen Rolls which bear their own dates, no reliance can be placed upon any part of the work, for he can have given no attention to the important matter of arrangement. Any such Roll may or may not be in its right place, or it may belong to a very different reign: if this is an unfortunate discovery, there is this consolation in it, that we may yet be able to discover Rolls of earlier periods and reigns than we have believed, to

be in our possession; and, at any rate, this is clear, that the work of indexing and arranging these important Rolls must be done, and ought to be begun at once. Yet, with all their staff, nothing is done and little is attempted. The Common Law Records are yet untouched, and the Chancery Rolls are in equal confusion, no indices, no facilities for using them, and no attempt to employ upon them the large force employed at the office for the purpose.

The writer was recently much pleased to have placed before him a new work by some one belonging to the office, aimed at the right direction to supply a want he has long complained of, a calendar of fines, not a very large work, for it may have taken six or eight weeks to complete it; but if this is a specimen of the work that the officials are capable of turning out, they had better relapse into their ancient idleness, for it is peculiarly erroneous and misleading.

The first entry is as follows :— Henry II., county unknown, 25 Mich. Term. *Mich. fil Ogi et ux Querents* v. *Ogu fil Ogi et ux, defts., de Ranobile, pte, terr Willi. de Selfley's ptris ux pdcar.*

Except for the date, there is nothing very promising in a fine emanating from the Odger family, though in all probability one of these parties was a Justice of the curia regis in 8 Richard I., but this account is really very inaccurate and very poor. In the first place, the date is wrong; it is certainly not so early as 25 Hy. 2, and probably is two or three years later; but, as a fact, the document has been so much illused that it is simply impossible to fix the date, inasmuch as between the figures and the word reign there is such a space left that it is clear we do not possess all of them; and as the dot at the end is still existing, we can conjecture within a figure or two what the correct date is; then the names of the Ogerian wives are omitted, and the name of their father, for they were sisters, is positively spelt wrongly; it is not Selfleye, but Selflige. Agarde, in his transcript, which this compiler would have done well to follow in many matters, reads the word Selfangre; and he

may be correct, as he undoubtedly is in some matters which, but for his transcript, it would be impossible to decipher, though the context might supply very good evidence of them. Again, the venue, that is the county in which the estates lay, is said to be unknown; but had the compiler read the whole of the document, he would have found that part of the lands, if not all, lay in Suffolk. There are several estates mentioned, not one of which does this compiler condescend to name. Then there are services due from and to certain individuals whose names are of the greatest importance—William de Mandevill, Earl of Essex, Hugh de Caldicot, and others. Then, again, we have no less than ten barons and justices mentioned. Raun de Glanville, the great Glanville Justiciar Domini Regis, and Ric the Treasurer, the head of the Court of Exchequer, both being present. The names of some of these judges are only known by this single record. Here is a document which disposes of the modern absurdities respecting the date of the creation of our courts, a deed which establishes their antiquity, and which established, besides, the important fact that the records of suits between private persons were at that day preserved in the Curia Regis, a fact which shows that the common Bench was then a portion of that court, and that records of all the courts must have existed, for this record is but the conclusion of a suit between private parties, and it recites the *placita* of that very suit. Indeed, the various indications contained in this single record would prove the existence of a complete *corpus juris civilis*. The law of inheritance, of female heirs, of partition, of servitude, of lord and vassal, of debts, of marriage, of rents, of pleadings, and of courts, are all clearly indicated, and all these facts are only considered worthy of record in half-a-dozen words, which do not indicate any one of them. Such a calendar as this is worse than useless; it leads off the scent and tends to propagate error. This fine is all the more valuable, because, up to this time, the existence of the records of this

date of the superior courts have not been discovered; but though the records themselves are wanting, it is clear, from references contained in those we do possess, that they were once in existence, and the contemporary fines assist the proof of their existence. We have only four fines of this reign which are, of course, of the greatest value, but of course they are regarded, at the Record office, as things of slight worth, instead of being framed in gold and exhibited under glass—they are all huddled together in a trumpery little book worth about twopence. This little case is not nearly large enough to contain them, consequently, as Mahomet will not go to the mountain, the mountain must come to him, a Record-office version of an old story. The parchments are therefore twisted about and crammed down to fit into the little two-penny case, so great creases appear right down their venerable faces and through the middle; again at right angles to the first named creases, terrible suggestive of names likely to be lost and obliterated. Worse than this, some labourer, probably of the fourth class, has had them in hand, possibly the mechanic who fitted them into the little case. He evidently thought them of some value, for he has taken the trouble to brand them all over with big letters about the size of those with which they mark sheep asserting their proper ownership. In one case he has used this great coarse stamp so roughly, that the ink actually appears through the ancient parchment, and threatens to obliterate the most important part, namely, the names of the parties. It is a pity that the attention, at any rate of one of the clerks of the fourth class, cannot be called to these documents, or they may be used shortly to bind some of the trash that the office thinks worthy of printing. Of course these four fines have never been printed, though the fact that, during the last century, Serjeant Smith, of the Surrey Rifles, was kept out of his 'bacca' for three days, or that his wife was deprived of the regimental washing, would be printed at once, as are all the complaints of the glorious privates

of Her Majesty's army and navy, and of any camp follower who could get up a grievance. These matters are treated as State papers. But this is not all, nor the worst. On comparing this revised index of fines with the labours of Agarde in this field, it will be seen that numerous fines have been lost or mislaid—some of the reign of Henry II. are missing, all of 1 Richard I., and many others. Possibly a strict search might produce some of them, for Agarde carefully designates the coffers in which he saw them.

The fines are invaluable, frequently in supplying the key to the entries on the Rolls, and very frequently the result of the pleadings and the decisions arrived at; in fact, the actual result of the litigation, they form, in truth, an important part of the Common Law Records, and, like them, are in confusion, undated, unsorted, and without indices. Some of them possess dates which would help to date the Rolls correctly, and they ought to be most carefully preserved.

The Master of the Rolls objects that the work of arranging these records is simply impossible, owing to the immensity of the number. But this is a great error; in proof, the fact may be pointed out that one gentleman, General Plantaganet Harrison, has, unassisted, been through the whole of these Rolls and extracted from them much important evidence relating to pedigrees and estates, which is contained in many volumes, in his own hand-writing. These he has indexed carefully, and so valuable is the result of his labours, that Record agents, who are searching for evidence in any pedigree case, are thankful to give him large sums of money for the privilege of merely searching his indices. If, then, one man can extract matter of one kind of such value, what would be the value of the whole of them if properly arranged and indexed? They would simply be invaluable, for it is no exaggeration to say that they contain more information than any other documents, or than all the other documents which we possess, put together.

It is an erroneous view of the question to regard these

records simply as of value in genealogical matters; their chief value is the evidence they contain of our ancient laws and national history. Our judges do not in these days sufficiently bear in mind the saying of the great Lord Bacon, that their duty is *jus dicere non jus facere*, and necessity compels them to disregard it, for in the absence of knowledge of what the law really is they are compelled to make new laws. Since the time of Coke and Bacon our law has deteriorated, because our lawyers and judges have ceased to study the records of the past, and have substituted, for the wisdom contained in them, crude and imperfect notions of their own, which suffice, indeed, for the moment if it is enough to settle a case anyhow, but which only add to the confusion of our law as precedent opposes and succeeds to precedent and case to case. The pages of Meeson and Welsby, and of Ellis and Blackburn, are stuffed, as the late Lord Chancellor Westbury rudely observed, with "rubbish;" with utter folly and inanity, as the late John George Phillimore frequently insinuated, and yet the knowledge of the contents of these volumes, and others of a like nature, has gained for more than one man of very ordinary attainments, a great reputation; and if this industrious mole, too frequently a mere pig, can only add the reputation of being able to read black letter, a system which any sharp school boy can master in half an hour, he will obtain an amount of respect amounting almost to veneration. Very rarely indeed have these great reputations been fairly earned, for these great lawyers could not decipher half a dozen lines of an ancient record, nor understand it if they could. Hence is it that so many of the brightest intellects amongst those who attempt the study of the law have failed to make their mark, have given up the study in disgust, or, like more than one living judge, have simply ignored the study altogether, and have relied upon intellectual supremacy, or the possession of sound common sense, to enable them to steer clear of difficulties. If only our Common Law Records were made accessible

to ordinary scholars, they would find the study of them infinitely preferable to the rubbish of our reports; and we should not be pained by reading in the delightful pages of Sir Edward Creasy and Sir Henry Maine, and men of their high class, fables, when we ought to find facts and theories, as childish as they are untenable; whilst such pseudo historical writers as Freeman and Stubbs would be utterly driven from the field of legal and historical literature, for which they do not possess one single qualification, and relegated solely to their present very gentlemanly occupation of abusing, in the columns of the *Saturday Review*, and papers of that stamp, all those who have the temerity to expose their errors. It is a fearful thing, in these days, to utter the truth upon matters which some Oxford professors consider to be within their especial province; for so doing one is tolerably certain to be held up to ridicule as a fool or a lunatic; Oxford manners, in these days, at least when displayed anonymously comprising a large amount of Billingsgate, with very little fairness.

If, then, this great work could be accomplished for comparatively a very small sum, why is it not at least commenced, and why is not the reproach of ignorance removed from us? These records would be the glory of our law, properly arranged, in our new law courts, freely exposed, under proper custodians, to the learned and the curious. They would excite the pride of our countrymen, and the envy of the world. Like the engraved tablets of the ancients, they would incite the youth to study and the sages to reflection, and produce benefits for the whole nation. Why should they not be openly exhibited, even if we left them as they are, still undated and unsorted, or worse with their present erroneous dates fixed to them? That would be better than leaving them buried amidst heaps of rubbish at the Record Office, under the care of a keeper who can neither appreciate nor understand them; of a Titular Master of the Rolls, who enjoys his salary and ignores their existence. Keep the Record Office, by all means, for the odds

and ends it contains. Some of them are valuable enough, but most of them of little worth; but restore the Rolls of Court to their proper custodians. Let the *Curia Regis* possess its own records, and the Common Bench also its own; whilst the Court of Chancery, or rather, the Court of Exchequer, should exhibit proudly the Great Rolls of the Pipe, the earliest Common Law Records extant, in this or any other country.

V.—THE LAW OF OFFICIAL LANGUAGE IN AUSTRIA, AND AUSTRIAN POLAND.

ATTENTION has been called, in a recent number of the *Revue de Droit International*,* to a subject of considerable importance, viz.: the law which governs the official use of the various languages prevailing within the Austro-Hungarian Empire. Dr. Kasparek, the author of the paper on which the present article is based, is a Professor at the University of Cracow, and while favourable to the development of Polish as a direct means of educating the Polish subjects of the Empire, and confirming their loyalty, he holds the balance very impartially between it and German. When Galicia passed into the hands of Austria, in 1772, Polish was the official language for administrative purposes, while in the Courts of Law, and in public instruction, both the Polish and Latin tongues were employed. The first German Primary School was founded at Lemberg in 1775, and the pupil teachers were prepared for their future career in German. In 1785 the Emperor Joseph II. not only exacted a knowledge of German from all judicial functionaries, but threatened to strike off the rolls all advocates who, at the end of two

* No. IV. for 1874, pp. 667, 686. (Brussels: Bruylants-Christophe et Cie.)

years, should not draw up their opinions on cases in that language. Under Leopold II., this rigid system of Germanization was modified, and a knowledge of German was not required from judicial officers. The provincial diets, organized in 1817, made constant attempts in favour of Polish, but their petitions met with no success, so that when the year of changes, 1848, dawned upon Austria, her Galician subjects were being taught in German and Latin, but their University, at Lemberg, had only a chair of Polish grammar, not soaring so high as literature. German was in use at this time for administrative, and Latin for judicial purposes. When 1848 made its influence felt in Austria, fundamental laws were hastily drawn up, promising "liberty and equality" to the various nationalities agglomerated under the Austrian sceptre. Bench and bar once more began to employ the Polish tongue, though from long disuse their language was far from being correct, says Dr. Kasparek. In 1849-50, the Imperial Royal and Apostolic Government went so far as to order that the laws of the Empire should be published in ten different national languages, and that each text should be considered authentic. This usage, though abandoned for the promulgation of laws, remains in force for the paper currency of Austria, the notes bearing their value in the various languages of "polyglot Austria," as Dr. Kasparek justly calls it. Since 1853, the German text of laws is alone the authentic one, and, as this bears retrospective force, the concessions made to the "ten languages," have not been either valuable or lasting. But, curiously enough, the Ruthenian language got a lift in 1848 when it claimed the rank of a "national" tongue, and, as the Government proved favourable to its pretensions, the advance then made has been kept up.

From 1851 to 1860 is a period of absolute preponderance of German in Galicia, and even the old university of the Jagellons at Cracow had to bow before the storm. Ruthenian, however, kept its place side by side with Polish in

school teaching, and a chair of Ruthenian was instituted at Lemberg to balance one of Polish. Religious teaching was, at this time, generally given in the national languages, and not, as before 1848, in German, though, by a rescript of 1854, German was ordered to be the dominant language in the higher classes of the "Gymnasien."

In the courts of justice, German reigned paramount after the suppression of Latin. Undefended parties might address the court in Polish, but even the judgment was given in German, and a Polish translation of the sentence was only to be had after special demand. In criminal procedure, an edict of 1852 ordered that cases should be closed in the language of the country, if the accused did not know German. But a ministerial decree of 1856 ordered that no other language than German should be used by the public servants, or for the defence, "even when the accused was unacquainted with the language." This, as Dr. Kasparek observes, was very much like saying, "outside the German language no salvation." And, unfortunately, owing to a bad system of prohibiting, at will, the publication of decrees and edicts, even concessions which were made in 1852, and 1860, restoring the use of the national language of the accused in criminal procedure, were not allowed to be published. This mode of acting cannot be too strongly reprobated. It is, manifestly, impossible for barristers to conduct cases properly, or for a person to know whether he has violated the law or not, and how he is to plead, if laws are not published with the changes made from time to time. Strictly speaking, Dr. Kasparek remarks, there is no common language for the Austro-Hungarian Empire. The delegates of the two divisions (Cis-Leithan, and Trans-Leithan) meet only on the common ground of a silent vote. In this sense, Austria is the only country with constitutional institutions, that can boast of a parliament which does not speak! A common currency and a common army are the links that practically bind the two sections together.

A curious sample of the practical inconveniences that are capable of arising out of Austro-Hungarian Dualism, is given by Dr. Kasparek in the hypothetical, but possible, case of a Hungarian court demanding from a Galician tribunal, prehaps not more than a mile or two the other side of the border, the arrest of a notorious criminal. The consequence would be, that the Galician court, not understanding Hungarian, might ask the Cracow authorities to procure them a translation, and in default of a Hungarian interpreter at Cracow, the document might have to be sent to Vienna. It is obvious that before the paper came back, properly translated into Polish, the criminal might have reached America in safety.

For representative purposes, German may be defined as the official language of Austria, and it is also the official language of finance, the post office, and telegraph service. In the Reichsrath bills are laid before the House in German, and the voting takes place on the German text. It is also the language in which the Reichsrath is opened, and in which reports of committees are addressed to the House. But all this, Dr. Kasparek says, rests only on usage. The oath has often been taken in other languages, and it is even perhaps possible, he thinks, that motions might be made in the House in other languages, if their object was not a new law. And it is believed by him that this liberty could not be restricted, since, by the electoral law of 2nd of April, 1873, the conditions of eligibility for the Reichsrath are the same as those for the Landtag, or Provincial Diet, viz: that the person elected shall be of the male sex, fully thirty years old, and shall have been an Austrian citizen for more than three years. In Hungary, on the other hand, according to the electoral law of 1847-8, only those persons are eligible who can comply with the requirements of the law constituting Hungarian, the sole language of political life, with the exception of the deputies for Croatia and Slavonia, who may use Croatian even in the Hungarian Diet. In the kingdoms of Galicia and Lodomiria, and the Grand-Duchy of Cracow, Polish is the

provincial language, with certain provisions in favour of German and Ruthenian, as previously related. The decisions of the Diet, and the orders of the "Landesausschuss," or Provincial Delegacy, must be published in Polish as the authentic text, and also in Ruthenian, and, if need be, in German. Polish is the official language of the Diet, and is used by the "Landmarschall" in the exercise of his functions. If, however, he is addressed in Ruthenian he answers in the same tongue; in all other cases he employs Polish. The minutes of the sittings are taken both in Polish and Ruthenian, and both languages serve as the basis for a final vote, but in case of doubt the Polish text is decisive. The Provincial Delegacy transacts its business, and carries on its correspondence in Polish, but gives answers in Ruthenian to applications addressed to it in that language. The language of education, in the popular and middle schools, is determined by the will of the person or body supporting them. In schools kept up by public money, the committee decides, in conjunction with the provincial board of education, whether German or Polish shall be employed. Recent provisions have given Ruthenian an increasingly favourable position, and the Diet has power to make still greater concessions. Parents and guardians are completely free, without distinction of creeds, in the choice of a school for their children or wards. At the present time it would seem, from Dr. Kasparek's remarks, that German is not so well taught as the other languages, and he states that the present governor of Galicia, Count Goluchowski, has been frequently obliged to draw the attention of the board to the defective state of this branch of instruction.

The language of the courts is, to a great extent, decided by the nationality of the interested parties in a case, whether communes or individuals, the judicial authorities being bound to use, whether in speaking or writing, a language intelligible to them; and the same rule applies to the "procès-verbal" of the declarations and examinations, both of the parties and

their witnesses and experts, and also to all judgments, decisions, warnings, and citations, throughout Galicia.

Similar regulations govern the keeping of public registers. In their internal relations, the Galician authorities are bound to the use of Polish; while in their relations with the imperial administration, and with all courts outside the province, German retains its official status.

There are many points on which it is impossible to give any details with certainty, owing to the unfortunate system of bureaucratic secrecy still prevailing in Austria. One particularly grievous cause of doubt is mentioned by Dr. Kasparek in relation to the decisions on the language of Galician courts of justice. He states that he has often been obliged to use a doubtful formula, because, besides the laws and decrees published in the official journals, there are in existence numerous instructions to the various authorities, known by the name of "Normalien," which are inaccessible to the public. It is therefore, he continues, exceedingly difficult to arrive at certainty in regard to any law whatsoever. And the extent of this difficulty may the better be comprehended when we mention, on the authority of Dr. Kasparek, that between the years 1856 and 1872, the number of "Normalien" addressed to the provincial court of Cracow alone, is computed at about 800! At this rate the *secret* statute book of the Austrian empire bids fair, at no distant period, to rival our own *published* statutes of the realm, and to reduce the Austrian bar to utter bewilderment. We hope they may yet find a clue to win their way out of so puzzling a condition.

VI.—THE JUDICATURE ACT, 1873.

THE country may be congratulated upon the decision of the Goverment with respect to the fate of the Judicature Bill of 1873, and the thanks of the country are especially due to those who have organized such an opposition in England (no factious or party movement, as Lord Selborne insinuates), that, coupled with the enlightened action of the lawyers of the sister kingdoms of Scotland and Ireland, the Government had no choice but to bow to it. Affairs, in legal circles, had fallen into utterly unsafe hands, unsafe because visionary experiments had taken the place of sober common sense, and we ran great danger of losing much, very much that is valuable in our Common Law. Chancellors of either party were apparently lost in admiration for each other's virtues, and compliments to each other of an immoderate kind had taken the place of proper criticism. Hence, perhaps, the most dangerous Act of Parliament that was ever penned, the most specious and ridiculous, the worst drawn and most awkwardly contrived, had actually passed through the legislature, and, but for the happy despatch which Mr. Gladstone gave himself about this time last year, it would now be the law of the land. It is not difficult to see why it passed through the House, because it undoubtedly removes some great blots upon our judicial system, and contains some provisions of undoubted value, which, it is to be hoped, may yet be preserved to us.

The great benefits which the Act secures are, first and chiefly, the investing the Courts of Common Law with the powers of the Court of Chancery. That proceeding only restores the pristine condition of our Law Courts, both courts formerly possessing both legal and equitable jurisdictions. The Chancery system, as it now exists, being

only a reflex of the original prerogative of mercy which the King reserved to himself in every case, and which he chiefly used in obedience to the dictates of his conscience, as it was enlightened by the precepts of the priest of the court, an officer who, on the decline of piety, preserved his usefulness simply because the ignorance which naturally followed made him a person of importance to the Court, inasmuch as probably he was the only person about it who retained any remains of learning, and therefore, as cancellarius, his position became of importance, and gradually it assumed the enormous proportions with which it is now invested. The conscience of the king has long ceased to have any influence on the Chancellor, or his conscience on that of the King, and custom has produced a current of decisions which at this day are as inflexible as the laws of the Medes and Persians. The consequence is that we have two separate systems of law, which is not only expensive but ridiculous; and hence we gladly welcome an Act of Parliament which deals boldly with the question. Whether the present Act is well drawn with respect to this part of it, would be difficult to state. It appears to possess the double fault of being too general and too particular. The jurisdiction is conferred too loosely, whilst some minute particulars are put forward, which greatly endanger the existence of others, and in the new schedule are contained as changes many things which are already in existence. The abolition of terms and vacations is simply absurd; but an alteration in both, and power to effect this purpose, may well be granted. It is to be hoped that this portion of the Bill may be modified. The power of the Court to refer causes for trial before referees and assessors, if exercised under conditions, might be very valuable, because at present this work is frequently conducted by the Masters, who, some few of them, are shamefully incompetent to conduct their duties. And it is to be hoped that the appointment of such referees and assessors will be made by the Government, and not by the Judges as at present; but

in no case should this power be exercised against the will of the parties. The greatest injustice is now frequently done by the Judges by the aid, or rather under cover, of their limited powers. No man ought to be deprived against his will of a fair trial before a jury.

The appointment of District Registries would be most valuable not only to the public but to the profession, and most particularly to the bar, as it would destroy the power of infamous cliques who combine to destroy those who are in their way. One would hope to see the corruption which now exists in every rank of the bar checked, and in many cases removed. The regulations as to the personal officers of the Judges might be fairly retained; and clause 86, as to patronage not otherwise reserved, might very properly be extended to include all in Her Majesty. So, too, the provisions of part 6, giving power to the Queen in Council to confer greater jurisdiction on inferior courts might be retained and extended. It would be a sad pity to lose the benefits of these enactments; and it is to be hoped that, although it cannot be expected that the present Act can in this session be safely converted into a sound measure for the purpose yet, that next session an Act may be passed which shall embody the good contained in this indifferent Judicature Act of 1873—the cause why it passed—the reason why its destruction will otherwise be regretted. But its withdrawal was inevitable. The Act, as it stood, threatened to destroy all that was great and precious in our constitution, amongst other absurdities, although each of our ancient courts attained their distinctive titles and especial jurisdiction, yet, at the same time, they were merged into a bran-new tribunal with a remarkable name. Lord Cairns proposed to amend this by calling it Imperial, though, unfortunately, his lordship overlooked the fact that ours is not an Empire, but, from the earliest times, a confederation of kingdoms. The Judicature Amendment Act of 1875 might have conferred upon the Queen of all the Isles, a

title which would compel her to compete with those of the Brumagem Emperors of Mexico, Brazil, or even of Germany, to the utter loss of the ancient prestige and prerogatives of her grander title and dignity. How the courts were to be new and old at the same time is not pretended to be explained; and this transformation scene stamps the Act with utter imbecility.

As it has already been pointed out, in a previous article in this Magazine, to save a few pounds, the Ancient Order of Serjeants-at-Law was to be suppressed, though it might well exist with a reform as to expenses; and its destruction would aim a deadly blow at the Constitution, as it would be a direct infringment of the liberties of the people, and so in hosts of minor matters is this miserable Act filled with snares and pitfalls, which, it is to be feared, cannot safely be eliminated in the present Session. The importance of these dangers is lost, in comparison with the enormous wickedness of destroying the balance of power in the Constitution, by the destruction of the legitimate power of the House of Lords, its greatest and most ancient prerogative, the power of controlling even the king. What other ribunal can so fitly determine the issues affecting the Royal Prerogatives? That danger is happily averted, and it would be wrong to revert to it; it is sufficient to say that we cannot be too thankful for the defeat of a measure mainly so absurd and unsatisfactory. But in our rejoicing, let us not lose, if possible, the crumbs of good which this Act contained, though, possibly, their retention will be very bitter to those who only held them out as baits to catch the unwary. No one likes to see the prey decamping safely with the bait intended to lure him to destruction. But this should be done. The last Amendment Act has already passed the House of Lords, of course without the slightest criticism; but it is not to be feared that the timidity of the lay peers will be imitated in the House of Commons, and as assuredly the Act must face the sharp edge of com-

mon sense, sans compliments, it is to be hoped that the Government will see the wisdom of postponing legislation upon the whole question, and deal with it next Session in a wise and comprehensive spirit. There is no immediate hurry, and it would only disarrange our present Courts of appeal, which are not strong enough to bear much tinkering if the system of robbing Peter to pay Paul, the master principle of the present Amendment Act, were proceeded with. It is simply mischievous to create a new court for a single year, as it is to be hoped that the Government will discover. They should remember the words of our ancestors many centuries ago, *Nolunnis legis Angliæ mutari.*

JUS.

VII.—SUPREME COURT OF JUDICATURE ACT (1873) AMENDMENT BILL, No. 2, SO FAR AS RELATES TO APPEALS.*

By ALEXANDER EDWARD MILLER, Q.C.

NOTWITHSTANDING the temporary collapse of the Lord Chancellor's Judicature Bill, so far as regards the Supreme Court of Appeal therein proposed, it may, I conceive, be taken as settled, as completely as anything in the future can be so, that we are to see established, and that at no distant period, one Supreme Court of Final Appeal, clothed with all the jurisdiction, and exercising all the functions in respect of appeals, at present divided between the House of Lords and the Judicial Committee of the Privy Council.

* A paper read at a meeting of the Law Amendment Society on the 26th ult.

It may, I imagine, be further assumed, that this jurisdiction will be entrusted to a separate and distinct court, having some independent constitution of its own; and that Lord Selborne's idea of a rehearing before a larger quorum of the same court, and Lord Cairns's proposal for an appeal from one division to another, each consisting of judges equal in dignity and position, and even alternating with one another after the vicious example of the Court of Exchequer Chamber, have been alike happily abandoned. Under what disguises it may be thought prudent that the court should sit, how far it may be considered desirable, either for the sake of disarming opposition or under any idea of preserving prestige, that all or any of the judgments of the court should take the form of reports to the House of Lords or recommendations to Her Majesty in Council, I do not care to inquire; provided only that the tribunal of last resort from every Court of Judicature in the empire, civil, criminal, and ecclesiastical, be in reality one and the same, and that that tribunal be properly constituted, having regard to the duties which it will have to perform, I look upon it as the purest of trivialities to consider whether any and which of its orders shall be promulgated under the guise of an Order in Council, a resolution of the House of Lords, or any other form which may be considered appropriate. For example, a not unimportant section of the community at present object to the authority of the Judicial Committee in ecclesiastical appeals, on the ground that it is a lay court: now, if it would tend to remove this objection—that the orders of the Court of Final Appeal should, in ecclesiastical causes, be issued in the name of the Upper House of Convocation, or otherwise howsoever, I should not dissent therefrom, provided only that these appeals are in fact heard and decided by the same men who are to sit in judgment upon appeals from the High Court of Justice, (in all its divisions) from Ireland, from Scotland, and from India and the colonies. I fail to see that the decisions of the Judicial Committee are,

at the present time, one whit less authoritative or satisfactory, because they conclude with the words, "Their lordships will therefore humbly advise Her Majesty" so and so, than they would be if they concluded, like the decrees of the Court of Chancery, "This court doth order" to the same effect. If, then, there be any person (and I believe they may be reckoned by the million) who will find consolation or satisfaction in any such sham perpetuation of existing authorities as I have described, I for one should be sorry to disappoint them, and I should earnestly deprecate any action on the part of more thorough-going (though not more thorough) law reformers than I am, which would endanger or postpone the realization of the substance from any objection to the manner of the coming reform. What ought, so far as I can venture to form an opinion, to be the constitution of our Supreme Court of Appeal, and by what principles we should be guided in its formation, I have already discussed so fully in a paper which I read before this Association at its Annual Meeting in Glasgow,* that it would be presumption in me now to go over the ground again. I may, however, be permitted to state shortly, as more or less connected with the remarks to to follow, the conclusions at which I then arrived. I showed in that paper, at any rate to my own satisfaction, that we ought to have a Court of Final Appeal of not less than five nor more than nine members, inclusive of the Lord Chancellor for the time being, containing no *ex officio* member except the Lord Chancellor, and a seat in which should be incompatible with the holding of any other judicial office, except that of Lord Chief Justice of England, and which should offer to its members such advantages, in the way of salary, position, and otherwise, as to make a plan in it certain to be regarded as preferable to any other position whatever, attainable by force of legal eminence.

It is an injustice both to the judges themselves and to the country, to offer to the judges of such a court a position

* See January number of this Magazine.

barely superior to that of the judges whose decisions they are to review, and a salary actually inferior to that of more than one of the judges of first instance.

Further, I showed that the Court must not, if it is to be accepted by the rest of the empire, be or tend to become a purely English court, and I suggested a scheme which seemed to me sufficiently to provide for this without unduly hampering the Government, for the time being, in the selection of the judges. Indeed, if the appointments are honestly made upon grounds of legal eminence, and not as a reward for political purposes, very little question of *selection* can ever arise; it is not probable that more than eight or nine men will ever be forthcoming at any one time fit to take their places on the bench of our ideal court.

If each gentleman present was at this moment to write down—without preconcert—the names of nine persons, to be recommended by him for this office, from the ranks of the profession (Bench and Bar) throughout the empire, how many names, do you suppose, would be found on *every* list? and yet no one who could possibly be passed over (apart from personal prejudice) by any one fairly acquainted with the subject, could be possessed of sufficient eminence for the office in question. For my own part, I do not believe that at this moment there are more than six, or at most seven, men in existence to whom this office could be fitly entrusted, and these, or the majority of them, would be necessarily pitched upon, to whomsoever the duty of selection was committed, if only that duty were honestly and intelligently performed. I have troubled you with these remarks, though not perhaps quite pertinent to our immediate subject, because it is impossible, as it seems to me, properly to approach the consideration of the rest of our forensic machinery without some idea of what is to be expected, or hoped for, as the keystone of our judicial arch. That may be a very good court indeed for purposes of intermediate appeal, which would be eminently unsatisfactory as the court, or a part of

the court, of last resort; nay, the very qualities which may unfit it for the due performance of the latter functions may be extra qualifications for the purposes of the former. A court of last resort should be exhaustively deliberative, eminently patient, nothing if not careful; it should therefore not be too easy of access, and should treat every case brought before it with the utmost minuteness and detail of which it is susceptible; and if the courts below be properly constituted, the appeals with which it will have to deal will be few enough to warrant, and important enough to demand, this treatment: and thus, and thus only, can such a court fulfil the great object of its existence by definitively "settling the law" to which all other courts and judges are necessarily to conform, and which, when once so settled, ought to be incapable of being disturbed, except by Act of the Legislature. A Court of First Appeal, on the other hand, ought to be ready of access, rapid in decision, supplying an immediate correction to the tendency to divergence inherent in the multiplicity of the courts of first instance; and ought to aim rather at the termination of the specific contest than the determination of any abstract legal principle. If so constituted as to command public confidence, appeals to it will be numerous, from it few; these few being confined to cases involving some point of especial novelty or difficulty, or where the value of the property at stake is so great as to induce the loser to risk the costs of appeal upon the doctrine of chances merely. Hence it follows that, while for a court of final appeal to sit in separate divisions, as provided in the Act of 1873, is to destroy its very *raison d'être*, this is not only not objectionable, but positively beneficial, in the case of a court of intermediate appeal merely. Having regard to the amount of work performed (or, at any rate, got through) by the courts of first instance in this country, it is manifest that if all the appeals therefrom arising were to be brought before a single court, their number must either be very unduly limited, or the business of the Appeal Court must be

shuffled through, or get hoplessly into arrear. But if the court may sit in two or more divisions, this difficulty disappears, as the court may be thus practically multiplied to whatever extent the emergency may require. Taking into account the fact that the Court of Appeal proposed to be constituted by the Bill now before Parliament is to discharge the functions of the Court of Appeal in Chancery, the Court of Exchequer Chamber, the Full Court of Divorce, the Judicial Committee, so far as regard appeals from the Court of Admiralty, and the existing courts of first instance as Courts of Appeal from the County Courts, I have estimated that it would require on an average two courts sitting 120 days each, and three courts sitting thirty days each, in every year, to dispose with due deliberation, without undue delay, of all the business which will come before this court. If we assume that the bulk of the appeals are to be heard by not less than three judges, but that for certain classes of questions two judges will be sufficient, a court composed of six judges, sitting in pairs for one day, and in two divisions of three judges each for five days in each week, would about suffice to get through the work in the course of the ordinary legal year.

If, taking these data, we compare the provisions for appeal contained in the Act of 1873 with those in the Bill now before Parliament, we cannot but be struck with the very singular fact that each of the proposed courts is so constituted as to be adapted rather for the work of the other than its own.

Lord Selborne's Act gives us a Court of Appeal containing five *ex-officio* and nine ordinary judges, with an indefinite number of "assistant judges," of whom we may reckon upon not less than eleven to begin with, that is to say, twenty-five in all, who are to sit ordinarily in divisions of three, and in any number of divisions at the same time that may be desired. From this number we may at once take off four out of the five *ex-officio* judges; the attendance of Common Law Chiefs and the Master of the Rolls will necessarily be very inter-

mittent, and I do not think that any more assistance can be expected from them in the new Appeal Court than they now afford to the Judicial Committee, that is, practically speaking, none whatever. Again, from the eleven retired judges who are now members of the Judicial Committee, and whom I have reckoned as the first assistant-judges under the Act of 1873, no very regular attendance could fairly be expected. The three ex-chancellors might, indeed, be unreasonably called upon to attend with tolerable regularity, but the remaining eight judges may, I think, be calculated upon as not more than sufficient to supply any temporary emergencies arising from illness or absence among the ordinary judges. As, however, under this scheme the sittings of the House of Lords were to be entirely, and those of the Judicial Committee all but entirely, put an end to, the constant attendance of the Lord Chancellor, and, of course, of the nine ordinary judges, might be confidently reckoned on. We may, therefore, look upon the regular strength of the court as amounting to fourteen judges, so that it would have been capable of sitting constantly in four divisions—which would have an obvious tendency to consist generally of the same sets of judges—and would thus have been able to dispose of all appeals that could possibly have come before it with celerity, and without undue haste. We would thus have had almost an ideal Court of First Appeal, the only possible objection being that, with so much judicial power at our disposal, it would, perhaps, be better to have raised the quorum of a division to four or five, which would still have left three working divisions, which we have calculated as being amply sufficient for the purpose designed. But the very qualities which would have rendered this court an admirable Court of First Appeal would have tended, to my mind, to unfit it altogether for the functions of a Court of Last Resort, which was what Lord Selborne intended it to be; and this, for three reasons.

1. A court which ordinarily sits in two or more divisions

consisting practically of the same sets of judges—and this must have been done, or the work could not have been disposed of—is in reality two or more distinct courts, and no amount of calling them by the same name will bring these courts in the least nearer to identity with one another. But the one qualification which is thoroughly indispensable in a good Court of Final Appeal is that it should be *single*, because its most important function is to repress that diversity of decision which inevitably flows from the tendency to "differentiation" which is as characteristic of the human mind as of all the rest of animal nature.

2. If it be true that *Sententia ponderantur non numerantur* (and if not, it certainly ought to be so), effect can only, in this case, be given to that maxim by separating the most weighty judges from their lighter fellows in some official way; and it is simplicity personified to suppose that so numerous and various a body as Lord Selborne's Court of Appeal could possibly exist exclusively of the former class. But the authority of the court could not be greater than that of the average of its members; and this quality, which again is essential to a good court of last resort, though of secondary importance in an intermediate court, would have been "conspicuous by its absence" from the proposed court.

Lastly. The very amount of business which would have come before the court, and which it would have been compelled to dispose of, would have tended directly to unfit it for the duty of ultimate decision. The strongest judge cannot always be both rapid and sure, though, when his decisions are subject to correction, rapidity may, within reasonable limits, be looked upon as the more valuable quality of the two. But rapidity, even when followed by right judgment, is a fault in a court of last appeal, because it necessarily detracts from the weight and solemnity of its decisions, and begets a feeling of dissatisfaction in the minds of the unsuccessful suitors. Nothing has tended more to the prestige of the House of Lords as a Court of Appeal than the feeling

with which every unsuccessful litigant there is impressed—at least, so far as my experience has gone—that his case has been, at any rate, fully heard and carefully attended to. This would be simply impossible in a court which had to dispose of, say, 250 appeals per division, per annum (I take this number as being something under the average of the appeals in Chancery alone, and these would, I suppose, about occupy the time of one division), and even if practicable it would not in fact be obtained, because the mere number of causes to be disposed of would act upon the judges as a constant incentive to haste, and the knowledge that there was no further appeal would tend to aggravate their natural intolerance of any argument which might seem to them trivial or inconsequent, or, to use the favourite judicial phrase, a waste of public time.

Turning now to the Court of Appeal proposed, avowedly as a court of intermediate appeal only, by the Lord Chancellor's Bill, we shall find it fairly adapted to the work of a Supreme Court, but utterly inadequate to get, with any satisfaction, through the business of a general Court of First Appeal.

The five *ex-officio* members remain, but the reasons which, as we have seen, render four of them merely ornamental, remain also, while the continuance—and even temporary increase—of the jurisdiction of the House of Lords will deprive the court of the assistance of the Lord Chancellor, except during Michaelmas Term and the sittings after, or by whatever name this term may be known in the future. The assistant judges are gone entirely; and this is but reasonable, as the dignity of the court is hardly sufficient to attract the attendance of unpaid volunteers, and the continuance of the sittings of the House of Lords and the Judicial Committee will supply them with as much work as can be expected from them. But the nine ordinary judges are cut down to five, and these five, therefore, constitute the whole available strength of the court for ordinary purposes. Such a court, if

only the judges were properly selected, would obviously fulfil all the requirements of a first-rate Court of Final Appeal, except that the absence of a single judge might temporarily cripple the court; but it is obviously incompetent to get through, without scrambling, the general appeal business of England and Wales. It would, or might, be a very strong single court, and could dispose, with perfect propriety, of all the work which would ordinarily reach the stage of a second appeal, but it could not supply two concurrent divisions, and would be physically unable to keep down arrears in the business which is to come before it. This court therefore would, or might, have the judicial weight and authority which is the quality most desirable in a Court of Last Resort—which it is not to be—but must necessarily be wanting in the power of accessibility and despatch, which are qualifications of the first importance in a Court of First Appeal such as it is meant to be. And all this for no reason, that I can see, unless it be for the sake of alteration. Let it be granted that, as the functions of the Judicial Committee are to continue, it was requisite to have two of the salaried members of the Committee to attend its sittings, why should two more of the proposed ordinary judges be summarily reduced? A court of seven judges, or even six, if they could all always attend, would be abundant for the purpose required; a court of five, with the occasional assistance of a sixth, must necessarily fail; either the business will fall into arrear, or the appeals will be impatiently hurried through, or parties will be forced—of which we have all seen instances—into reluctant compromises, all which results, though in other respects different, agree in this, that each involves a substantial denial of justice, and all this for the difference, at most, of the salaries of two judges. A more practical illustration of the loss of the ship for the value of a pennyworth of tar, I have seldom seen. I do not care, for the present purpose, to inquire where the blame of this ought to rest; whether it is or not a natural consequence of the reduction in the number of the judges, provided for by the Act of 1873

(a reduction which I look upon as mischievous in the extreme), nor whether either or which of the great legal authorities whose joint efforts have been devoted to the completion of this long-pending reform, is the more responsible for this unfortunate blunder; but I do most earnestly desire to avoid, if possible, before it be too late, a blunder which seems to me so vital as that which I have pointed out.

VIII.—THE LAW OF COMPENSATION FOR DAMAGE BY RIOT.*

MR. HASTINGS said that his attention had been called some twelve months since to the law of compensation for damage done by rioters, owing to the serious riots which had taken place in the borough of Dudley at the last general election. Considerable damage was done to property in Dudley, but with one exception no redress had been obtainable by the sufferers. He showed that the existing law was most uncertain if not nugatory, and that the procedure in cases of smaller amount was obsolete.

In the case of *Reid v. Clarke*, 7 Term Reports 496, and which was an action on the Riot Act for damages, it appeared that during the illumination at Tynemouth for Lord St. Vincent's victory, a large mob collected in the streets and broke the windows of several houses, including that of the plaintiff. In his case the stanchions of the windows, the uprights of the sashes, and all the shutters inside were smashed. The mob then passed to other houses.

* A Paper recently read before the Law Amendment Society, by G. W Hastings, Esq.

A verdict was found for the plaintiff, but leave was reserved to the defendants, two of the inhabitants of the hundred, to move to enter a nonsuit.

After hearing the arguments of counsel, Lord Kenyon said:—

"This is an attempt to extend this Act of Parliament, which is a penal law, farther than it has ever yet been carried. If the hundred are liable in this action, the rioters are guilty of felony; for I cannot agree with the plaintiff's counsel that the different sections of this Act are so far to be considered separately and distinctly, that the hundred are answerable for damages done by persons who are not guilty of felony within the former part of the Act. And I am most clearly of opinion that it was not a beginning to demolish or pull down the plaintiff's house within the meaning of the fourth section of the Act. The rioters who committed this outrage on the plaintiff's property are deserving of reprehension and punishment; but still they are not guilty of felony; and therefore I think that the rule to enter a rule must be made absolute."

Lord King v. *Chambers and another* 4 Campbell 377, was an action against the defendants, two of the inhabitants of the Hundred of Ossulston, to recover the amount of damage sustained by the plaintiff's house in Wimpole Street, for an attack of the mob during the Corn Bill riots. It was proved that the mob put out the lamps in the street, broke open the door, tore down the railing before the house, and broke the shutters and window frames, and after doing other damage to a considerable amount retired, and that in about five minutes afterwards the street was occupied by the military.

Gurney, for the defendants, admitted that if the mob intended to demolish the house, a sufficient degree of violence had been proved, but contended on the authority of *Reid* v. *Clarke and another*, 7 T. R. 496 (before Baron Thompson, at Newcastle), that it was merely the intention of the mob to express their indignation by doing mischief and dispersing without proceeding to a demolition, the action could not be supported.

The Attorney-General:—"The mob must be taken to have intended that which they actually begun to do, namely,

to demolish the house; the consequences would be dreadful if this doctrine were allowed to prevail, and if a mob could say we have just done mischief enough to the party, now let us leave him, and he will be without any remedy."

Lord Ellenborough:—"I do not know any case where the mob have not been interrupted in the course of demolition by the interference of the military, and where, after the work of demolition had been begun, they would not have gone through if they had not been interrupted, and where they have retired, if I may use the expression, unsatiated. The proof would have been abundantly sufficient if the mob had been dispersed by the military whilst they were occupied in the demolition. The words of the statute are, 'beginning to demolish,' and there must be proof that such was their intention."

The plaintiff's counsel requesting that the case might be left to the jury, his lordship said—

"There is in this case, without doubt, a sufficient beginning to demolish under the statute, provided the violence was used with an intention to demolish. We can only infer what the mob intended to do from what they did; and what they had begun to do is striking evidence to show what they intended to do; but if they went away voluntarily of their own head, the question for your consideration is whether they ever intended to demolish. If they dispersed voluntarily and without having satiated their purpose, it will be for you to consider whether what they did was done with an intention to demolish." Verdict for the defendants.

Sampson v. Chambers, 4 Campbell 221. This was an action on 1 Geo. I. st. 2. 5, against two of the inhabitants of the Hundred of Ossulston, for the damage done by a mob in feloniously beginning to demolish, and in part demolishing the plaintiff's house in Harley Street. It appeared that during the riots respecting the Corn Bill, a mob assembled round the plaintiff's house, and threw stones and brickbats against it for a considerable time. In this manner several of the inside window shutters, a window sill, and part of the wood of the fan light over the door were broken, but none of the window frames. The mob in the meantime holloaed out, "No Corn Bill!" While they were proceeding in this manner, a cry was raised that "the Piccadilly butchers were

coming." The Life-guards immediately rode up, and the mob dispersed. Lord Ellenborough held that there was here a sufficient beginning to demolish, within the meaning of the statute, and the plaintiff had a verdict.

At the York Spring Assizes, 1830, certain prisoners* were indicted before Mr. Justice (afterwards Baron) Parke, for beginning to demolish, pull down, and destroy a certain building used in carrying on a trade. It was proved that the mob began by breaking the windows, and having afterwards entered the house, set fire to the furniture, but no part of the house was burnt. The judge said to the jury *inter alia*—

"The beginning to pull down means not simply a demolition of a *part*, but a part with an *intent* to demolish the *whole*. It is for you to say if the prisoners meant to stop where they did (*i.e.* breaking windows and doors) and do no more; because if they did, they are not guilty. But if they intended, when they broke the windows, &c., to go further and destroy the house, then they are guilty of a capital offence. If they had the full means of going further and were not interrupted, but left off of their own accord, it is evidence from which you may judge that they meant the work of demolition to stop where it did. . . . If you think that they originally came there *without* intent to demolish, and the setting fire to the furniture was an afterthought, but with that intent, then you must acquit, because no part of the house having been burnt, there was no beginning to destroy the house. If they came originally *without* such intent, but had afterwards set fire to the house, then the offence would be arson. If you have doubts whether they originally came with a purpose to demolish you may use the setting fire to the furniture, under such circumstances and in such manner, as that the necessary consequence, if not for timely interference, would have been the burning of the house, as evidence to show that they had such intent, although they began to demolish in another manner."

In *Rex* v. *Thomas*, 4 C. and P. 237, it appeared that the prisoners and others, on the 15th March, 1830, at about midnight, came to the house of the prosecutor, and that having, in a riotous manner, burst open the door, they broke

* Ashton's case, Lewin's Crown Cases, 296.

some of the furniture, all the windows, and one of the window frames, and forced out a small iron bar; and that after doing this mischief, they went away. It did not appear that there was anything to hinder the rioters from doing more damage if they had chosen so to do.

Curwood, for the prisoner, objected that this was not a beginning to demolish the house.

Mr. Justice Littledale—"I am of opinion that this will not be a 'beginning to demolish' within the Act of Parliament unless the jury shall be satisfied that the ultimate object of the rioters was to demolish the house, and that if they had carried their intentions into full effect they would, in point of fact, have demolished it. Now here that is not so, for they come and do a great deal of mischief, and then go away, having manifestly completed their purpose, and done all the injury they meant to do."—Verdict, Not Guilty.

At the Hertford Spring Assizes, in 1833, one Price, and fifteen others, Rex v. Price C. and P. 510, were indicted, under the 7 & 8 Geo. IV., for feloniously beginning to demolish the "Ram" public-house, at Hertford, on the 11th of December, 1832. The transaction out of which this prosecution arose, occurred on the evening of the first polling day at the election of members of Parliament for the borough of Hertford. The election was warmly contested, and had excited much feeling among the lower order of persons in that town. Shortly after the close of the poll, two or three persons, among whom was a man named Pitts, who were supporters of the Whig candidate, were casually met by a small party of persons who were in the interest of the Conservative candidate. A quarrel and a scuffle ensued, in the course of which Potts was repeatedly knocked down and much beaten; he then drew a knife, with which he slightly wounded one of the opposite party. A considerable crowd had by this time collected, and Pitts, being pursued by them, took refuge in the "Ram" public-house, the landlord of which was known to be in favour of the Whig candidate. Pitts having been admitted into the public-house, the doors and windows were

all secured, and a crowd of about two hundred persons (among whom some of the defendants were present and actively employed) came up, carrying sticks and stones, and demanded that Pitts should be given up to them, threatening, in case of refusal, that they would "pull the —— house down." An attack was then made upon the house, the front door and the lower windows were beaten in, and the shutters and frames of some of the windows much broken. A portion of the mob entered the house, repeating the expressions before mentioned, and did much damage to the furniture; but in about twenty minutes from their first approach, the mob being unable to find Pitts, and a rumour having spread that the mayor was coming, they went away.

On proof of these facts, Chief Justice Tyndal said:—

"I am of opinion that this offence does not come within the Act of Parliament on which these parties are indicted. The persons committing the outrage must have the intention of destroying the house before they can be charged with a felonious beginning to demolish. In the present case, it is clear that they had no such intention, not within the scope of this indictment, which was merely to get possession of the person of Pitts. The prisoners must be acquitted."

In the next case necessary to quote, that of *Rex* v. *Butt and others*,* an opposite conclusion seems to have been arrived at on much the same facts. The prisoners were indicted before Baron Gurney at the Old Bailey, February Session, 1834, for riotously assembling and beginning to demolish a public-house, called "The Silver Lion," kept by one Liddiard. It seemed that a person named Miller, a coal-lumper, had his pay-table at this house, and that one evening he was in the back kitchen, when the shout of a mob was heard, and a cry of "Murder Miller and all the ——— lumpers." Many large stones and brick-bats, and a flat-iron, were thrown at the house, and the mob rushed in; Miller got over the wall of a backyard and made his escape. One of the mob pursued one of Miller's men into the backyard, and tried to seize him.

* 6 C. & P., 329.

While the mob were engaged in throwing stones at the house, a policeman ran in between them and the front of the house, and, drawing his staff, told them to desist, adding, that the first man he saw throwing any stone, he would take him into custody or knock him down. The mob then went away. A surveyor proved that in addition to the breaking of the windows in the front of the house, a sash in a door inside was broken to pieces, and one panel in a door, and another in a partition were broken quite out. The partition itself was much injured, and a wall in the backyard was also broken down. On these facts Mr. Charles Phillips, for the prisoners, submitted that the case did not come under the Statute. He read Mr. Justice Littledale's opinion in *Rex* v. *Thomas;* but that of Chief Justice Tindal in *Price's* case does not appear to have been quoted.

Baron Gurney said that he did not differ from Mr. Justice Littledale, but that there was an important distinction in the cases. He further said, after reading the evidence—

"It does not follow that, because their object was not to murder Miller, that they had not a further object to demolish the house, which is to be judged from what they do, and the interruption they met with. A surveyor has proved the damage done; and, no doubt, the damage is sufficient, provided you are of opinion that the demolition of the house was the object of the mob. . . . A mob's breaking a person's windows is not a beginning to demolish, even though the frames of the windows should be broken, because the object of the mob in such a case is evidently very different. But here there is a purpose of violence against Miller, and a purpose of pulling down his house. The mob, however, do not go to Miller's, but to 'The White Lion,' and when they got there they began to throw stones and brick-bats. In the case cited, of *Rex* v. *Thomas*, there was nothing to prevent their going on; and, in favour of life, it was inferred that as they left off voluntary, they never had any intention of proceeding further. But, certainly, that is not so here; because there is the interference of the police, and it was after the threats of the police that the mob desisted. If you are of opinion, that this mob began to do mischief to the house, intending to persist in demolishing it if they were not interrupted, the offence charged will have

been committed. . . . The mob might have two purposes, and if one of those two purposes was to demolish the house, there was a sufficient beginning to demolish to support the indictment."

The case of *Regina* v. *Howell and others*, 9 C. and P., 437, arose out of the destructive riots which took place in the town of Birmingham in July, 1839. The prisoners were indicted under the 7 & 8 Geo. IV., that they did feloniously demolish, pull down, and destroy the house of James and Henry Bourne, and in the second count they were charged with "beginning to demolish." This was one of the houses which were set on fire by the mob, and it was completely gutted, only the bare walls being left standing. While the fire was still raging a body of dragroons charged the mob, and drove them from the street. There is a great deal in the report of the case which is instructive as to the general law of riot, but I notice only that part of Mr. Justice Littledale's summing up which relates to the "beginning to demolish." He referred to the words of Baron Gurney in *Rex* v. *Butt*, to those of Chief Justice Tindal in *Rex.* v. *Price*, and to his own in *Rex.* v. *Thomas*, and went on to say—

"There is no doubt that the rule of law as there (*i.e.* in *Rex.* v. *Butt*) laid down is applicable to this case. If part of the object of those rioters was to destroy and demolish this house, and they began to demolish it, they are clearly guilty of this felony. The demolition in this case was by means of fire, and though there is a specific enactment as to arson, yet if burning is the means of the demolition of the house, it is just as much within this enactment as the knocking down of the house by hammers or crowbars, or anything else. If the mob went away without doing any act at all, they would not be guilty of this offence, whatever their intention might be; but if, having once begun it, they are prevented from going on with the act of demolition by the interference of the military, I am of opinion that it is a case clearly within this enactment. . . .

"If, after having proceeded a certain length, the mob left off of their own accord before the act of demolition was completed, that would be evidence from which a jury might infer that they did not intend to demolish the house; but if they

were prevented by the police, or any other force, that would be evidence to show that they were compelled to desist from that which they had designed, and it would be for the jury to infer that they had begun to demolish within the meaning of this Act of Parliament. You must, however, be satisfied that there was a beginning to demolish the house. The shop shutters are not part of the freehold, and if all that these persons had done was demolishing the window shutters, that would not be within this statute. However, it appears here that the house itself is set on fire, and though setting fire to a house is a substantive felony, yet if fire is made the means of attempting to destroy a house, it is as much a beginning to demolish as if any other mode of destruction were resorted to."

The case of *Reg.* v. *Adams and others*, 1 C. M. 299, was tried on an indictment for riot under the 7 & 8 Geo. IV., c. 30, at the Taunton Assizes, in 1842, before Mr. Justice Coleridge. The riot occurred at the time of an election of members to serve in Parliament for the city of Bath. The rioters were of the yellow party, and the house which they were charged with beginning to demolish was a public-house frequented by the supporters of the other interest. The house had been forcibly entered by the mob, and many of them said to the landlord, "Turn out the —— blues, or we will have the house down." They destroyed every moveable thing which they could find, and some fixtures, glasses, plates and chairs, windows and window-frames; and they wrenched away the iron bars from one window, and with them some of the surrounding brickwork. On a cry raised that the police were coming, they quitted the premises. One witness, the daughter of the landlord said—

"As far as I saw, the rioters had done all they wanted to do, and were going away. I did not suppose that they were going to pull down the very walls of the house."

Mr. Justice Coleridge said, in summing up to the jury—

"We must take the words of the statute in their common sense. The words are, 'if any persons shall begin to demolish, pull down, or destroy.' Do you think that these men wanted to do any of these three things to the house? No intention to do injury, however great, to the moveables,

will bring the offence within this Act. The three words, 'demolish,' 'pull down,' and 'destroy,' are strong words and hard of proof. Before you can find the prisoners guilty, you must be of opinion that they meant to leave the house no house at all in fact. If they intended to leave it still a house, though in a state however dilapidated, they are not guilty under this penal statute. If a man were to say, 'I have pulled down my house,' we should understand what he meant; the state of that house must be the state to which these people intended to reduce this inn. To have left off the work of devastation without interruption would lead to the inference that they did not intend to destroy the house. But, even if they were interrupted, the question is open, What was their ultimate intention? If they had been some time at work of ruin before they were interrupted, it is for you to say, looking to the nature of the things which they have destroyed, whether their purpose was to demolish the house itself."

The prisoners were acquitted.

The result of these cases, he said, was that no compensation can be claimed unless the house or building attacked by the riotors is totally destroyed, or the mob are driven off by superior force while the work of devastation is going on, and the jury have reasonable ground to believe that if not interrupted they would have proceeded to total destruction. The remedy for damages done under the amount of £30 was before a special sessions of the Hundred in which the riot had taken place. The Hundred was an obsolete institution, and its sessions court was anything but a satisfactory tribunal. There was, moreover, great difficulty in raising a special rate from the Hundred for the exact sum obtained as damages, as he and his brother justices in Worcestershire had experienced in the Dudley case. He proposed that to remedy this state of things both the action in the superior courts and the proceeding before the session of the Hundred should be abolished, and that anyone whose property had been injured by riot—whether the destruction had been partial or complete, should have liberty to apply to the Quarter Sessions of the county for redress, with option of trial by jury; the damages awarded

to be paid out of the county rate except where the riot had taken place in a borough having a separate police force, in which case they should be paid out of the borough rate. This would maintain the old principle of the common law, on which he conceived the statutory enactments had been founded that the authority bound to keep the peace must pay for the consequences when the peace was broken.

LEGAL TOPICS.

FRENCH JURISPRUDENCE.—We have just received from M. Thorin, of Paris, the first number for 1875 (January and February) of the *Revue de Législation Ancienne et Moderne*, published by him, and of which we have already made favourable mention in various articles. We hail this as the first-fruits of an attempt to bring about that interchange of knowledge on the progress of juridical science in the principal countries of Europe which the *Law Magazine* has, we believe, been the first to organise. If other foreign legal publications support us by the exchange of their current numbers, and legal publishers on the Continent send us for review copies of their most generally interesting issues, we shall hope in time to be able to offer our readers something that may not compare unfavourably with the excellent bibliographical notices of foreign jurisprudence which are to be found in the *Revue de Législation Ancienne et Moderne*, the *Revue de Droit International*, and other Continental journals We have only at this moment time and space sufficient to mention that M. Thorin's publication fully sustains its old character for interest and ability at the opening of the present year. We note that M. Flach, advocate at the Paris Court of Appeal, has become editorial secretary, the editorial committee consisting, as before, of

Messrs. Edward Laboulaye and Eugène de Roziére, both members of the institute, Paul Gide, Professor in the Law Faculty of Paris, Rodolphe Dareste, advocate before the Council of State and Court of Cassation, and Gustave Boissonade, Agrégé of the Law Faculty of Paris. In conclusion, we can only enumerate the subjects treated, reserving to a future number some appreciation of the value of the articles.

M. Caillemer, Professor in the Law Faculty of Grenoble, leads off with a continuation, the second of a still unfinished series, of what will be, when completed, a valuable treatise on the Law of succession at Athens. Roman Law is represented by a paper on the "Apparitio," or military resort of the Roman Magistrate in criminal procedure and on occasions of capital punishment, with reference to a recent discussion at the Academy in Paris. Lastly, it may be worthy of remark that 'self-government,' which has formed the object of a recent series of papers in the Brussels *Revue de Droit International*, also has its place in the opening number of the Paris *Revue de Législation* for 1875, where it is treated by M. Demongeot, Master of Requests before the Council of State.

We desire to add, that we have received the "Annuaire" of the Society for Comparative Legislation, from the Secretary of the English section of that valuable society. We shall notice these publications in our next issues, with much pleasure.

BOOK REVIEWS.

THE LAW AND PRACTICE OF ENGLAND AND SCOTLAND IN AFFILIATION CASES. By HUGH BARCLAY, LL.D., Sheriff Substitute at Perth. (London: Reeves & Turner. Edinburgh: T. & T. Clark. Glasgow: W. A. MacPhun. 1875.) This little brochure, price one shilling, the latest contribution from the pen of one of the ablest, and, certainly, the most experienced of local

jurists, will, most probably, excite much attention, not merely amongst lawyers, but also in our local deliberative assemblies,—we mean, our parochial boards. In every aspect the subject is a perplexing one—alike to the moralist, and to the sociologist. Perhaps, at no former period of our social history, since the reformation, has existed more urgent call for a remedy to stay the stream of pollution which daily enters our law courts, and occupies the time and attention of our judges, not merely in many, but, it may be accurately said, in every county in the land.

Here we have within a small compass, the results of the observations, and the judicial experience of almost fifty years. Dr. Barclay has had ample opportunities of examining into the varied phases, and judging of a vast number of a class of cases from which the ordinary non-legal, or the non-medical mind recoils, he has, as a judge, seen, but too often, the utter inadequacy of the existing procedure in our law courts, for establishing guilt, or asserting innocence. The number of direct contradictions presented in almost every case subjected to the test of legal judgment, is so great as to lead to the inevitable inference that untrustworthy evidence has been, of design and of purpose, set up by either or by both of the parties to the suit. From this alone, in our estimate, most serious evils arise. The value of testimony in other cases is affected,—if not seriously depressed from its moral standard. Oaths in courts of law have, as we think, become far too common in practice. Every case, under our present system of popular or small debt jurisdiction, is fraught with too many oaths. To establish the merest pecuniary trifle, even two, and sometimes as many as a dozen, solemn oaths are exacted. This is a serious state of things. Our small debts courts have not improved the public morals, nor have they propagated a sense of justice in the million. Lord Palmerston, an experienced man of the world, and the most jaunty of English statesmen, announced in his place in Parliament: "The more solemn the act the greater is the responsibility which a man incurs by taking an oath. The more that engagement is entitled to the respect of men, in the same proportion ought to be the seldomness of its being taken, and the importance of the occasion upon which it is taken." This is speaking out wisely and orderly; and we would earnestly desire to see this important matter reduced to a reasonable measure of decency. Now here it may be well to recall to the recollection of our readers, the mode of enquiry adopted in practice in Scotland prior to the year

1853, in the class of cases with which Dr. Barclay deals in this acute contribution to legal literature.

The mother of the child, and the man charged with its paternity, were, severally, subject to what was then—as it still is—called a judicial examination; usually, a searching enquiry, in detail, but without the sanction of an oath. The woman was first placed in the witness-box. She was then subjected to a verbal questioning, conducted by the agent for the defender, of course, under the judicial superintendance of the judge. On this, the first scene of this legal drama, being declared terminated, the man was then put under the same ordeal. Reticence, real or affected, on his part was usually unavailing. The examining agent, generally essayed to fix the man into a series of denials on matters of fact, which being plainly within the man's own knowledge, the examinator expected to establish in evidence affirmatively against him, in the course of the proof to be afterwards adduced. If these examinations were not regarded as evidence, the litigating parties were allowed a proof by witnesses, and by all other competent evidence, If, again, upon the judge's consideration of that accumulated testimony, the frail pursuer had made out what was called a *semi plena probatio*, she was allowed to add the element of proof deemed wanting by her oath in supplement. Again, if, on the other hand, the pursuer failed to make out a *semi plena probatio*, then the man was assoilzied from the claim set up against him, leaving it open to the pursuer, if she desired it, to seek final chance of redress under the oath of a hardened, recalcitrant defender.

But in the year 1853, this mode of judicial enquiry was changed in Scotland. It then became competent to adduce, and examine, *as a wi ness*, any party to a legal suit. It was supposed, and, down until the very last session of Parliament, we have gone on supposing that it was necessary, for the ends of truth and justice, that the parties to the cause be allowed to give, and if required, compelled to bear evidence for or against, themselves. This mode of judicial procedure has been in observance for almost a quarter of a century. It has been, and is still, being daily practised in every Court in Scotland; but we do not think that that extended experience has demonstrated that truth is now-a-days attained more easily, and with greater certainty, than when the parties to the suit, in short, when everybody related to the parties by the ties of blood, or having an interest, real or fancied, in the suit, were peremptorily excluded from giving testimony. Under the prevailing mode of legal warfare, the

honest, nervous litigant has (as we fancy we have sometimes observed), but a bare or doubtful chance of success in his suit when opposed to a frank, off-hand, and unscrupulous opponent. Now-a-days, a litigant's case, as it is often said, depends greatly upon his air and steady attitude in the open-fronted witness-box; how effectively, for the purpose of giving his testimony, he can conduct himself in Court, and in plausibility, or in real or apparent candour, outvie his, perhaps, more honest, or, it may be, his less artistic opponent in discharging the duty of a field day in a Court of Justice. But, be all this as it may, we fear that it must be confessed that truth is not now more easily attainable than it was formerly; and thus, as we infer, the standard of truth has not, by the various "Evidence Acts," been more firmly or substantially planted or elevated in the soil. Other persons, probably, better informed than we can profess to be, may differ from our estimate of the general result of the Evidence Act of 1853; but we imagine that every one who has observed the results of recent decisions, will admit that the pursuers in the class of cases with which Dr. Barclay now treats, have gained nothing, while it is not certain the truth has acquired any benefit from the extension of the limits, or from the facilities afforded by the extension of law of evidence.

On this head Dr. Barclay has furnished an instructive table of statistics from cases of affiliation brought before him, as a sheriff, during the years 1860 to 1872, both inclusive. During these thirteen years there were 735 actions of affiliation raised before him. Of these 440 went off, undefended. Of the remainder, 295 were litigated. While the paternity was held established, in evidence, against 229—not less than 66 of the alleged fathers, were, either justly or unjustly, freed from pecuniary liability. The result, by an easy induction from these figures, is, we think, appalling. And we think so in respect of two grounds. 1. They either show that 66 cases, groundless actions, of this unfortunate class were instituted against innocent persons Or, (2) on the other hand, they show the utter inadequacy of the existing law in reaching and fixing pecuniary responsibility on the fathers of an unhappy offspring. Nay more. In each of these 295 defended causes most likely the oath of each of the parties was solemnly evoked and impledged; and thus the extent of perjury prevailing in the land, and permeating the business of our Courts may be painfully imagined. Dr. Barclay also states, as an irrefragable result drawn from his figures, that "it follows that in 295 instances direct and gross perjury must necessarily have been per-

petrated on one side or other, but far the greater proportion being by the defender."

Our Poor Rates, yearly increasing in amount, and only rendered less tolerable in detail by the rental of almost every parish steadily increasing in its total rental, tell heavily as to our existing state of pauperism occasioned by the illegitimate childrenbeing thrown upon parishes for their support.

But what is to be done? In what quarter are we to seek a remedy? For these questions we gladly refer to Dr. Barclay for an answer. He states:—"It is a matter for consideration whether some form of process similar to the ancient *semi plena* of Scotland, with the mother's oath in supplement, might not be found a better mode of obtaining justice in this increasing class of cases. It has been suggested that a mode, not unknown in continental countries might be still more efficacious in reaching the truth. First of all the parties should be separately interrogated by the judge in presence of the agents, but not on oath, and then, if necessary, confronted with each other. Such sifting of facts might, in most of these delicate cases, render further evidence unnecessary; or, where such is necessary, would greatly limit its extent by confining it to ascertaining which party has spoken the truth, and is in the right."*

The system thus suggested is in active operation in the jurisprudence of Germany; and it has been skilfully and effectively applied to the discovery of truth, particularly in cases of un occult nature. There the *Unter suchungs richter*—an examining judge—is an officer of remarkable efficiency. Truth slowly, perhaps, under so exhausted a mode of inquiry, must be, we think, necessarily reac ed more frequently than under our existing principles of evidence. In the hands of an examining judge like *Anselm Von Feuerbach* the guilty rarely escape; and the innocent have their fame and honour placed, palpably, beyond all question.

Once of a day, these cases came more frequently before our Parish Courts—our Kirk Sessions—than they do now-a-days. Spiritual thunder has—a result due, we suppose, to our internecine ecclesiastical feuds—lost much of its power. But every one who has had occasion to spell his way among the dingy leaves of the records of a Kirk Session, will have found ample evidence confirmatory of Feuerbach's experiences as an examin-

* The greater part of Dr. Barclay's pamphlet appeared as an article in a recent numb[illegible]ur journal. The above notice has been sent us by a Scotch attorney of [illegible]ce in the profession.

ing judge. Usually, in such cases, we have at first the prompt indignant denial of the charge Then the pressure of evidence or of conscience is brought to bear on the accused. By and bye, he feels the inability to resist, or elude the cross examination as to the circumstances in which he finds himself placed. Months indeed may elapse, yet after all, just following in the wake of Feuerbach's course of procedure, the accused, different as they were in age, in rank, in knowledge, and in character, were ordinarily convicted upon their own confession.

But we must not be supposed here to advocate a return to the usuage and practice of Kirk Sessions, where sometimes a crafty man got the benefit of a rehearsal at but little sacrifice of feeling or of money. To render the system, as *now* suggested by Dr. Barclay—and of which we most heartily approve—efficient, it must be left under the control of an experienced lawyer, fitted by education and by habit, able to grapple with the arts and inconsistencies of the most adroit, until the wrong-doer, feeling undone in a losing game of chicanery, feeling ashamed to persist in an evident lie, fatigued and confused by having to invent statements and circumstances which the judge instantly demonstrates to be false, at length surrenders to a confession of the truth.

THE CIVIL LAWS OF FRANCE TO THE PRESENT TIME, supplemented by Notes illustrative of the analogy between The Rules of the Code Napoleon and the Leading Principles of the Roman Law. By David Mitchell Aird, of the Middle Temple, Barrister-at-law. (London: Longmans, Green, and Co. 1875.)—A single glance at this book reveals the practised hand of an able master in the way of arranging his subject and methodizing his work. When an author succeeds in these he is generally near success; for it is not from a lack of good matter, or the presence of bad, that so much energy is thrown away in book-writing, as from the awkward and unattractive manner of laying what the author has to say before his readers. Mr. Aird's problem is a model of concise and handy treatment of the subject. It is divided into three books, and each of these is subdivided in many short chapters. The first book treats of the Civil Law of Persons; the second, of the Law of Property; and the third, of the Different Modes of Acquiring Property. The law student will find this work a most useful addition to his library, bearing, as it does, so closely upon the subject now in highest estimation at the Inns of Court. The new scheme of Legal Education gives the best prizes for proficiency in Roman Law, justly calculating, no doubt,

that therein lies the surest foundation of an accurate knowledge of our own system. The Civil Laws of France may be spoken of as a modification of the Roman Civil Law, so that, in studying the work of Mr. Aird, the student will find the law of the ancients brought into harmony with the civilization of the present. We heartily recommend Mr. Aird's latest work to the careful attention of all who are interested in the study and instruction of law. It is worthy of mention that, with his permission, this book is dedicated to the Lord Chief Justice of England.

THE STUDENTS' STATUTES: being the principal provisions of some of the more important Acts of Parliament in a condensed form, especially designed for the use of students of English law. By John F. Haynes, solicitor. (London: *Law Times Office*. 1875.)—This handy manual certainly possesses the charm of a novel conception. Probably no one but a gentleman who has devoted his time to the study of the law for the purpose of educating others, would have ever dreamt of the possibility of making the dry Statutes at Large tell, in their own language, the outline both of the theory and practice of English law. Mr. Haynes, encouraged in his idea by the approval of the Examiners of the Incorporated Law Society, and some of the Examiners in the Universities, has succeeded in producing, in a small compass, a most interesting and useful treatise in the very words of the Acts quoted. Each separate part deals with an entire branch of the law. Part 1, contains the statutes relating to the common law. Part 2, those relating to Conveyancing and Equity. Part 3, statutes relating to the Supreme and County Courts, including the constitution, jurisdiction, and procedure of the Supreme Court, the Probate, Divorce, Admiralty Courts, and County Courts. Part 4, sets forth the statutes relating to Bankruptcy; and Part 5, might almost be called a compendium of Criminal Law. Beyond all this the author directs attention of those readers whose time will permit them, to many other Acts, all possessing considerable information to the young student.

Though professing simply to be a manual for the use of those preparing for the legal profession, we cannot but think Mr. Haynes's book will be found most valuable to those in practice. The immense amount of material in a small compass would render the work a most useful companion on circuit, while its arrangement is so good that the student, we feel assured, will be able to gather from its pages a more intimate acquaintance with

the law than would be acquired by the study of larger and more pretentious works. Even to laymen who desire to understand the technicalities in the law reports of their daily paper, Mr. Haynes's book will be found an inexpensive and trustworthy adviser.

THE LAW OF USAGE AND CUSTOMS: a Practical Law Tract. By J. H. Balfour Browne, of the Middle Temple, author of the "Law of Carriers," &c. (London: Stevens and Haynes. 1875.) In this small volume of 125 pages Mr. Browne has given us an outline of the prevailing customs, local and general, with which this country abounds, and the usages of trade. The text, though briefly drawn out, forms the peg on which to hang a multitude of precedents, and in this will be found the real value of the work. As a book of reference we know of none so comprehensive dealing with this particular branch of Common Law, no less than about 400 cases being cited in reference to the subjects commented upon. In this way the book is invaluable to the practitioner. It nevertheless seems to us that as a general book of reference it might with advantage have been greatly extended in the direction of giving more information on the points in question. In fact the subject would furnish ample means for a general work on the law of usage and custom, in which the decisions might be worked out in such a way as to become an authority on all matters of privilege. It might bring together the substance of such works as Pulling's "Laws and Customs of the City of London;" Elton's "Tenures of Kent;" Seimen on "Copyhold and Customary Freeholds;" and Merewether and Stevens "On the History of Boroughs." Mr. Browne, in his opening, says that "custom went before law, and, indeed, that law is nothing but agreed-upon usage," and he proceeds to show the distinction as exemplified by modern legislation. A large proportion of the book is appropriated to the admissibility of evidence, and here again numbers of authorities are cited to show the usages of trade, and the laws of evidence respecting them. In concluding his treatise, Mr. Browne thinks that he might be accused of giving undue importance to only one branch of the law of evidence. To this he rejoins, "It is true it is a branch of the law of evidence, but it is one of the most important branches, and it is doubly important to the real student of jurisprudence by reason of the fact that it is, as it were, the connecting link between the science of evidence and the science of law. The fact that questions in relation to usage have been so fre-

quently litigated, shows the importance of the subject and the importance of having the main questions in connection with it definitely settled." A very good index adds to the value of the work for which, we think, Mr. Browne should take credit.

AN INTRODUCTION TO THE HISTORY OF THE LAW OF REAL PROPERTY: WITH ORIGINAL AUTHORITIES. By Kenelm Edward Digby, M.A., barrister-at-law, &c. (Clarendon Press Series). 1875. This book is written much after the same plan as Prof. Stubbs's well-known "Select Charters," being a history of the most important doctrines of the law of real property divided into periods, each period being illustrated with extracts from our legal classics, Glanvill, Bracton, Britton, Littleton, &c., and important Acts of Parliament, such as Quia Emptores, Extenta Maneri, the Statute of Uses, &c., with specimens of ancient deeds and pleadings. These extracts are very useful, and give the student a much clearer idea of what the old law really was than any quantity of epitomes. In the historical part Mr. Digby principally follows well-known modern authorities and rarely wanders from the beaten track, although he has evidently studied the sources for himself, as the frequent citations from the old books testify. Being primarily designed for students, including those who do not intend to follow the law as a profession, the book only deals with the salient points of the subject, and there is consequently little opportunity either for the author to enter deeply into the technical mysteries of our ancient law of real property (a fertile field for research), or for the critic to discover errors in the execution of the plan; such subjects as tenures, uses, mortmain and so on have been so thoroughly worked up by writers of the last generation that it would be hardly possible even for a writer of less learning and experience than Mr. Digby to go wrong in treating of them.

There are, however, a few points of minor importance which we think Mr. Digby's book capable of improvement. In the earlier portions of the history, especially that preceding the Norman Conquest, he has naturally relied on the excellent works of Kemble, Ellis, Prof. Stubbs, and others; these authors, however, have treated the subject from the political rather than the legal point of view; and Mr. Digby has not quite succeeded in welding their conclusions and those of professed jurists into a homogeneous whole. Thus in Ch. 1 we have two accounts of the origin of manors, commons, &c., one founded on the theories of Kemble

and Prof. Stubbs, the other on those of Maurer and Nasse, the reader being left to unite them for himself. In the account of the origin of feudalism the author has hardly brought out with sufficient clearness the fact that the feudal system did not really exist until the Merovingian period, although many social contrivances closely resembling it may be found long before, and that no theory explaining the transition has yet been satisfactorily worked out: M. Fustel de Conlange's recent contributions to the subject are not even referred to. In ch. 5 Mr Digby attributes the difference between the devolution of freeholds and leaseholds to the fact that the action of covenant which was originally the only remedy for eviction possessed by a lessee devolved at his death on his personal representatives; this is ingenious, but seems to us less probable than the ordinary explanation that as leases to farmers (at first the only kinds of leases for years) were not within the objects of the feudal system from which primogeniture and the other canons of descent arose, terms of years followed the ordinary rule, namely, that governing the devolution of personalty. Mr. Digby does not point out (p. 168) that leaseholds are not the only kinds of chattel interests on land. We also notice a few inaccuracies, principally arising from the mode of expression; thus the unwary reader might be led to suppose that the modern trial by jury is the direct descendant of the old trial *per recognitionem* (p. 82n); that *ususfructus*, *usus et habitatio* was an interest in land known to the Roman lawyers (p. 125 n); that in Bracton's time *seisina* and *possessio* were different things (p. 126 n); that *servitus realis* is a right in alieno solo arising from tenure; (p. 145 n) and that a mortgage at the present day is occasionally drawn with a proviso for re-entry on default (p. 211). It is not quite fair to accuse the German use of *subject* meaning a person possessing a right, of incorrectness; Mr. Digby is no doubt as well aware as anyone that the German *subject* has drifted from philosophy into ordinary language, taking its technical meaning with it But these are only trifling defects in a book which on the whole is well-planned and well-executed. It is a useful companion to Blackstone and Williams on Real Property.

TRANSACTIONS OF THE NATIONAL ASSOCIATION FOR THE PROMOTION OF SOCIAL SCIENCE Glasgow, 1874. Edited by C. W. Ryalls, LL.B. Cantab., LL.D., London. (Longmans, Green, & Co. 1875.) The present volume of Transactions certainly takes rank with any of its predecessors both in variety of subjects discussed,

and also in the value of the discussions which have been provoked upon the reading of the papers. Our main business however, is with that department which relates to the great subject of Jurisprudence and Amendment of the Law, over which Lord Moncreiff presided. Passing over the address of the President, not because it does not deserve the closest reading, but because there are other papers which appear to possess a more practical value, we come to the paper which would appear to possess at the present time a peculiar value. We mean the paper by Mr. Forsyth, Q.C., M.P., upon the desirability that the verdicts of juries should be absolutely unanimous. We commend this paper, and the discussion which followed it, to the careful attention of our readers, legal or lay, because there is no subject, there cannot, in fact, be any subject of greater importance. We are not wishful ourselves to express our own view. It is not our intention to promote or provoke discussion now, but must be content with drawing attention to it. The paper by Mr Miller, Q.C., "upon the Constitution of a Supreme Court of Appeal for the British Empire" is full of valuable suggestions, and the learned author points out with force that the weight of the decisions of the House of Lords as such, vastly exceeds the weight of the opinions or decisions of those individual peers or law lords who compose it. Upon these subjects where it may be said the ethical or moral elements combine with the legal, such, for example, as are discussed by Miss Mary Carpenter in her paper upon "The desirability of extending the Industrial Schools Act to day Industrial Feeding Schools," by Mr. Serjeant Cox, by Dr. Yellowlees, by Dr. Robertson, and others, we have not space to comment. But of the thing, we feel assured, that these volumes which are published every year, should find a place in the library of every zealous, earnest man, certainly of every public man, as they are replete with information, and present clearly and ably the best views of many of the best thinkers upon the all important subjects upon which they treat.

BAR EXAMINATIONS.

General examination of Students of the Inns of Court, held at Lincoln's-inn Hall, on the 6th, 7th, and 8th April, 1875.

The Council of Legal Education have awarded to Bellingham, Alan Henry, Esq., of Lincoln's-inn; Birley, Francis Hornby, Esq., of the Inner Temple; Biss, William Charles, Esq., of Lincoln's-inn; Bromfield, Samuel Worthington, Esq., of the Inner Temple; Bruce, Alexander Carmichael, Esq., of Lincoln's-inn; Daniell, James Whiteman Esq., of the Inner Temple; Dé Brajendranáth, — Esq., of the Middle Temple; Green, Samuel, Esq., of the Inner Temple; Harris, Seymour Frederick, Esq., of the Inner Temple; Hewetson, Joseph Hyacinth, Esq., of the

Inner Temple; Hill, John Robert Durlop, Esq., of the Inner Temple; Humphry, Alfred Paget, Esq., of Lincoln's-inn; Jones, Edwin, Esq., of the Middle Temple; Knott, John Reginald Stanhope, Esq., of the Middle Temple; Lamb, Joseph Chatto, Esq., of the Inner Temple; Larcom, Arthur —, Esq., of the Inner Temple; Lawson, William Hastings, Esq., of the Middle Temple; Madden, William Henry, Esq., of the Middle Temple: Monnington, Walter, Esq., of the Inner Temple; Neville, Hugh, Esq., of the Inner Temple; Paine, Tyrrell Thomas, Esq, of the Inner Temple; Parnell, Henry Tudor, Esq., of Lincoln's-inn; Perkes, Richard Moon, Esq., of the Inner Temple; Purcell, Edmund Desanges, Esq., of the Middle Temple; Robin, Charles Janverin, Esq., of the Inner Temple; Rodwell, William Hunter, Esq., of the Middle Temple; Scott, Henry Alan, Esq., of the Inner Temple; Sington Alfred, Esq., of the Inner Temple; Smith, William James, Esq., of Lincoln's inn; Tebbutt, Neville, Esq., of Lincoln's-inn; Tyabjee, Abbas Shumsooden, Esq., of Lincoln's-inn; Twamley, Zacariah, Esq., of the Inner Temple; Walshe, Holwell Hely Hutchinson, Esq., of Lincoln's-inn; Williams, James —, Esq., of Lincoln's-inn; Williams, Thomas Goddard, Esq., of the Middle-temple; and Woodhouse, Samuel Henry, Esq., of Lincoln's-inn; Certificates that they have satisfactorily passed a public examination.

APPOINTMENTS.

Mr. Ralph Disraeli has been appointed Clerk Assistant and Deputy Clerk of the Parliament in the House of Lords; Sir William Rose, Clerk of the Parliaments; Mr. Charles J. Coleman, Stipendiary Magistrate for Middlesborough; Mr. J. M. Ludlow, Registrar of Friendly Societies; and Mr. Horace Watson, barrister, one of the three English members of the Anglo-French Joint Commission on the scheme for a tunnel under the English Channel. The following are the Examiners of the High Court of Admiralty: W T. Pritchard, Esq., E. C. Currie, Esq., G. H. Brooks, Esq., A. Heales, Esq, H. C. Coote, Esq., H. Stokes, Esq., G. A Rogers, Esq., and Charles Ford, Esq. Mr. Richard Footner has been elected to the office of Town Clerk of Andover; Mr. F. Charles Sydney, to the office of Deputy Registrar of the Lord Mayor's Court. Mr. Thomas Cox has been appointed Town Clerk of Evesham; Mr. John Cole, Registrar to the Birmingham County Court; and Mr. John Thomas, Town Clerk of Swansea. *Ireland*—Mr. Stephen Huggard has been appointed Sessional Crown Solicitor for the county of Kerry; Mr. Buchanan, Crown Prosecutor for the county Leitrim. *Scotland.*—Mr. A. Rutherford, Clerk Advocate, has been elected a Curator of Patronage in the University of Edinburgh; Mr. J. M. Duncan, Secretary to the Board of Northern Lights; Mr. W. A O. Paterson, Sheriff-Substitute of Ayrshire at Ayr. Sir William Henry Doyle, Knight (Chief Justice of the Bahama Islands) has been appointed Chief Justice of the Supreme Court of the Leeward Islands, in substitution for Mr. W. E. Browning. *New Zealand.* Mr. James Prendergast has been appointed Attorney-General.

THE

LAW MAGAZINE AND REVIEW.

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I.—JURISPRUDENCE: A REVIEW.*

By John G. W. Sykes, LL.B., Barrister-at-Law, and Advocate H.M.'s High Court, N.W.P., India.

"Qui de legibus scripserunt, omnes, vel tanquam philosophi, vel tanquam jurisconsulti, argumentum illud tractaverunt. Atque philosophi proponunt multa, dictu pulchra, sed ab usu remota. Jurisconsulti autem, suæ quisque patriæ legum, vel etiam Romanorum aut Pontificiarum, placitis obnoxii et addicti, judicio sincero non utuntur, sed tanquam e vinculis sermocinantur."—De Augmentis. Lib. viii.

"And albeit the reader shall not at any one day (do what he can) reach to the meaning of our author—yet let him noway discourage himself, but proceed; for on some other day in some other place that doubt will be cleared."—Lord Coke.

(Continued.)

HAVING thus fixed the subject-matter of the science with which we are concerned, Austin might forthwith have proceeded to a discussion of it and its various sub-divisions. We have already spoken fully of the difficulty attending the study through reasons connected with language and terminology. Before going on to consider the philosophy of positive law Austin, therefore, defined certain terms and

* The Students' Edition of Austin's Lectures on Jurisprudence. Abridged from the larger work. By Robert Campbell, of Lincoln's Inn, Barrister-at-Law. London: John Murray.

analyzed and settled certain notions pervading the science; as the terms Right, Law, Duty, Sanction, Person, Thing, Act, Forbearance, Injury, Wrong, Intention, Negligence, Heedlessness, Rashness, Will and Motive, and Political or Civil Liberty. And he does this with an admirable clearness, showing, at the same time, the interconnection of each of these ideas with each other and with the rest. To follow him through this analysis is an excellent mental exercise, and he makes the reader feel what might be done in various sciences, if, to use his own somewhat strange expression, "Men would only think distinctly and speak with a meaning."* We cannot dwell upon this part of the subject, and we shall only give one or two instances of ideas which he settles in this portion of his work. First, we will take his definition of Right, meaning, of course, legal right. The import of Right in the abstract he states thus:—"When a monarch or sovereign body expressly or tacitly commands that one or more of its subjects shall do or forbear from acts towards or in respect of a distinct and determined party, the person or persons who are to do or forbear from these acts are said to be subject to a duty or to lie under a duty; and the party towards whom the acts are to be done or foreborne is said to have a right or to be invested with a right." † From this definition it is clear Austin fully recognizes the distinction which has been taken, when it is said, that to be perfectly accurate we should say the object of *obligation* or duty is not the thing to be furnished, but the act of furnishing to which the *debitor* or person subject to the duty may be compelled. Thus if the right is what is called a right *in rem*, *i.e.*, availing against all the world, it is a right to forbearance on the part of every one else from disturbing the enjoyment of the party entitled: if it be a right *in personam*, *i.e.*, a right availing

* Works, p. 123. Students' Ed. p. 30.

† Works, p. 412. Students' Ed. p. 192.

against a person or persons specifically determined, it is a right to acts or forbearances on the part of those persons. Or, as it is expressed by Paulus, "Obligationum substantia non in eo consistit, ut aliquod corpus nostrum, aut servitutem nostram faciat; sed ut alium nobis obstringat ad dandum aliquid, vel faciendum, vel præstandum." * On which terms M. Ortolan comments, as "indiquant élégamment par là que l'obligation ne produit aucun droit direct du créancier à la chose (ce que nous nommons droit réel) qui permette à celui ci de disposer ou tirer profit en aucune manière de la chose, mais seulement un droit contre le débiteur, pour le contraindre à fournir la chose.—D'où il suit en amenant l'idée à sa plus grande simplicité et à toute son exactitude, que l'obligation n'est autre chose qu'une necessité juridique d'action ou d'inaction imposée à une personne envers une autre." †

And, from Austin's definition, it is clear also that it is to the act or forbearance of a person other than himself and the monarch, that the party having the right is entitled. Else a man might have a right against himself. And this is the reason why, to take an instance from English law, there is a release by operation of law when a creditor appoints his debtor to be his executor, and in similar cases.‡

With Austin's definition of right, Mr. Mill finds fault,§ and we think unnecessarily. He renders it thus: "The only definition of a right which he (Austin) finds himself able to give is, that whenever a legal duty is to be performed *towards*, or *in respect of*, some determinate person, that person is invested with a right." The italics are Mr. Mill's. Mr. Mill considers that this definition is defective, by reason of the absence of this element, namely, "that the person who

* Dig. 44. 7. 3.

† Commentaries on the Institutes, Vol. iii. p. 130.

‡ Add. Contr. 6th Ed., pp. 984-5; Co. Litt. 264, b. Pothier, on Obligations, No. 643-607: *contra*, if only appointed administrator. Bac. Abr. Exor. a 10. Add. Contr. p. 986.

§ Edin. Rev. Oct. 1863. pp. 453-5.

has the right is the person who is meant to be benefited by the imposition of the duty." And he adds a passage of value to the student of Austin. It is this: "In the lectures as delivered (which included much extemporaneous matter, not preserved in the publication), Mr. Austin anticipated this obvious objection, and combated it. The notion of a right as having necessarily for its purpose the benefit of the person invested with it, is contradicted, he said, by the case of *fiduciary* rights.* To these he might have added (and probably did add) the rights of public functionaries—the judge, for instance, or the policeman; which are not created for the benefit of the judge or policeman themselves. These examples are conclusive against the terms of the particular definition contended against; but it will appear, from two considerations, that they do not fully dispose of the subject.

"In the first place, Mr. Austin's own definition is amenable to a similar, though contrary, criticism. If the definition which he rejected does not comprise all rights, his own comprises more than rights. It includes cases of obligation to which he himself must have admitted that there were no rights corresponding. For example, the legal duties of jailors. It is a jailor's duty to feed the prisoners in his custody, and to this duty corresponds a correlative right in the prisoners. But it is also his legal duty to keep them in confinement, perhaps in bodily fetters. This case is strictly of the kind contemplated in Mr. Austin's definition of a right; there is a duty to be performed towards, or in respect to a determinate person or persons; but would it be said that a corresponding right resided in those persons, or, in other words, that they had a right to be imprisoned, and that their

* Cf. also Works, p. 789, for an important passage on this question, which is omitted from this students' edition. "The rights and duties of guardians are merely subservient to those of the ward. The guardian is clothed with rights and duties in order that the rights of the ward may be more effectually protected, and in order that the duties incumbent on the ward may be more effectually fulfilled."

right would be violated by setting them at liberty ? Again, it is the duty of the hangman to inflict capital punishment upon all persons lawfully delivered to him for that purpose; but would the culprit himself be spoken of as having a right to be hanged ? Certainly not. And the reason is one which Mr. Austin fully recognises. He says, in one place, that 'a right in a condition which is purely burthensome is hardly conceivable;' and in another, that 'a right to be a burthen or to vindicate the enjoyment of a burthen,' is 'an absurdity.' He also, with writers in general, speaks of many obligations as existing for the sake of correlative rights. If this is a correct expression, there is more in the idea of a right, than an obligation towards or in respect to a given person; since an obligation cannot merely exist in order that there may be a person towards or in respect to whom it exists.

"The truth is that it is not customary to speak of a person as having a right to anything which is not, in the contemplation of the legislator, a desirable thing; and it is always assumed that the person possessing the right is the person specially interested in enforcing the duty which corresponds to it. Mr. Austin, no less than others, makes this supposition, when, in the common language of jurists, he says, that when a duty is violated, the person who has the right is *wronged* or *injured* by the violation. This desirableness of the right, and this especial vocation on the part of the possessor to defend it, do not necessarily suppose that the right is established for his particular advantage. But it must either be given to him for that reason, or because it is needful for the fulfilment of his own legal duties. It is consistent with the meaning of words to call that desirable to us which is required for the performance of our duties. The alternative covers the case of fiduciary rights, the rights of magistrates, and we think every case in which a person can, consistently with custom and with the ends of language, be

said to have a right. And including all such cases, and no others, it seems to supply what is wanting to Mr. Austin's definition."

We have given the passage at length, for it seem to us full of errors of reasoning and misstatements, and, in our remarks upon it, we are wishful to do the late Mr. Mill all justice. No doubt passages may be cited from the English Reports, advancing the idea contended for by Mr. Mill. Thus we read, "Every estate, whether given by will or otherwise, is supposed to be beneficial to the party to whom it is given."* Whence willingness to accept it is presumed.† But this idea of desirablenes, or of benefit, is not essential to that of right. For it is clear that fiduciary rights, as contended by Austin, are not created to give the element of desirableness or benefit to the trustee. Though he has the right, and is so enabled to perform his legal duty, he is not "the person meant to be benefited by the imposition of the duty," but is merely a means of conveying the benefit to the person for whom he is trustee. True, the *fidei-commissarius*, in Roman Law, took the *Falcidia quarta*. But in English Law it is a distinct principle, indeed, both at law and in equity, that the parties having fiduciary rights, so far from being intended to be benefited in any way whatever, shall not make profit, *i.e.* derive benefit from their office, as of guardian, trustee, etc. Then as to the argument founded on the duties of jailors; it involves a fallacy, and a deep one. Because the Sovereign gives prisoners a right to be fed, and imposes a duty on jailors of feeding them, it by no means follows, that we are to dissent from Austin's proposition that "a right in a condition which is purely burthensome, is hardly conceivable;" and to say that, "because the Sovereign imposes a duty on jailors of keeping prisoners in confinement, and on hangmen of inflicting capital punishment

* Per Abbot C. J. Townson v. Tickell, 3 B & A. 31. 36.
† Thompson v. Leach, 2 Salk. 618, 2 Lev. 284, 2 Vent. 198.

on those lawfully delivered to them for the purpose, that, therefore, a corresponding right is given to the prisoners of being confined and the parties of being hanged;" in this passage Mr. Mill has tried a trick with words. Having given Austin's words, "*towards*" and "*in respect of*," in italics, it suits Mr. Mill's argument here to substitute for the words "in respect of" the words "*in respect to*." Now the duty of confining and hanging imposed on the jailor and hangman, respectively, is *not* to be observed "*towards or in respect of*" the prisoner or party: though it is undeniable that it is to be observed "in respect to" the prisoner or party. But the duty of the jailor or hangman is one which is to be observed "*towards or in respect of*" the State, "*in respect to*" the person of the prisoner or party. Now, if Mr. Mill had looked at the preceding page of his analysis of Austin, he would have seen that there are some absolute duties *which correspond to no right at all.* One class of those duties is that of duties to be observed towards persons indefinitely or towards the State. Under this class the duties in question clearly fall; and the prisoner, or party who is to undergo capital punishment, also, instead of having a right to be confined or hanged, has similarly an absolute duty to undergo one or the other of these, and a duty which is constantly enforced. Hence, not only is Mr. Mill wrong in his proposition, but he attempts to reduce Austin's definition to an absurdity, by the introduction of a fallacy into his own argument, and a word not used by Austin into the latter's definition, and he does so after having had 30 years to think over the matter. Truly, as we have elsewhere said, whole courses of logic may be gone through without accuracy of thought being attained.

Let us take as another instance the term "person;" and we take this to notice a correction which Mr. Campbell should have made in his edition of the larger work, and which, we are glad to see, he has made in the present edition. After a long discussion of errors into which preceding jurists had

fallen, Austin defines person as "a human being considered as invested with rights or as subject to duties." * But besides denoting human beings, the term person sometimes denotes "the *conditions* or *status* with which they are invested." In discussing the meaning of person the question of *status* thus arises, and Austin treats of it at considerable length. In doing so he makes a statement which certainly called for a note from his editor. He writes, "The reason why *status* or condition makes so little figure in English law as compared with the Roman, though the idea must of course exist in all systems of law, seems to be this: that the right in a *status* may by the Roman law be asserted directly and explicitly by an action expressly for its recovery; while in English law no such action can be brought, and the right to a *status*, though of course it often becomes the subject of a judicial decision, almost always comes in as an episode, incidental to an action of which the direct purpose is something else. Thus a question of legitimacy, which is precisely a question of *status*, is usually brought in and decided upon incidentally, in an action of ejectment. The question whether or not a particular person is a *slave*, would generally come before the judge upon a prosecution by the slave of the person claiming to be his master for doing some act which would be illegal unless the claim could be re-established. The only case in which a question of status is decided directly in English law, is when a jury is summoned to try that precise question as an *issue* incidental to a suit in another court." † In a note to the first sentence of this passage Mr. Campbell adds, "In the English Probate Court—formerly the Ecclesiastical Court—the right to the executorship or administration, a species of *universitas juris*, is obtained by what is substantially a judicial proceeding." ‡

* Idem, p. 402. † Works, p. 360.

‡ Works, p. 402. Students' Ed. pp. 190-1.

And we are inclined to say, in the language of a child's game, "How he burns!" But this only makes it the more remarkable that when by the very passage his attention was called to the question of legitimacy, "which is precisely a question of *status*," he did not tell us that on this question we may have a direct decision expressly on the point if we choose to pay for it, and that we may obtain it in the Court of Divorce and Matrimonial Causes, as was lately done in the Frederick Baronetcy Case.* The Act under which the Court has jurisdiction to make such a decree was passed sometime before Austin's death, and it shows how completely he had relinquished all work on his great subject that no note of it was found among his papers. It was not to be expected that Mrs. Austin should be able to state the alteration. But when Mr. Campbell, a barrister, undertook to edit a work like Austin's, he should have had a more intimate acquaintance with English law on which Austin so largely builds, and he should have had higher qualifications than any which he has displayed in either the larger or the present work. For instance, he clearly had not bestowed that careful reading and re-reading of his author, which we look for in an editor. Had he done so he would never have fallen into an error which he makes in another of his notes. Austin very carefully restricts the term "act" to those of our bodily movements which immediately follow our desires of them. What he says is:—"Our desires of those bodily movements which immediately follow our desires of them, are therefore the only objects which can be styled volitions."—"And as these are the only volitions, so are the

* By Statute 21 & 22 Vict. c. 93, s. 12, "The Court of Divorce and Matrimonial Causes may, on petition of a natural born subject of the Queen domiciled in England or Ireland, or claiming any real or personal estate situate in England, make a decree declaratory of the validity of the marriage of such person, or of his father and mother, or of his grandfather and grandmother, or of his legitimacy or illegitimacy, or of his right to be deemed a natural born subject of the Queen."

bodily movements by which they are immediately followed, the only *acts* or *actions* (properly so called)." And again, "But as the bodily movements which immediately follow volitions, are the only *ends* of volition, it follows that those bodily movements are the only objects to which the term 'acts' can be applied with perfect precision and propriety."* On this his sapient editor observes, "It is not clear whether the author here intends to exclude from the category of acts all processes that do not *immediately* result in a *palpable* bodily movememt."† (Is it not, indeed?) "If so, he is inconsistent. The author elsewhere (p. 469) implicitly recognizes *meditation* as an act: further, (p. 470), while he regards the conviction produced by evidence as a case of physical compulsion, he recognizes that non-belief may be blamable as the result of insufficient examination, refusal to examine, &c. The process of examination is therefore the object of a duty, and hence, according to his own analysis, it is an act (p. 350, 378, 406)." Now it is perfectly clear from all Austin says, and in particular from the passages quoted, that he does intend to exclude from the category of acts everything (not processes merely) except 'those bodily movements which immediately follow our desires of them.' Nor with the rectification in Lecture XIX.‡ of his mistake in Lecture XIV. § in distinguishing acts into internal and external can he be considered inconsistent. Nor does he, in the passages cited, recognize meditation as an act. What he does say is this:—"For example, I cannot know science by simply wishing to know it. But by resorting to

* Works p. 426-7.

† In this Students' Edition, the editor seems to have changed his mind as to the indistinctness of Austin's meaning, when he uses the term "act." He retains, however, the rest of his note, and the charge of inconsistency in it. (Students' Edition, p. 174.)

‡ Works p. 483.

§ Idem, p.p. 376-7.

means suggested by the wish, I may come to know it. By reading, writing and meditation, I shall acquire the knowledge which I desire. And so virtues may be acquired by indirect consequence. Numerous changes in the mind are, therefore, wrought by desires: *though none of the desires which work changes in the mind can be likened to the peculiar desires which are styled volitions*,"* *i.e.*, those desires which are immediately followed by the bodily movements wished for, *i.e.*, by *acts*. This is a strange method of recognizing meditation as an act. Again, Austin does not say that meditation will immediately follow our desire to know, but that we shall read and write, &c. Again, Austin recognizes as acts only those bodily movements which immediately follow our desires of them as an end. But by the statement of the case, what we here desire as an end, is not the meditation but the consequent knowledge. In the case of blamable non-belief, as in failure to examine evidence, Austin has not spoken of a *legal* duty to examine. Hence to apply his analysis of legal duty and its object is a mistake. And (to use Mr. Campbell's own words, and here he is right) "no doubt the mental processes in question are too impalpable and obscure to enter the domain of positive law, unless evidenced by acts of a more observable kind, which last are sometimes distinguished by the name of overt acts, a term devised not without insight."† We have not space for any further instances, but those already taken may serve to give some faint idea of the care with which Austin has drawn this part of his subject, and of the apparent impeccability of his definitions. These terms form the

* Works, p. 469: a passage totally altered by the editor in the present edition and rendered as follows:—"But changes in the mind may be wrought through *means* to which we resort in consequence of such desires: *e.g.*, acquiring knowledge of a particular science, by reading, writing and meditation." (Students' Ed. p. 222.)

† Works, p. 427, n.

machinery by means of which an examination of the science of Positive Law becomes at all possible. And now, knowing what is the subject-matter of the science, and having these terms thus defined, we are in a position to follow Austin in his consideration of it.

Positive Law may be considered under either of two aspects. First, with reference to its sources and with reference to the modes in which it begins and ends; or secondly, with reference to its purposes and with reference to the subjects about which it is conversant. In whichever way it is examined, numerous important considerations at once arise: if in the former, the distinction between written and unwritten law, the principles of customary law, the meaning of equity, and the great question of codification; if in the latter, the no less important question of the best manner of arranging the *corpus juris* and a discussion of the nature of rights. We propose to look very briefly at Austin's treatment of it under each aspect. Looking at Positive Law in the former manner, we see that a law may be set *immediately* by the sovereign, or by a party in a state of subjection to the sovereign, by virtue of a delegated authority from the sovereign. This distinction is intended to be indicated by the civilians by the inappropriate terms, written and unwritten law, and promulged and unpromulged law. Again, whether set by one or the other, it may be set by its author as properly legislating, *i.e.*, as a law; or it may be set by its author as properly judging. But whether set by one or the other, or by its author in one way or the other, every positive law exists as such by the pleasure of the sovereign. Whence it follows that customs, which have got the name of Customary Law, are not law at all until re-enacted by the sovereign in the way of direct legislation or enforced by the judicial tribunals. For, as we have already seen in considering Austin's definition of a positive law, an expression of the will of the superior is necessary to its existence.

Hence the absurdity of the idea that customary law exists as law without regard to the will of the sovereign, merely by being custom. But the sovereign makes custom law, not merely by giving a description of it, but by declaring his will that so it shall be, and by annexing a sanction ; his will to which expression is given being backed by his sovereign power.

Austin, in this portion of his work, traces the growth from the *jus gentium* of the early Roman lawyers, of the equitable jurisdiction of the Prætors, and the Roman Æquitas. He distinguishes the various meanings of equity, and shows that, as the name of a species of law, the term equity is confined to Roman and English jurisprudence. For the latter he suggests the name Chancery Law. He compares the equity of the Roman Prætors and the equity administered by the English Chancellors. And he concludes that the only points of close resemblance between them are: that each allowed the law which it abrogated to exist in form ; 2nd, that each was unsystematic in form ; and, 3rd, that each was formed to some extent by analogy to the law :—the one to the *Jus Civile* (*subsequitur Jus Civile*), the other to the Common Law (*sequitur legem*). But this last is no proof of resemblance ; every body of innovating law is formed by the same analogy. To these points of resemblance, Sir H. S. Maine rightly adds the following : "Each of them tended, and all such systems tend, to exactly the same state in which the old common law was when equity first interfered with it. A time always comes at which the moral principles originally adopted have been carried out to all their legitimate consequences, and then the system founded on them becomes as rigid, as unexpansive, and as liable to fall behind moral progress as the sternest code of rules avowedly legal.* And "another remarkable characteristic of both English and Roman equity, is the falsehood of the assumption upon

* Ancient Law, pp. 68-9.

which the claim of the equitable to superiority over the legal rule is originally defended." In the one case, the assumption that a lost perfection is being regained; in the other, the assumption that the king has a general right to superintend the administration of justice as a natural result of his paternal authority.* The most material points of difference between Roman and English equity, as stated by Austin, are these. Whilst the Roman Prætor, besides judging, legislated directly, even in matters regulated by what is called substantive law, the English Chancellor obliquely legislated as directly judging. And, second—a difference which it is now important to consider—the Roman equity was administered by the ordinary civil tribunal, whilst English equity has hitherto been administered in the separate tribunal of the Court of Chancery.

It may be in the recollection of our readers that when Lord Selborne's Supreme Court Bill was introduced into Parliament, Her Majesty's counsel practising at the Chancery Bar protested against an amalgamation of the Common Law and Equity jurisdictions in the remodelling of the Courts. This action of the leaders of the Equity Bar was met in some quarters with ridicule, and at all events effected little. They were spoken of, in some quarters, by Lord Selborne's less enlightened supporters as "reconciled to the double system by nothing but inveterate usage," and as governed by "obstinate prejudices." But they were not without grounds for their protest, and would no doubt have shown this, had full opportunity been given them. They might well have argued from a comparison of the Roman and English legal systems, in this respect. In its early stages we find the Roman Law hard and fixed. We have it engraved on XII Tables, a symbol of its intended fixity. To this Tacitus bears witness when he speaks of the law of the XII Tables as "Finis Æqui Juris." † In the course of time this is found to require

* Idem, pp. 70, 72. † III. Annal., 27.

relaxation, and the equitable jurisdiction of the prætors springs up. Through the force of circumstances, the best account of which is given by Sir H. S. Maine,* the equitable jurisdiction of the prætors became fixed. The lava solidified, and a new equitable jurisdiction arose, and none the less that, as Austin says, the ordinary civil tribunals were administering Law and Equity together. This was the equitable jurisdiction of the emperors, which was of the widest and freest description. The advance of equitable principles was now carried on through the medium of Imperial Constitutions. An Imperial Constitution in its widest sense was anything by which the Emperor declared his will and pleasure, either in a matter of legislation, administration, or jurisdiction. It is defined by Gaius, in his list of the sources of the Jus Romanum, in these words: "Constitutio Principis est quod Imperator decreto vel edicto vel epistola constituit. Nec unquam dubitatum est, quin id legis vicem optineat, cum ipse Imperator per legem imperium accipiat." † In the next stage we see the law oppressed by its own weight, and Justinian determining on its codification, and on the fusion of law and equity, so that we read the two together in his compilations, *e.g.* of *obligationes aut civiles sunt aut prætoriæ*, etc. This is exactly what has occurred in English law. The Common Law is hard. To the source from which alleviation might have been got the judges declined to go.‡ "The Englishman," says John Hill Burton, the historian of Scotland, "disdained the universal Justinian jurisprudence, and would be a law unto himself, which he called, with an affectation of humility, 'the Common Law.' It is full no doubt of patches taken out of the

* Ancient Law, Chapter III.

† Com. Bk. I., sec. 5; and similarly Inst. Bk. I., Tit. I., sec. 6; Dig. Bk, I., Tit. 4, sec. 1.

‡ Temp. Rich. II., the Judges at Common Law prohibited the citation of Roman Law in their Courts. 1, Spence's Equity, 346.

Corpus Juris, but so far from this source being acknowledged the civilians are never spoken of, but to be railed at and denounced, and when great draughts on the Roman system were found to be absolutely necessary to keep the machine of justice in motion, these were entirely elbowed out of the way by the Common Law, and had to form for themselves a separate machinery of their own called Equity." * That system of Equity has now become settled. It is governed by rules and precedents as much as the Common Law. Hence the question of the fusion of the two has arisen. And whilst the opponents of the Supreme Court Act would, of course, admit that it may be possible to fuse the two, seeing that heterogeneous as they originally were time has thrown them into a state of homogeneity; yet looking a little further than those who have ridiculed their view they see in this very fact of the increased fixity of equitable principles the hint of a possible future requirement of a more advanced equitable system. They ask themselves the question, 'Will these equitable principles which seem to satisfy us in the nineteenth century, satisfy our descendants of the twenty-fifth?' 'We have advanced in our views of right, shall we think our distant descendants will do less or the times to come be worse than these?' It is natural to suppose that other equitable principles will be required, nay they are wanted even now. And the idea with Equity barristers was that these would be better administered by men brought up in that particular branch of the law and not trained under the insinuating influences of the Common Law in many instances to value precedent above principle. This was probably also the idea of a late Lord Chancellor, now dead, when he said, "It seems to me, that for the most part Common Lawyers

* "Scot Abroad," Vol. I., p. 237. Of course numerous other causes co-operated in bringing about the establishment of the Chancellors' Equity jurisdiction; *e.g.*, the defective system of Common Law Procedure on Writs; the requirements of Uses and Trusts; and the invention, by John de Waltham, Bishop of Salisbury, and Keeper of the Rolls under Richard II., of the Writ of Subpœna.

are men of contracted intellects,"—a remark in which we cannot concur. The Equity barristers, too, heartily advocate the abolition of the remaining inconsistencies between the two systems, and the grant to equity judges of more advanced equitable powers. This was their view, and it must be owned that it has some force in it. We think the balance of advantage is on the side of the supporters of Lord Selborne's Supreme Court Act; but at the same time we feel that it is a question on which there may be two opinions; and we have perhaps said enough to show that the shallow scoffs of the self-styled Reformers display all the insolence of ignorance and all the traits of a very jejune advocacy.

We have spoken of the distinction between law formed in the way of direct legislation, and law formed in the way of oblique legislation by the sovereign or by authorized parties, as judging. The whole effective distinction between statute and judiciary law seems to be that the former is expressed in general or abstract terms, whilst the latter exists nowhere, in general or abstract terms, but is implicated with the peculiarities of the particular case in which it was laid down. By judiciary law or judicially-made law Austin means not a law made by judges, but law made by the sovereign or any other authorized party, not as properly legislating but as properly judging. And therefore it does not affect his statement that a judicially-made law exists nowhere in abstract terms to know that our judges have sometimes legislated directly, and in abstract terms and that, too, in direct opposition to "King, Lords, and Commons in parliament assembled." For instance an Act was passed in the reign of King Charles II. "concerning the size of carts and wagons, with many penalties upon the transgressors; and yet when it appeared that the model prescribed by the Act was not practicable, the judges (in their circuits) gave directions not to execute the Act*." But these cases in which our judges have legislated directly do not affect the correctness of what

* Burnet. Hist. own Times. 428.

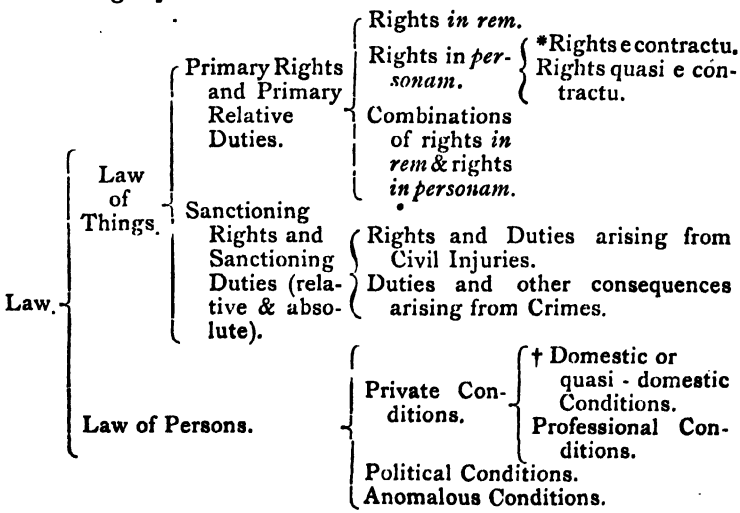
Austin says of judiciary law; every rule of which has to be disentangled from the facts of the particular case in which it was enunciated. And what we have to look for is the *Ratio decidendi*, or the general reasons and principles of a judicial decision rather than the terms in which it is expressed. Or, as one of our great judges, Lord Chief Justice Holt, puts it, "The reason of a resolution is more to be considered than the resolution itself.* " It is then a grave objection to Judiciary Law that it is not precisely expressed in general and abstract terms, as law. Groundless objections have been raised to it as, that it is not law; that if subordinate judges have the power of making laws, the community has little or no control over those who make the laws; that it depends on the *arbitrium* of the judge; and that it is not attested by authoritative documents: an objection now removed by effect being given to Lord Bacon's suggestion to King James I. that authorized Reporters should be appointed. But besides the great objection to Judiciary Law resting on the form in which it is expressed there are also the following. It is not only made in haste, but it is applied in haste.† In relation to the decided case by which the rule is introduced it is always (strictly speaking) *ex post facto* legislation. It is vague and inconsistent, owing partly to the bulk of the documents in which it is to be sought, and partly to the difficulty of extracting a law from the decided cases in which it is imbedded. There is no test by which the validity of a judiciary law can be ascertained. "Since then," says Austin, "such are the evils of judiciary law, the expediency of a code—a complete and exclusive body of statute law--will hardly admit of a doubt. Nor would it admit of any at all, if the code could be a good one. But whoever has duly considered the difficulty of making a good statute will not think lightly of

* 12 Mod. R. 294.

† Lord Eldon's judicially-made law was not made in haste. In *Earl of Radnor v. Shafto*, his lordship said: "Having had doubts upon this will for twenty years there can be no use in taking more time to consider it. (11 Ves. p. 458.)

the difficulty of making a code. Codification, then, is a question of time and place. It may be questionable whether codification in this community or in that, and at this time or at that, would be good. But a tolerably good code must be allowed by all to be preferable to an incondite mass of judiciary law." The question of codification thus introduced is well considered, and, in the text and the "Notes on Codification," all objections to codification generally are met, and a few practical suggestions on the question given.*

We come now to the last portion of our subject, which is concerned in finding out the best method of arranging the whole field of law. And whilst acknowledging that his method is not free from defect, Austin decides that the most convenient division is that which turns on a classification of various sorts of rights. This portion of the subject will be best explained by a reference to Austin's tabular division of law considered under this aspect, to which we have slightly added.



* These are reproduced with some additional matter, in an "Essay on Codification," by T. E. Holland, Esq., M.A., B.C.L., Barrister-at-Law, and Chichele Professor of International Law at Oxford. "Essays on the Form of the Law," which, though not very original, may repay perusal.

* Works p. 55. † Works p. 69.

The names *Jus Rerum* and *Jus Personarum*, Law of Things and Law of Persons, have been a fruitful source of cunfusion to legal writers. The Roman Law terms are unhappily chosen. The term "*Res*," in Roman Law, meant first, "*id quod tangi potest*," but it also denoted *Res incorporales*, *i.e.*, "*ea quæ ad jura pertinent, at jus hæreditatus, jus utendi fruendi, jus servitutis, obligationes quoquo modo contractæ;*" that is, in short, rights generally: whilst *Persona* was used, not in its meaning of a human being considered as invested with rights, or as subject to duties, but in its sense of *Status* or the conditions which persons bear. The distinction, then, between the Law of Things and the Law of Persons thus rests entirely on the meaning of *Status*.

Now what constitutes a *Status?* In considering this question Austin chases down many definitions which have been given of *Status*, and on the making of which much juristical subtlety has been expended. And he concludes that the rights, duties, capacities, and incapacities, constituting a *Status*, are not susceptible of any accurate definition. But every *Status* is accompanied by the following distinguishing marks. Universally, or nearly universally, it resides in a person as belonging to a class, and not as being his individual self; the rights and duties constituting the *Status* are generally so considerable in number as to impart to the party invested with them a conspicuous character, and as to have a considerable influence over his social relations; and they regard *especially*, though not exclusively, the class of persons by whom they are borne. And hence they may be separated from the bulk of the legal system without affecting its unity or compactness. And this, in Austin's opinion, is the whole *rationale* of the division of law into Law of Things and Law of Persons. "Wherever a set of rights and duties, capacities, and incapacities, specially affecting a narrow class of persons, is detached from the bulk of the legal system and placed under a separate head, for the convenience of exposition, that set of rights and duties, capa-

cities and incapacities, is called a *Status*." The uses of the division of the *Corpus juris* into *Jus Rerum* and *Jus Personarum*—corresponding with Bentham's division into general and special codes, are manifest. Repetition and consequent voluminousness are avoided. In the Law of Things all that can be affirmed of rights generally, is stated once and for all. And to separate the portions of law, specially affecting peculiar classes, renders these portions more accessible to them. These grounds determine Austin's opinion that this division is, of the three possible ones, the best.

It is noticeable that the Law of Things is placed before the Law of Persons, and it ought to precede the Law of Persons, as being the Law *minus* the Law of Persons, and, therefore, requiring fewer references to what is to follow and for the reasons suggested.

On the principle of the division rests also Austin's rejection of the Roman Lawyers' division of *Public Law*, or the *Law of Political Conditions*, as a department of law opposed to the rest of the Law. He places it where he has shown conclusively that it ought to be placed, namely, as one limb of the Law of Persons. For though much of it is not positive law at all, and not strictly matter for any position in a body of positive law, having to do as it has with the sovereign, who, as we have seen, can have neither legal rights nor duties against his own subjects, the reasons for constituting the department Law of Persons at all exist most fully in this instance.

Now let us look at the divisions of the Law of Things. Some rights arise upon facts which are not delicts, injuries, or offences; and some arise upon delicts, injuries, or offences. These rights are clearly distinguishable, and for very good reasons are placed in different classes. And here we may point out a flagrant error in Mr. Mill's review of Austin's works. He says, "Though Mr. Austin retains the class of rights *ex delicto*, it is here that his classification most materially deviates from that of the Roman jurists.

Instead of making rights *ex delicto* a secondary, he makes them a primary class. Instead of co-ordinating them with rights from contract and quasi-contract as a species of *jura in personam*, he opposes them to all other rights *in rem* and *in personam* taken together." * Now Austin, in this division of his, is considering law "with reference to its purposes," and what he says of this division is: "Rights and duties which are consequences of delicts are *sanctioning* (or preventive) and *remedial* (or reparative). In other words, the ends or purposes for which they are conferred and imposed are two: *first*, to prevent violations of rights and duties which are *not* consequences of delicts; *secondly*, to cure the evils, or repair the mischiefs, which such violations engender.

"Rights and duties *not* arising from delicts may be distinguished from rights and duties which are consequences of delicts, by the name of *primary* (or principal). Rights and duties arising from delicts may be distinguished from rights and duties which are *not* consequences of delicts by the name of *sanctioning* (or secondary)." † Again, Austin expressly recognizes some of these rights as rights *in personam*, though not as belonging to the department of primary rights. Here what he says is, "Rights *in personam*, including the obligations which answer to rights *in personam*, arise from facts or events of three distinct natures: namely, from *contracts*, from *quasi-contracts*, and from *delicts*.

"The only rights *in personam* which belong to this sub-department, are such as arise from contracts and quasi-contracts. Such as arise from delicts belong to the second of the capital departments under which I arrange or distribute the matter of the Law of Things." ‡ Austin does, then, all that Mr. Mill requires, and he does not oppose one class of rights *in personam* to the other, because, in his considera-

* Edin. Rev. Oct. 1863. p. 473.

† Works, p. 45. ‡ Works p. 55.

tions of the purposes of these classes and the facts on which they arise, he shows that the rights of one class exist to support or sanction the other, and arise on facts of a very different character from those on which the rights of the other arise.* The division of Rights into Primary and sanctioning does not present a logical distinction, as Austin takes care to point out; for a primary right or duty is not of itself a right or duty without the secondary right or duty by which it is sustained. The division in question is the same as that indicated by Bentham and other jurists by the names Substantive and Adjective Law, or Material and Formal Law. In writing on the distinction between the two Bentham advances some strange ideas on the validity of Substantive and Adjective Law respectively, which we have nowhere seen animadverted on. He seems, absurdly, to think there is some peculiar efficacy in the former, for he says :—" A rule like this," (that a wife is not bound to testify

* It is clear from these passages from the Outline of the Course that Austin does consider that one, though not the sole difference, between Primary and Secondary or Sanctioning rights and duties lies in the difference of "the ends or purposes for which they are conferred and imposed." But, in his forty-fifth lecture, (Works pp. 789, 790 Students' Ed. p. 375,) he says: "The division, therefore, of law into law regarding primary rights and duties, and law regarding secondary rights and duties cannot be referred to a difference between the purposes for which those rights and duties are respectively given by the State. And I object to the names, 'Substantive and Adjective Laws,' as tending to suggest that such is the basis of the division. It appears to me that the division rests exclusively upon a difference upon the events from which the rights and duties respectively arise. Those which I call primary do not arise from injuries, or from violations of other rights and duties. Those which I style secondary or sanctioning (I style them sanctioning because their proper purpose is to prevent delicts or offences) arise from violations of other rights and duties, or from injuries, delicts, or offences." This, as it stands, is inconsistent with what is said in the Outline, and likewise *inter se*. The insertion of the word "alone" after the word "referred," and the substitution of the words "partly also" for the word "exclusively," would make them consistent. Here, then, was a chance for Mr. Campbell to distinguish himself. Here a note was wanted, and the results of a close examination of Austin's MSS. *in loco* should have been given us. But Mr. Campbell, instead of this, was pointing out inconsistencies which do not exist, and showing an ignorance of his author unpardonable in an editor.

against her husband)* "protects, encourages, inculcates fraud. For falsehood, positive falsehood, is but one modification of fraud : concealment, a sort of negative falsehood, is another : I mean, concealment of any facts, of which, for the protection of their rights, individuals or the public have a right to be informed. The concealment which is authorized by the law, it may be said, ceases to be fraud. No ; that it does not : I mean, in this case. A concealment which is authorized by the *substantive* branch of the law cannot be fraudulent : the authorization does away with the fraud : what is authorized is legalized : criminality and legality are repugnant, and incompatible. But the law cannot, without authorizing fraud, authorize, by its *adjective* branch, the doing of that which, by its substantive branch, it has constituted a crime." † But this is nonsense. One is as strong and of as great validity as the other, each being supported by the same power, namely, that of the sovereign who may express his commands as he will, and either in one branch or the other. And in the case put we must read the two together, the enunciation in the substantive branch (so-called) with the exception engrafted upon it in the adjective branch. Sometimes, indeed, the same provision of law is substantive or adjective, according to the way in which it is regarded. Section 126 of the Indian Evidence Act, for instance, gives a client the right of having his communications to his legal adviser kept undisclosed ; as such it is substantive law. The same provision is a rule of evidence and procedure, and as such is adjective law being concerned with the enforcement or other rights. Of Primary rights there are several classes. Rights arising on facts other than delicts, injuries, and offences may arise and avail against persons generally, when they are called rights *in rem*, as the right of personal security : or they may avail only against persons specifically

* Which is no longer the law in Civil Cases. (16 & 17 Vict. c. 83, s. 1, and the "Evidence Further Amendment Act, 1869," 32 & 33 Vict. c. 68.)

† Bentham's works Vol. VII. p. 484.

determined, when they are called rights *in personam*, or rights *in personam certam vel determinatam*, as on a contract for one contracting party against the other contracting party; or again from one such fact a combination of rights of one class and of the other may arise which may be more or less complex, as when a man becomes executor to one deceased.

Of Rights *in personam*, which are primary rights, some arise from contracts, and some arise from facts which are neither civil injuries, nor crimes, nor contracts, but circumstances on which the law raises an obligation, or as they are called, for want of a better name, *quasi contracts*.

Passing to Sanctioning Rights and Sanctioning Duties, we find that they arise either from wrongs of which the remedy is pursued at the instance of the party injured, or from wrongs of which the remedy is pursued at the instance of the sovereign. The former class of wrongs is that of *Civil Injuries;* the latter that of crimes. And, from the different nature of their classes, it is advantageous, if not necessary, to consider them separately.

Under the leading department, Law of Persons, falls, as we have seen, Public Law, or the Law of Political Conditions; and co-ordinately with it may be placed the law of private conditions, which are either *domestic* or *professional*, and a class of conditions which will not fall under any of these heads, and which Austin styles *anomalous*. We have already said enough of *status* to prevent the necessity for further comment on this branch of the law.

In this arrangement of the law we have only incidentally any mention of absolute duties. And this is interpolated between the discussion of rights arising from Civil Injuries and rights arising from Crimes. This is a defect in Austin's classification, but these duties are comparatively few, and an examination of them as of the portions of the law forming the Law of Persons may be detached from the rest of the legal system, and treated almost anywhere. Mr. Mill fixes on this defect, and on this and other grounds finds fault with

Austin's division of the law; and he does so through sheer inaccuracy of thought and ignorance of law. What he says is this:—"Is, then, this requirement of distinguishing the parts of the *Corpus juris* from one another, according to the ends which they subserve, fulfilled by a division which turns entirely upon a classification of rights?

"It would be so, if the ends of different portions of the law differed only in respect of the different kinds of rights which they create. But this is not the fact. The rights created by a law are sometimes the end or purpose of the law, but are not always so.

"In the case of what Mr. Austin terms Primary Rights, the rights created are the very reason and purpose of the law which creates them. That these rights may be enjoyed is the end for which the law is enacted, the duties imposed, and the sanctions established.

"In that part of the law, however, which presupposes and grows out of wrongs—the law of civil injuries, of crimes, and of civil and criminal procedure—the case is quite otherwise. There are, it is true, rights (called, by Mr. Austin, Sanctioning Rights) created by this portion of the law, and necessary to its existence. But the laws do not exist for the sake of these rights; the rights, on the contrary, exist for the sake of the laws. They are a portion of the means by which those laws effect their end. The purpose of this portion of the law is not the creation of rights, but the application of sanctions to give effect to the rights created by the law in its other departments. The sanctioning rights are merely instrumental to the sanctions; but the sanctions are themselves instrumental to the primary rights."* And Mr. Mill suggests, as an amendment of Austin's division, the following: "The primary division of the body of law should be into two parts. First, the Civil Law, containing the definition and classification of rights and duties; secondly, the law of wrongs and

* *Edin. Rev.*, October, 1863, pp. 475-6.

remedies. This last would be subdivided into penal law, which treats of offences and punishments, and the law of procedure."*

Tabulated for ease of comparison with Austin's division, these views stand thus :

Law. { Civil Law or Law of Primary Rights. / Law of Wrongs and Remedies. { Penal Law. / Law of Procedure.

Mr. Mill's objection rests upon the idea that "the rights created by a law are sometimes the end or purpose of the law, but are not always so." Now the creation of the mere right (and in criticizing Austin, we must use right in his sense) is never the purpose of the law; but, in Mr. Mill's language, "*That these rights may be enjoyed* is the end for which the law is enacted, the duties imposed, and the sanctions established." Would Mr. Mill, then, argue against the division of primary rights as given by Austin because the intended results of those rights could not be classified as the rights are classified? Again, and a plainer fallacy, the creation of the sanctioning rights is the very object of the law creating them, and it is none the less so because those rights, when created, do sanction and support, and are intended to sanction and support, the primary rights created by quite other facts.

Then as to the division suggested; we may reply that the object of arranging well the *corpus juris*, is to make the law clear and ascertainable, and we have no doubt as to which division—Austin's or Mr. Mill's—answers this purpose. Again, and this appears to us a fatal objection to Mr. Mill's division, the Law of Wrongs and Remedies comprises far more than Penal Law and the Law of Procedure. Very few wrongs which are only Civil Injuries, or, in the language of English Law, Torts, give rise to any punishment or anything penal at all. The idea of punishment in this

* Idem, p. 476.

portion of the law, comes in only in the exceptional cases in which "vindictive damages," as they are called, are given. The principle of damages, under the Law of Torts or of Civil Injuries, is one not of penal consequences but of compensation. In this portion of his work Austin treats of the nature of the various sorts of rights. He clears up the mist which has hung over the ideas of jurists as to the destinction between *dominium* and *servitus*. And in the course of this it is made apparent that his acquaintance with English Real Property Law was not perfectly accurate. For instance, he describes the right of *Usufructus* as " a right of completely enjoying the whole subject for life merely under certain restrictions. The entitled party cannot cede his usufruct so as to put the alienee in his own place, though he may let it out, reserving a reversion to himself. We should call this right, I think very justly, an estate for life." * Taking for granted, for the sake of argument, that the right in question is correctly described, the English Lawyer could not properly consider " Usufructus," an estate for life. For in English Law power of alienating, so as to put the alienee in the place of the alienor, is an incident of an estate for life ; and one cannot ordinarily give a man an estate for life without such power to alien.† The tenant for life, in English Law, may part with his estate if he pleases, though of course it will terminate at his death. To this rule married women, who are tenants for life for their sole and separate use without power of anticipation, are the only exception.

To take a further instance, he says, in another place. " Again, Blackstone says, that purchase or *perquisitio* is distinguished from acquisition by right of blood, and is made to include all modes of acquisition except inheritance; because,

* Works p. 853. Students' Ed. p. 399, where the last sentence is simply omitted without any rectification.

† Graves v. Dolphin, I. Sim. 66. Snowdon v. Dales 6 Sim. 524, etc.

in this last case, the title is vested in the party, not by his own act or agreement, but by simple operation of law. This is clearly a mistake; it vests in him by descent, but not by simple operation of law; for if he did no act amounting to seisin it would not vest in him, analogously, to those heirs by the Roman Law, who were said not to take *ipso jure*, but by their own act." * And to this passage a marginal note from Austin's copy of Blackstone is appended, which it is a disgrace to his editor to have passed over without answering the *quære* in it. Had he tried to do so he must, if only by accident, have found the error in Austin's text and have remedied it. Austin's note is:—" Differing in this from the Roman heir, whose *aditio* (or some equivalent act) was a necessary link in the chain of title. The English heir (it is presumed) is obliged to repudiate: and, quære, the manner of this at Common Law?" But the statement of Blackstone is not clearly a mistake; the mistake is clearly Austin's, who supposes that the heir in English Law can disclaim, and that the inheritance is not vested in him by simple operation of Law. Blackstone is not clearly mistaken. When the lands are not in actual possession of the ancestor at the time of his death, as where they are held under a lease for years and the lessee has entered under the lease, the heir will be considered as having the seisin, though he be perfectly quiescent and do no act whatever.† And where the ancestor is in actual seisin or possession, the heir-at-law immediately on his death becomes presumptively possessed or seised of all the lands.‡ The reason, of course, being that there is no one to deliver the seisin to him. It is true that it is a fundamental principle in all systems of law that two things are necessary to constitute ownership. (1) Possession and (2) the *animus*

* Works p. 927. Students' Ed. p. 440.

† Smith's "Law of Real and Personal Property," 2 ed., p. 418.

‡ "Watkin's on Descents," 4th ed., p. 34.

possidendi. A man cannot have property put into him, so to speak, in spite of his teeth. Yet here the case is different, and "the heir-at-law is the only person in whom Law of England vests property, whether he will or the not." * After all these are errors in the technicalities of the English Law, which competent editing would have rectified, and, which, now that they are pointed out to him, Mr. Campbell will not, perhaps, again, pass by in silent ignorance.

Such, "in outline and no more," was the work of Austin. It has taken years for it to obtain anything like a due appreciation. Its value is becoming known more and more. To those who have not the requisite time to bestow on a study of the larger work we commend the present edition, for, with all its defects, Mr. Campbell has performed his task, which was no easy one, fairly. But the larger work, though a fragment, is a display of power, such as centuries may not produce, and which every lawyer should study, as one of the marvels of legal literature.

His written works are not all that Austin has left us. The ardour of mind which he displayed for his science has not been without its results. Not only has Sir Henry Maine worked up a new vein of legal history and philosophy in a brilliant style, but the mantle of Austin has fallen on no unworthy successor in the present occupant of his chair at the Inner Temple—the present hard-working and enthusiastic professor of Jurisprudence to the Inns of Court.

* "Williams on Real Property," p. 91.

II.—THE ORDER OF SERJEANTS-AT-LAW.

WE are glad to see that the question of the preservation of this order has entered a higher phase since it was first mooted in the columns of this Magazine.* Sir George Bowyer, who has taken so leading a part in the preservation of the ancient privileges and duties of the House of Lords, has happily thought it not beneath him to cherish and protect this inferior pillar of the State—inferior in degree, though not less important to its stability, preserving as it does the balance of the Constitution; and he has brought this important question before the attention of the House of Commons. This is precisely a people's question, and all those who would preserve the privileges of the peers ought to follow Sir George Bowyer in his endeavours to retain for the people this their greatest safeguard. *Salus populi, suprema lex.* We fear, however, that it will hardly obtain the same support, as it will certainly not gain for itself the same amount of interest.

It seems but a very small matter whether the leading men of the Bar should be called Queen's Counsel, or whether, as Serjeants-at-Law, they should be sworn to protect the rights of the people. There is no fear of judicial or Royal tyranny in these days. Public opinion would be too strong to permit it; yet we cannot tell what may be in store for us: we cannot tell even what a single generation may bring forth. Great changes have been effected recently in the composition of the third estate of the realm, which may produce results far from what has been intended and might be expected. It is no secret that the late Lord Derby deplored the changes wrought by his own Reform Bill, and that he anticipated for

* In the February Number, in an Article by Pym Yeatman, Esq., Barrister-at-Law, entitled, "On the Contemplated Destruction of the Ancient Order of Serjeants-at-Law."

it a more gloomy future than happily yet has dawned upon it. Thus much is quite certain, that it was a leap in the dark, and no man can tell where it may lead to. One effect may be that for a time a great increase of power may be thrown into the hands of the people; all the less reason why they should disregard and throw away their privileges, for if we study the pages of history aright we shall find that a reaction invariably follows every excess of power either in the people or in the Government, in the king or in the nobles, and then will it be necessary to guard every prerogative and every protection to prevent that reaction from proceeding too far, from overwhelming the rights of the people, and from destroying the balance of power in the Constitution. If we preserve the safeguards, so elastic is its fabric that there is no positive danger in the temporary increase of power of any component part; but take away its safeguards, remove its moorings, the ship will not simply swing round, but it will be swept away with the tide, and drift no one can tell whither—the spoil of the winds and of the currents—in the boundless paths of the ocean.

But there is a lower view of the question which a practising barrister will hardly care to put forward as one of importance, and yet it is of every day importance, and may affect the safety and well being of any one amongst us who is not provided with a long purse. The fee, the honorarium, or by whatever name the necessary amount of gold required to retain the services of an advocate may be called, that is a matter of importance, it seems a very small matter to many of us whether we should pay a fee of five guineas, which is perhaps the lowest a Serjeant-at-Law may take. We are not quite sure that etiquette may not permit him, in cases of extreme poverty, to accept a fee of three guineas, or whether we should pay one of ten or twelve guineas to a Queen's Counsel, with five or six more to a Junior, and a couple of guineas to the Crown for the license to retain a Barrister nominally retained for the Crown, for in Queen

Victoria's days, as in those of King John, the people pay for justice—amounting, in all, at least to twenty guineas to counsel, with a proportionate sum to the attorney; for it is hardly to be supposed that an attorney would care to expend twenty guineas for counsel's fees, unless he had at least that amount for himself, but it is a matter of the greatest importance to thousands of prisoners who could well afford to raise, or their friends would raise it for them, a sum of £10, for which they might retain the services of a Serjeant, but who could not dream of raising between £40 and £50, which is the lowest sum for which they could retain the services of a Queen's Counsel; so that, in fact, Lord Selborne, in endeavouring to strangle this order, was simply depriving the poor of the services of the best men at the Bar. Lord Selborne did not appoint one Serjeant during the whole of his administration; and indeed no Liberal Government has done so for a long period, Lord Cairns, in 1868, having been the last Chancellor to appoint one; and it is to be hoped that he will see the importance of re-establishing this order. Mr. Yeatman proved conclusively that it is equally a crime against the State to strangle the order by refusing to appoint fit men to the office, as it is to alter or curtail the privileges of the Serjeants without the sanction of an Act of Parliament. It is a sin of omission quite as culpable as one of commission, and it is a sin directly against the poor, because what is the effect of a poor man being unable to retain the services of a leader of the bar? If the Crown, or if private prosecutors, on the part of the Crown, were unable to bring in Queen's Counsel to prosecute, there would not be so much mischief, so much unfairness, but a rich prosecutor has no difficulty in retaining a Queen's Counsel, and no expense, for the country will pay the fee in every case of real importance; and what chance has a stuff gownsman against a Queen's Counsel? There are some who rejoice to see an array of silk against them, who are put on their mettle by it,

and who plead far better for the increased difficulties of their situation, and it is, perhaps, a good thing for such a man that he is thus unfairly over-matched, but what about the poor prisoner? We are not quite sure that a fox does not enjoy a good chase after him—if he escapes—he really seems to enjoy it; but we are quite sure of the feelings of a poor prisoner, who has only been able to scrape up a few pounds, and who has confided his life, it may be, or at any rate his liberty, to the hands and eloquence of a comparatively unknown man, for the leading juniors, in these days, despise criminal business, and refuse to enter the criminal courts without a fee quite as high as that necessary to retain a Serjeant. Observe that prisoner, as a grave and learned Queen's Counsel—it may be an eloquent and powerful advocate, with the keen sense of enjoyment of a foxhunter, rises to address the jury—watch the beads as they swell upon his brow, as he, from time to time, wipes them hurriedly off in desperation; he knows that every word tells, that the judge himself is impressed by the presence of the great advocate, that the audience are subdued, and, worst of all, that the jury are carried away by the tide of his eloquence. How different would it be if he had the aid of a Serjeant-at-law—how the unhappy prisoner would watch his countenance as point after point was made against him; and how calm and confident would he feel, and satisfied that, never mind, his counsellor's turn was coming; he would wait with calmness and patience, for he would obtain justice. What chance has even a brilliant junior against a Queen's Counsel of standing and ability? It must be confessed that he has a very poor one, and that in refusing him the aid of a leading man at the Bar, the privilege of having a Counsel at all to speak for him—a very recent improvement in our law—is being frittered away, and that poor prisoners are being put back into the miserable position in which they stood before Counsel were allowed to speak for them. It is, then, no merely sentimental

question, no matter which only may become of importance in the event of improbabilities happening, but it is a pressing and a crying evil, and a real injustice to our poorer brethren at the present moment. Every circuit, in which there are congregated some five or six Queen's Counsel, ought to have, at least, half as many Serjeants-at-Law.

There is no fear that if the order were revived—for, alas! it is practically dead—that there would be any great rush on the part of the Bar to enter its ranks. The candidates would still be few, and probably not the best men either; for the Crown, with its wealth and influence, will always command the services of the best men, and few men care to be styled Advocates for the people. But, at any rate, if care were taken in the selection of men for this rank, they would be persons of experience and of judgment, and they would stand upon an equality with their opponents, the Queen's Counsel, not only in the eyes of the judges, but in the eyes of the people, and especially of the jury, and the unhappy prisoners who had retained their services would feel that their causes would be fairly tried.

It is said, with what truth we do not know, that the few remaining Serjeants have already, in anticipation, and in imitation of the Advocates of Doctor's Commons, divided the spoil, and shared amongst them the price to be obtained for Serjeants' Inn for its libraries and wine cellars, and all the curiosities—the accumulation of many centuries. It would be a pity to spoil this anticipation, though, no doubt, the learned serjeants who are enjoying it would gladly give it it up if it were for the public good; but this question need not embarrass the action of Government; if the spoil has been promised to them, by all let means them have it. Serjeants Inn is not essential to the liberty and well being of the people; it only affects the comfort of individual Serjeants. It is not every Serjeant who is a member of it; it is a mere accident, and not a necessity, but still it is worth while to

reconsider the question. Great use may be made of the resources of the Inn, as in olden time, in assisting the education of the Outer Bar; and whilst Lord Selborne, on the one hand, is trying to destroy this power of usefulness, on the other he is trying to build up a bran new Institution for this very purpose. Let my Lord Selborne stay both hands, and things may come round better without his assistance: at any rate, if he must be active, let him restore the functions of Serjeant's Inn, and assist the profession in restoring it to its full dignity and honour. If the honour of the Queen's Ancient Serjeant, which existed only the other day, were to be revived in its full splendour—the counterpart of the French Batonnier—better men might be induced to throw in their lot for the people, and something like equality between the two great orders of the profession would be created and maintained.

III.—ON THE ORIGIN OF THE COMMON LAW.

By Pym Yeatman, Barrister-at-Law.

"THE historical theories commonly received among English lawyers have done so much harm, not only to the study of law but to the study of history, that an account of the origin and growth of our legal system founded on an examination of new materials and the re-examination of old ones is, perhaps, the most urgently needed of all additions to English knowledge. But, next to a new history of law, what we most require is a new philosophy of law." This passage, if it had been written by any one of less authority, would have been received with ridicule and disdain: disdain for the summary rejection of all our legal histories and philosophical deductions upon the subject, and ridicule for

asking for something absurdly beyond the requirements of the age. That Coke's Institutes, Hales, Reeves, Blackstone, Spence and a host of other writers should all be summarily disposed of in a half-a-dozen lines of print without so much as the allegation of one fact to support the indictment, would flutter the nerves of our critics tumultuously; but such a charge coming from the pen of Sir Henry S. Maine is entitled to and obtains universal respect. The writer, in his "History of the Common Law" and in his "Early English History," ventured to propound the same theory, and elaborately supported the charge by facts, by arguments, by induction, and by every means within his power, and the idea he propounded was that our law was of British origin. The critics howled in despair. The *Academy*, in an article signed J. W. Willis Bund, no doubt a critic of the greatest weight, could only agree with one conclusion at which the writer had arrived, and that agreement was "most cordial," that his work "was boldly begun and feebly executed;" and the learned man hoped that, for the sake of English legal scholarship, the book would not fall into the hands of French lawyers. Professor Freeman, in the pages of the *Saturday Review*, in which journal he is wont, in his pleasant way, to put down all those who venture to differ from himself or Mr. Stubbs, styled the author a lunatic, and a variety of things of that genus. The *Scotsman* compared him to "Parallax," whom he wittily suggested, as he had not been lately heard of, had probably proved his peculiar theory by getting to the edge of the flat earth and tumbling over it. The author's new theory, that our common law was British, this North Briton, who ought to be proud of the fact, thought "amazing," "that the serious discussion of such a view would be a mere waste of time and space," and especially angry was he that "our author" vouched the Rev. William Whittaker whom the well-read critic knew well, "as the author of a History of Craven,") in support of part of his views, and

" oblivious of the immense researches that have been made since Whittaker's time, extended that author's indictment of falsehood against the historians up to his date—in itself absurdly presumptuous—to Sir Edward Creasy, Sir H. S. Maine, and the remainder of modern historical writers."

Now that Sir Henry Maine has himself admitted the charge to be true, and deplores it, the writer may feel somewhat relieved from the "charge" of lunacy preferred against him by Professor Freeman, and he ventures to call Sir H. Maine as a witness in favour of his main proposition. The critic in the *Scotsman* added, " in some mysterious way, Mr. Yeatman discovers in the laws collected by Howell Dda, in A.D. 914, evidence that the system of jurisprudence which existed in Britain before the Roman conquest had been practically maintained up to that date, and he contends that it still forms the basis of our jurisprudence." Of course this was cited as an instance of the author's utter imbecility. It, however, fairly enough expresses his true views.

Sir Edward Creasy, and Sir H. S. Maine, and the rest of our modern historical writers, had all adopted the theory that the Britons were utterly exterminated by the Saxon invaders, who were, they thought, the authors of all our laws and civilization. Sir Henry himself went so far as to condemn those who expressed the contrary views as prejudiced or dishonest (see the " Cambridge Essays " for 1856. In his new work, the " Early History of Institutions," Sir Henry Maine gives evidence of his having abandoned these strange views, and although he does not yet openly avow his adhesion to the writer's theories, and though he does not even mention him, yet he refers unmistakably to him more than once, unfortunately, in anything but terms of commendation which the writer can only deplore. But though he cannot regard the censure of a former tutor without real pain, he cannot help congratulating himself upon the fact, that although it is apparently unknown

to himself, for he never so expressly states it, Sir Henry Maine's views have undergone a complete revolution and, perhaps, it is only fair to claim some small part in bringing this revolution about. The critic of the *Scotsman* will weep if he reads the following lines, at page 96, of Sir Henry Maine's new work. By it at once is cut adrift the Teutonic Theory, which had so blinded the eyes of our countrymen for so many generations.

"The assertion, which is the text of Dr. Sullivan's Treatise, may be hazarded without rashness (presumably, Sir Henry means that it may safely be averred) that everything in the Germanic has at least its embryo in the Celtic land system."

Shade of Alfred (the Great ! ! !) Is this the way England's greatest writer ignores your claim to the authorship of everything good in our Institutions ! ! ! And in a similar uncertain strain, Sir Henry Maine enters a little more fully into the question, and, at page 295, he writes:—

"Amongst the writers who have recognized the string of affinities connecting the English and Irish law of distress I find it difficult to distinguish between those who believe in the direct derivation of the English law from pre-existing Celtic customs common to Britain and Ireland, and those who see a sufficient explanation of the resemblances between the two sets of rules in their common parentage—(what can this mean ?)—I am not at all prepared to deny that recent researches, and particularly those into old French customary law, render it easier to believe than it once was, that portions of primitive or aboriginal custom survive the most desolating conquests, but I need scarcely say that the hypothesis of the direct descent of any considerable branch of English law from British usage is beset by extraordinary difficulties, of which not the least is the curiously strong case which may also be made out for the purely Roman origin of a good many institutions and rules which we are used to consider purely English and Germanic."

Here is a full confession of error and of faith, not the less valuable that it is worded with the greatest caution and hesitation, and conjures up difficulties which are only "flowers of Rhetoric" without any serious meaning. The concurrently "curiously strong case" of the Roman origin of our customs, Sir Henry Maine knows well enough may be summarily disposed of in all those cases where the English institution varies in important particulars from all similar systems existing in other parts of the old Roman Empire, which are clearly derived from it. When we find this to be the case we are compelled to come to the conclusion that the Romans must either have borrowed the custom from us or from that fount from which we ourselves obtained it. Many of our laws and institutions are of acknowledged Roman origin, whilst others are as clearly older and essentially different. Take Borough English, which seems to puzzle Sir Henry Maine, that is clearly not Roman, and quite as clearly it is Celtic. Its counterpart is not to be found in the Irish law only, but also in the Welsh and French. It is to be deeply regretted that Sir Henry Maine has resorted so seldom to the Welsh laws, which are far superior in point of preservation to the Irish or to the French laws, and which relate to nearly every topic of English law. The Irish, so far as they are yet accessible to English readers, are very limited in extent, and deal with but few measures of importance. The writer of this article, in his unpublished work on the History of the Common Law, has traced in numerous cases very clearly, and in many with a great show of reason, the origin of nearly every ancient head of our Common Law, and he has been able to extract from the early rolls of our courts evidence of actual suits in which the traces of nearly all the Celtic institutions may yet be discovered; but until Sir Henry Maine and writers of his stamp shall speak out more clearly, it is useless to publish the work, for no author cares to be howled down at his own

expense, and that would be the result of publication; and the unfair criticism of the present day prevents every publisher from undertaking such a work, much though it is needed. If Sir Henry Maine would only give half the attention to our own law which he has bestowed upon the wretched remnants of Archaic law to be found buried under heaps of rubbish in the Hindoo laws, he would find much more to repay him. It is not from any want of faith in the genuineness of the Welsh laws—that is the Gaulish laws—that deters Sir Henry Maine, for the upholders of the dying Teutonic theories will be shocked to read, at page 19, though how it got in that place is rather curious, that Sir Henry speaks of the doubts as to their authenticity as "unfounded" and "owing to the thick mists of feudal laws."

No intention exists to disparage, or, in any way, to undervalue the Irish Records; they are simply invaluable, and the only fault found is, that, at present, we have so few of them; they are very valuable to prove the archaic form of our Celtic Institutions, which they assist by comparison. But they can never be so valuable to us as the Welsh, for this simple reason, the Welsh laws are the nearest to us, for the British were driven westward by the encroaching Danes, Franks, and Saxons, and they were never displaced from Wales. The Scotch institutions are next of value, because the British there intermixed with their brethren from Magna Scotia, and, in the union, preserved much of the Ancient British laws. But, unfortunately, the Scotch MSS. are poorest of all, and we must cross over into Ireland to complete them and render them at all intelligible.

It is very curious that the foremost scholar of the day should so persistently refuse to illustrate his subject by reference to our institutions, and should cross over to Ireland for the purpose. And it is evident that it is done designedly, and from pure dislike to the British records, for we read at page 28, a statement that is utterly inconsistent with the

statement last quoted; and, probably, it is only retained accidently. He writes, "There is so much wild speculation and assertion about Druids and Druidical antiquities, that the whole subject seems to be considered as almost beyond the pale of serious discussion," and yet Sir Henry Maine is well aware that every thing in his book which is of value—for the Hindoo speculations are merely curious—is derived from these much abused Druids, for, at page 19, he tell us that it is true "That the Irish is the same system as the law of Wales, and that the just and honourable law of England grew out of the lewd institutions of the Irish." This is, in fact, putting the cart before the horse, or is it a bull? for there is no rational doubt, and the names of the chief tribes proves it, that a great portion of the Irish tribes, and with them, doubtless, these laws, crossed over from England.

To say that English, Irish, and Welsh, as well as Scotch, Cornish, and French laws and customs are identical, is only to state that they are all branches of the great Celtic family of nations; and the confusion of Sir Henry Maine's statements is a just punishment to him for his refusal to read what he knows is the right and should be the true source of his inspiration. When we say that the laws of all the Celts are Celtic, we only say that they are Druidical, for the Druids were the only law-givers before the Christian era. It is childish, therefore, to invoke the miserable old prejudices, and Sir Henry Maine is well aware of this, for in the very same page he adds, that "there is not a word in Cæsar's account which does not appear perfectly credible, and so with regard to Strabo." And to prove that he considers those accounts most valuable, and any thing but childish, he enters most fully into the particulars, and speculates upon things which Cæsar has omitted to mention, and which must have been learned from writers he pretends to ridicule. Cæsar's silence as to Tribesmen, Septs, and sub-Tribes, is to him particularly instructive, for the curious reason that our

modern rulers in India have also disregarded somewhat similar institutions amongst the Indians ; but, after decrying the value of the Druidical institutions, Sir Henry Maine once more, at page 32, tells us that there "are strong and startling points of correspondence between the functions of the Druids, as described by Cæsar, and the office of the Brehon, as suggested by the Law Tracts, as if there could be any sort of doubt as to the absolute and perfect identity between them. And as if, indeed, each institution, from the Pendragonship downwards, did not exactly agree in principle with the other.

Sir Henry Maine writes about his Irish discoveries like a child with a new toy; what he has stated is no doubt very much in advance of his former views, of Oxford, of Freeman and Stubbs, *et omne hoc genus*. But it is all very stale to Celtic scholars, and his speculations are very crude and imperfect, as he will see if he will give equal attention to the Welsh laws. A little further on, at page 37, he again refers to his great discovery as to the identity of the Irish and Celtic laws, and again sneers at it as valueless, and again insists upon its importance. He writes, "if we can assume a substantial identity between the literary orders of the Celts and Brehons we not only do something to establish a historical conclusion, perhaps more curious than important, but we remove some serious difficulties in the interpretation of the interesting and instructive body of archaic law now before us;" and he then proceeds to make some very rash and incorrect remarks respecting the effect of Christianity upon Brehon law and its non-effect upon Druidism, doubtless in ignorance of the fact that the Druids also embraced Christianity—teaching loose enough and fallacious enough for Mr. Freeman himself—but utterly unworthy of one who could and who should instruct the students of one of the first universities of the world. Sir Henry is himself only learning the rudiments of this branch of law, and it will certainly be better for his repu-

tation if he will study it more completely and more in detail before he gives his discoveries to the public. Would that he himself would undertake the task which he pronounces to be the most important for English science, that of giving to the world a new history of our law. But in no case, perhaps, is Sir Henry Maine more hopelessly inconsistent and more weakly foolish than in his condemnation of the theory—the immediate consequence of his own premises—as he himself practically admits, that the English are of a different race of people from the German. It would follow that if their laws and customs and languages are different, so must be their origin; but Sir Henry Maine thinks that certain identities in the law of distress between the laws of Ireland and Germany is almost enough by itself to destroy "these reckless theories of race which assert an original inherent difference of idea and usage between Teuton and Celt," and to cap this argument he "recklessly" states that the Irish system of distress is practically the German system. Now this conclusion is of course only arrived at by an unjust disregard of the effect of the Roman laws which is the origin of the German system, at any rate, but as a matter of fact it is not true that the systems are identical. The Irish and English systems do agree with the greatest nicety, thus affording another proof and a strong one of the British origin of our law, but they both differ in the same material particulars from the German system, and Sir Henry Maine himself points out one most essential difference which proves that they are of radically different origin. The "lien" is not found in the Teutonic system, and again, unlike the Irish and English Laws, which are based on the Celtic right of taking goods by force—the Teuton cannot put his laws into force without the direct assistance of the Courts of Law, and in many other instances they differ materially. As if to show his own entire freedom from reckless assertion, and indecent inference, he adds, at

page 296, "the true rival of all these theories of the derivation of one body of custom from another is, of course, the theory of the common descent of all from one original basis of usage which we must provisionally, at all events, call Aryan. If there could be a doubt of the law of distress being a legacy from the primitive Aryan usages, it would be removed by the remarkable details which connect the Irish with the Hindoo law as to fasting, which possible explanation will cover all the facts, except that the primitive Aryan bequeathed the remedy of distress to the communities which sprung from them; and that varieties of detail have been produced by what Dr. Sullivan, in his Introduction, had happily called Dynamical influences."

It must be conceded that there are some very curious points of resemblance between Hindoo institutions and our own, and there are some in this question of fasting, but they bear no kind of proportion to the notes of difference; and the number of the latter even if we possessed no belief in the fact of a light in the East which enlightened the whole world, are sufficient to dissipate any shadowy notion of an original union between the British and the Hindoo peoples, but to every Christian the fact presents no difficulties, that in the East laws and institutions are to be found amongst nations, with no pretence to religion, which correspond with those of God's peculiar people as well as with many of Christian origin. Just as the Israelites, in their turn, imitated and adopted the laws and customs of those surrounding them, the latter people must have been struck with, and must have been prone to imitate the deductions of a higher and nobler philosophy than their own, and hence it is childish to dream of proving a common origin between people of such different physical organizations, of such different usages, customs, language, and modes of thought, simply because both of them adopt some particular laws and customs. We can estimate the true value of the Hindoo literature from

the poor results of the examination which so brilliant a scholar as Sir Henry Maine has been able to obtain from them. His "Early History of Institutes," though a work of great value, is not worthy of that name. It is simply an attempt to prove a powerful resemblance between our own and Hindoo institutions, an attempt which signally fails from this one fact, that the points of divergence are of so much greater importance than the points of similiarity, that they prove an entirely different origin. What do we yet know of the history of Hindoo law? Are we certain of a single date? Sir Henry Maine, very rashly it would seem, would fix certain dates, but he must admit that the whole of this literature is wanting in true systems of chronology, and that until this is supplied it is "rash and reckless" to draw inferences from it. Of what value are the Herculean labours of Professor Max Müller in this field? Until we discover the true chronology—if there is any—his labours are useless, or nearly so, and he has spent many years of a valuable life in vain—not in vain alogether perhaps, for we learn what to avoid and what to reject by labours like his, and we learn how little there is of value in this curious learning. But if Sir Henry Maine fails in proof of his favourite theory, and only proves its worthlessness, he has done great good to the cause of truth—by throwing over the form of reasoning he has adopted the shadow of his great learning. It is something if we know from him that we may safely conclude that if we can find a people who had and who practised the same ideas and usages, who used radically the same language as the British, we have found the progenitors of that people. It may fairly be asserted that for every point of identity which Sir Henry Maine has or can discover between our laws and that of the Hindoos, we may find any number, say 100 for argument's sake, though the true number is far greater, between our laws and customs and those of the ancient Celts. If, then, Sir Henry Maine is justified in

claiming an affinity between the descendants of what very properly is called by him—doubtfully—the Aryan race, *a fortiori*, is there a relationship between ourselves and the Celts, and the deduction of course follows, that if it is rash and reckless to point to such a relationship with the Celts, *a fortiori*, would it be rash and reckless to talk of our relationship to the Hindoos; and for another reason our disconnection with the Celts, at any rate, dates since the Christian era, since which period we have many means of proof, whilst the separation of the so-called Aryan relationship must date at least 2,000 years earlier, and at a period when we have no existing proofs or evidences, nothing, indeed, but the barest deduction to be made from this line of argument. The admission that the "Aryan" is a doubtful nomenclature is very valuable in proof of what is passing in Sir Henry's mind; but why is it reckless and rash to refer to the essential difference between our own and the Germanic races? If it is a fact, a very slight consideration will demonstrate that it cannot be too well known. It is no merely fanciful or sentimental idea, it is a stern living fact that men and armies are swayed by such ideas, that Napoleon warred for an idea, Bismark covers and excuses his raids and encroachments by the same method. "Germany must possess every inch of territory once possessed by a German-speaking population." That is his gospel, and that is the merest fallacy, and the most shocking pretence, and if this can be shown it is a duty to shew it; if only to put a stop to the excuse for German annexations. Why, under this plea, in our present state of ignorance, not only Scandinavia, but England, and, if Sir Henry Maine is right, India also rightly belongs to Germany, and may fairly be annexed as German territory. But draw a sharp line between the true nationalities, and the shocking nonsense is at once annihilated, and German conquests stand out in their naked horror or rugged boldness, according to which view one takes of a barbarous action. There is

a great and living difference between the ideas and customs of the Celtic and Germanic races, and no amount of sophistry can bridge it over. The one is properly an enlightened and a Christian people, the other is radically barbarous and heathen. What has Christianity gained by the alliance with Germany? The old Catholics and modern German infidelity attest. So long as a portion of Germany was Catholic, so long was there a semblance of religion in the land; but now the voice of the Emperor is the voice of their God, and the trumpet tongues of their generals supply the ministrations of the priests of the church. There is a war between the State and Church, and the only religion soon left will be the order of the barrack room. We do not admire all the doings of Frenchmen; there, also, we are terrified by the ideas of the Commune; but the heart of France is sound, the beating of her pulse yet proves that her faith in the unseen is as great, and her reverence for the illimitable is as pure as in the days before Cæsar presented her with the benefits of Roman institutions.

To which nation shall we assimilate ourselves—to the Teuton or the Celt? to the bond or to the free? France suffers from an excess of freedom, Germany groans because it is one huge barrack, and the blood of her children cries for vengeance upon her patriots. If our thoughts and our usages are any proof of our origin, then, assuredly, are we of Celtic, and not of Teutonic origin, and we shall be Celtic in thought and habit still; but if we despise our birthright, and seek to adopt another, to what portion of the Germanic nation shall we ally ourselves?—to the north or to the south? to Prussia or to Bavaria? to Teuton or Sclave? what is the origin of the Germanic people? of what race and kindred are they? They are a people who possess no history, and who have no literature—an assemblage of a hundred nations, who have each of them lost their early traditions. The very name proves it—Allemayne—Allimanic—all men—all nations. When the continent of Europe became so thickly populated

that the Nomadic tribes were forced to stand still, then Germany arose. If by Germany we mean a collection of people who had no known nationality, or who had lost and forfeited that which they had possessed, this surging mass would be periodically and largely recruited by those whom the Celtic tribes expelled from their communities because they would not conform to their laws, and by those whose restless habits compelled them to wander, but it would be chiefly recruited by wandering tribes from Asia who were forced upon them, and probably oftentimes from the prolific hordes of Assyria. If Germany can point to any one place in the world, and to any one nation, to which they are chiefly allied, and from which they may be said to be chiefly sprung, it is not from the banks of the Oxus, but from the land of the Assyrians, who, like the Germans, were a stiff-necked people, a Godless, hard, presumptuous race, and the Germans may trace their God Thoth in a Canaanitish Divinity. After the destruction of the Roman power by the Barbarians, people of all sorts flocked into German quarters, and there supplanted the conquerors who had ousted them from their own homes. The innumerable dialects and sub-dialects of Germany prove their miscellaneous origin, and the words in their language, which modern philologists point at triumphantly as proof of Aryan descent, just as their laws and customs—so many of them have a Celtic origin—are only proof of their indebtedness to the Celts and Romans for the civilization they possess. But all this proves the existence of much Celtic and Roman blood amongst them, and as we may always hope and believe that in the long run blood will tell, we cannot doubt that amongst the leading people of Germany are at this moment to be found those who are the least German in blood and origin. Prince Bismark may certainly be excepted from this hope, but assuredly, from their very names, may we claim our Guelphic Kings as of Celtic descent, and hence of our own kin and race. Is this a conclusion to be deprecated? is it wrong to claim such an

affinity? No one can doubt the difference between German and English, and if the truth of this conclusion is unrecognized, our Royal family will scarcely seem a kindred race.

The unfairness of the disparaging remarks in which Sir Henry Maine has indulged, is none the less that he has not distinctly named those whom he blames. He has freely named those whom he approves of, and lavishly praised them. It would be more fair and more in accordance with the old traditions of Cambridge, boldly to state his objections, and to name those to whom he objects.

In Sir Henry Maine, we recognize a very different person from Professor Freeman; the latter reverses the process of the former; he abuses, in no unmeasured terms, those from whom he differs, and calls them by their names, whilst he himself, writes anonymously. This is indeed a novelty in Oxford traditions. Well may that great writer, that wise old man, of whom Oxford may still be proud, though he dwells no longer within her community, well may Dr. John Henry Newman thus write of Oxford and of her ways. "No one mourns more than I over the state of Oxford, given up, alas, to 'liberalism and progress,' to the forfeiture of her great mediæval motto, *Dominus illuminatio mea*," and with a consequent call on her to go to parliament or the Herald's College for a new one. "No one," writes the Doctor, "can dislike the democratic principle more than I do." "Toryism," that is, loyalty to persons, springs immortal in the human breast. Religion is a spiritual loyalty, and Catholicity is the only divine form of religion; and thus, in centuries to come, there may be found out some way of uniting what is true in the new structure of society with what is authoritative in the old, without any base compromise with "Progress" and "Liberalism."

Surely there is hope of an early regeneration of Oxford, of an earlier return to her old traditions than Dr. Newman, in his far off study, now dreams of. Let us hope that he may live to see a radical change. Surely it is a step in the right

direction when so eminent a man as Sir Henry Maine boldly throws off the trammels of liberalism, and appeals to the truth; his defection from the modern Germanic theories of the Freeman and Stubb's school, must cast a gloom over that party, for it is more a party than a school of thought, and they cannot afford to lose the protection of his brilliant genius, whilst his conversion must be a source of pride and joy to those who are struggling to maintain the truth, and to uphold it above the pestilential miasms of modern thought.

IV.—LIFE OF THE RIGHT HON. FRANCIS BLACKBURNE.*

NO one acquainted with the professional and public career of the late Lord Chancellor Blackburne will have any doubt as to the propriety of his biography being written, nor will there be much question in any quarter as to the sound discretion exercised by the author of the present work in confining it to a single volume. Of the political views and tendencies of the writer we are sorry we cannot speak with unqualified approbation. According to him, Blackburne considered it unnecessary to have recourse to what were styled "healing measures," but believed that the true way of governing Ireland lay in an unflinching administration of the law. Taking "healing measures" to mean measures by which the laws and institutions of a country are adapted to the circumstances and necessities of the

* Life of the Right Hon. Francis Blackburne, late Lord Chancellor of Ireland, some time also Master of the Rolls, Lord Chief Justice of the Queen's Bench, and Lord Justice of Appeal, chiefly in connection with his public and political career, by his son, Edward Blackburne, one of Her Majesty's Counsel in Ireland. London: Macmillan & Co. 1874.

people, we must consider them as essential in any sound and enlightened government. It is difficult to conjecture in what condition we should have been at this time in England without such "healing measures." It is in vain to treat Ireland as an exception. We are in favour of a combination of the two systems of policy, and are equally opposed to that which deals in "healing measures" without a firm administration of the law, and that which unflinchingly administers the law without applying "healing measures." Our present object, however, is not to discuss any questions of this sort with the author, and we have only made the above remarks by way of protest against views which we deem erroneous. Although the work is chiefly occupied with the public and political career of Blackburne, we have glimpses of his professional history which are not without interest to English lawyers.

Blackburne was borne at Footstown, in Meath, in 1782, the year in which the independence of Ireland was obtained. After having been placed at several schools, he entered Trinity College, Dublin, in 1768, and, having passed triumphantly through his undergraduate course, completed his career by obtaining the gold medal on taking his degree. He then kept the usual number of terms at the King's Inn, Dublin, and in due course came to London, and entered at Lincoln's Inn. The following account by Blackburne himself of his law studies in England is worth extracting: "Whilst endeavouring to acquire a knowledge of law, I experienced what is felt by most men who enter on such a study unaided (as I was), a great degree of disappointment. No matter what the amount of time or attention devoted to it, there was scarcely a sense of progress; there were no tests to try what degree of knowledge was acquired, or the power of applying any that was, to any practical use. This to a certain extent might have been achieved in the office of a special pleader or conveyancer, and many of my fellow students had this advantage. It was, however, too expen-

sive to be followed in this instance, and it was with satisfaction that I heard that Lord Downes had given an opinion to a young man who consulted him, that, with due application of the approved elementary works, he might acquire a thorough knowledge of the principles of law, and be better employed in doing so that in labouring in a draughtsman's office. This was also the advice of my friend William Ball, the author of the 'Index,' and the course made eligible, if not necessary, by the pecuniary circumstances adverted to. The only insight into the great machinery of the law was that of attendance in the King's Bench in England; and, after spending the vacation of the year 1804 at Broadstairs, and labouring incessantly to make some impression on 'Coke,' 'Blackstone,' and 'Fearne,' the three following terms were usefully employed in reading assiduously and attending that court. It was filled by very able judges, and though imperative (to use the mildest term), Lord Ellenborough as well as Lawrence and Le Blanc laid down and applied principles of law, so as to give it the character of a science. Erskine, Gibbs and Garrow, then conducted every important case, and many great men were just rising into eminence, for instance, Abbott, Giffard, Copley." (pp. 21-3.)

However opposed to all modern notions of legal education, this method of study operated well in Blackburne's case. Having been called to the Irish Bar, in 1805, he speedily acquired the reputation of a sound lawyer, and obtained considerable practice. He joined the Home Circuit, and practiced also in the Court of Chancery. When junior on circuit, his health was proposed by Lord Norbury, Chief Justice of the Common Pleas, in the following short and pithy language:—"Black Strap, Blackletter, Blackburne." In a case before the Privy Council, where a question of precedence arose between Blackburne and a barrister, who rejoiced in the name of Paulus Æmilius Singer, the same judge decided the question by saying—"I think that Mr. Singer is right; we all know that the singers go before—the minstrels follow after."

After a time, Blackburne determined to confine his practice to the Court of Chancery, and to decline any Nisi Prius business except where specially retained. He was called within the bar in 1822, and from that period to the end of his life his name was more or less connected with the history and affairs of Ireland. In the same year he was appointed Chairman of the Special Sessions for the County of Limerick under the Insurrection Act then recently passed. In this capacity he rendered great services to the government and the country by the firmness, impartiality and ability, with which he performed the difficult duties which fell to him. These services were rewarded by his appointment as Serjeant, in 1826. The office in Ireland is one of distinction, and the Serjeants rank according to seniority immediately after the Attorney and Solicitor General.

The following description of Blackburne and of the characteristics which led to his success in his profession is interesting. "He was about the middle height, and carried himself very erect. His forehead was wide and capacious, but his eyes were the great and striking feature. These were of a dark hazel; keen, bright and piercing; their expression was at the same time soft, and gave him the appearance of great intelligence rather than of sternness or severity. His voice was naturally musical, and the enunciation of his words beautifully distinct, while his diction was almost perfect; he never used an unnecessary word. Every sentence might have been printed as it fell from him; and he had the great power, not merely of concentrating his mind on the subject-matter before him, but also the equally rare faculty of being able, in a few weighty and pregnant sentences, to impart to his auditors the ideas which he wished to convey.

"He had, too, the power of at once seeing the point of the case—of that of his opponent as well as of his own: in fact, what medical men term the faculty of 'diagnosis.' He used but little action, and trusted more to the effect of his language and articulation upon his hearers than to the adven-

titious aids of declamation and of storm. It is not intended, however, to convey by this that he was a tame or unimpassioned speaker—he was quite the reverse. No doubt he, as a general rule, preferred to work upon the minds rather than on the feelings of his hearers, but, when occasion demanded it, he showed himself a master of vigorous and powerful language.

"As a lawyer, he was intimately acquainted with legal principles, and applied them, as it were, intuitively to the questions which were brought before him. His services were, of course, for the most part called for as an advocate; but when they were required as a conveyancer, the instrument, when it left his hands, was a model of conciseness and brevity, but at the same time of completeness. It contained no unnecessary verbiage, but it omitted no material statement. His style of conveyancing was very much that of which old Izaak Walton is so much enamoured when he speaks of those times "when there were few lawyers—when men might have had a lordship safely conveyed them in a piece of parchment no bigger than your hand, though several sheets will not do it safely in this wiser age." (pp. 57-9.)

When Earl Grey's Government was formed, in 1830, Blackburne became Attorney-General for Ireland, and held the office until the resignation of Lord Melbourne's administration, in 1834. He had not been in Parliament, and he had never shown any strong political bias. His great achievement as Attorney-General had been the prosecution under the "Proclamations Act," of O'Connell, who was driven to withdraw his plea of "not guilty" to certain of his counts in the indictment, although he had boasted at the commencement of the prosecution that "he would teach Blackburne law." When Sir Robert Peel came into power, in 1835, he requested Blackburne to retain his office, and the latter had apparently no difficulty in consenting. On the resignation of Sir Robert Peel, however, in a few months, Blackburne, having resigned his office, was not again ap-

pointed to it by Lord Melbourne, and ceased henceforth to have any connection with the Whig party.

Blackburne returned to the Bar, where he enjoyed extensive practice, and was re-appointed Attorney-General by Sir Robert Peel, in 1841. He was, in the next year, made Master of the Rolls, and in 1846, Chief Justice of the Queen's Bench. He presided on the Special Commission, which was issued, in 1848, for the trial of Smith O'Brien and Meagher. He remained Chief Justice till 1852, when, on Lord Derby coming into power, he was made Lord Chancellor. He resigned with the Ministry at the end of the same year, and had no judicial employment until he was appointed Lord Justice of Appeal, in 1856. He declined the Great Seal when Lord Derby took office, in 1858, but was induced to accept it at the urgent request of Lord Derby, in 1866, on the formation of a Conservative Government. Considering the great age of Blackburne at this time, we cannot but think his acceptance of the office of Lord Chancellor was a mistake. He was still perfectly qualified to discharge all the duties of Lord Justice of Appeal, but those of Lord Chancellor were of a much more distracting nature. Some years before, when he was shortly to enter on his 80th year, we had seen him in his own house at Rathfarnham, and had admired the vigour and soundness of his intellect, as well as the kindness and grace of his hospitality, and his many admirable social qualities. We confess, however, that it was with some regret we learned, nearly five years afterwards, that he had been appointed Lord Chancellor. He resigned the Great Seal, at the request of Lord Derby, in March, 1867, and died, in the following September, having nearly completed his 85th year.

The following description of Rathfarnham Castle and of Blackburne's enjoyment of it after resigning the Great Seal in 1852, will interest some of our readers. "Situated at a short distance from the foot of the Dublin Hills, and within a few miles of the city, the place, independently of its old and

historical associations, presents great attractions. The castle, which was built by Adam Loftus, in the later part of the reign of Queen Elizabeth, not merely as a residence, but as a stronghold, to repel the incursions of the mountaineers, although it can lay no claim to architectual beauty, forms, from its solid and massive character, a bold, if not a striking object, and, in other respects, possesses many features of interest; while the diversified nature of the grounds, which are of considerable extent, their great retirement and seclusion, together with the beauty of the surrounding landscape, contribute to render the old place a delightful retreat. Here Blackburne, surrounded by his family, and by 'love, honour, and troops of friends,' spent his well-earned rest and leisure; books and the varied resources which his house afforded gave him employment, and to the fullest extent he realized Cicero's ideal of a wise—a happy man." p.p. 288-9.

We cannot but regret that Blackburne's last years were not spent, as was the period more than ten years before when he was without office, or even as the long period during which he acted as Lord Justice of Appeal. Ireland never produced a more able judge, and no country ever produced a worthier man. It was truly unfortunate that one, of whom all thought so highly, should have experienced at last the pangs of wounded feeling, but it affords a lesson to all men in high places of what they ought to avoid when years have accumulated on them.

V.—THE LAW OF MARINE INSURANCE AND GENERAL AVERAGE.*

By G. STEGMANN GIBB, LL.B.

IT is not often that any branch of commercial law excites so much public attention and interest as has been directed to the law of Marine Insurance within the last few years. The publication of Mr. Plimsoll's usefully inaccurate book upon "Our Seamen" was the occasion of exciting an interest upon the subject which has never flagged, and the very full statistics which have been published from various sources with regard to the loss of life and property at sea certainly warrant the belief that a considerable porportion of these losses might be prevented by wise and vigilant legislation, which to be successful, must, of course, be based upon an accurate knowledge of the existing state of the law. We do not, however, intend to treat so much of legislation as of law, and chiefly of a few points suggested by the books which we have placed at the head of this article.

There is no branch of commercial law which affects so large and important a class of interests as the law of Marine Insurance. And, whether it arises from the uncertainty of the law, or from the immense and continually increasing changes which take place in the conditions of shipping enterprise, there is, perhaps, no branch of the law which is the occasion of more litigation. A glance through the annual volumes of

* The Law of General Average (English and Foreign), by Richard Lowndes' 2nd edition. London: Stevens and Sons. 1874.

Royal Commission on Unseaworthy Ships. Final Report of the Commissioners, Minutes of the Evidence, and Appendix. 1874.

The Principles of the Law relating to Marine Insurance and General Average in England and America, by F. Octavius Crump, of the Middle Temple, barrister-at-law. London: Butterworths, 1875.

Papers on Maritime Legislation, with a translation of the German Mercantile Law relating to marine commerce, by Ernest Emil Wendt, 2nd edition. London: Longmans & Co., 1871.

reported cases will show that a considerable proportion of them, and these often the most important, considering the magnitude of the interests at stake and the importance of the principles involved, are connected with marine insurance. It cannot be said, however, that there is much need of new text books on the subject. Text-books are numerous and good, and, by the frequent issue of new editions, the most valuable and authoritative of them are kept abreast with the latest cases and the most recent legislation. Few branches of the law, indeed, whether commercial or otherwise, can boast of a literature so extensive or so philosophical as exists upon this subject. And, as it is one of the few subjects upon which the writings of foreign jurists are cited in our courts, the number of valuable books, which can and must be consulted, is thereby largely increased.

Many both of the excellencies and the defects of this branch of the law arise from the fact that it is almost entirely judge-made. It owes to this fact much of its easy adaptability to the exigencies of an ever-increasing and extending commerce. The judges to whom, from the time of Lord Mansfield onwards, insurance law owes its development, have been, also, in most cases, practically unfettered by ancient precedents; they have been free to give full weight in their decisions to considerations of mercantile convenience. Indeed, large parts of this branch of law are not even judge-made, except in name. Many of the most important principles are nothing more than mercantile usages and customs adopted and sanctioned by the courts. What Mr. Lowndes says, in the Introduction to his most admirable book on General Average, is strictly applicable to marine insurance law. "A large portion of our commercial law," he says, "was directly and avowedly taken from the then existing customs of merchants. Whether from profound wisdom, or, as is more likely, from mere contemptuous indifference, merchants were, in the early days of English law, permitted to frame their rules of dealing pretty much for themselves; the courts,

when questions of that kind came before them, being content simply to enquire what was the custom of merchants on the point, thus leaving to the merchants the legislative work of framing customs which should have the force of law." *

But, although mercantile customs, sanctioned and developed into a science by judges, make a splendid basis for a complete system of commercial law, as time goes on and decisions multiply, this method of judicial legislation becomes less efficient. If a point has once been clearly decided, however much inconvenience may result from the decision, it is binding as a precedent, and remains so until overruled by a Court of higher jurisdiction, if, indeed, it be not a decision of the highest court, where infallibility no more dwells than in the inferior ones, in which case the mischief is irremediable by judicial legislation. Thus, while the conditions of commerce change unceasingly, the law, when once settled, is, so far as judges are concerned, immutable. The inconvenience of this state of things is perhaps more often illustrated in the law of marine insurance than in any other branch of commercial law. New questions, arising out of the modern magnitude of commerce, undreamt of before, out of the novel methods and conditions which are created by the necessities of an increased commerce—the many new points of difficulty thus raised have to be settled, often by construing the words of a form of policy, badly framed in the first instance, and encrusted with countless decisions.

It is not surprising that a branch of law so created and developed should be somewhat uncertain and difficult, not only to apply, but also to know. Here, then, is the value of a design, such as the one conceived, but not executed, by Mr. Crump, in the book which we have placed at the head of this article—a book which would digest and consolidate the law of marine insurance, setting it forth in a methodical and scientific manner, with precision of language, carefully

* Lowndes on General Average. Introduction p. 7.

separating the principles from the complicated circumstances of each case, the refinements of pleading, the elaboration of counsel's skill, and judges often too copiously cautious wisdom. We are willing to give Mr. Crump the approbation which he claims in his Preface for the design of his work, but we fear that he has not yet earned the "ample reward" of having made a "single step towards simplification—not to use" which of course means that he wishes to use, and does use it, "the term codification of the law."*

The publishers of Mr. Crump's books, in an advertisement circular for the contents of which Mr. Crump must, of course, be more or less responsible, "consider it advisable to make some remarks upon the novelty of its design and its general importance as dealing in a manner nearly approaching to codification with one of the most difficult and intricate branches of jurisprudence."

After reading these flourishes we were considerably disappointed in the book itself. On opening it we came upon one of the greatest puzzles of Marine Insurance law, the title, "Abandonment," the definition of which is about as clumsy and incomprehensible as it well could be.† The arrangement of the titles throughout the book is alphabetical, an arrangement which, the author seems to consider, renders unnecessary a more minute index of the contents. This is, we think, rather to be regretted, for it interferes with the usefulness of the book as an index to the law of Marine Insurance. A code it is not, nor even an approach to one; a consolidated digest it is not; a plain digest of case law in the very words of the cases it is not; and, what it might have been, if a little method and uniformity of arrangement

* Crump on Marine Insurance. Preface p. 11.

† Crump on Marine Insurance, tit. "Abandonment," section 1. "Abandonment is the act by which the assured, declining as a prudent owner uninsured who exercises a reasonably sound judgment to prosecute the adventure, cedes to his insurer the subject matter of the insurance affected by a peril insured against but still existing in specie, in order to acquire the right to claim for a total loss."

had been observed in the subdivisions of each title, namely, a large and useful explanatory index, it fails to be, on account of the absence, so far as we can see, even of any well considered attempt to introduce such method and arrangement into the minor divisions and details of each title.

We shall take one title—that of 'General Average,'* for the purpose of illustrating and justifying our criticisms. The title commences with a definition of 'General Average,' to which we shall presently return, and then, under the heading of "Loss," are given the "essential elements" of a claim to general average contribution, after which a series of remarks, and references intended to serve as illustrations or examples of the essential elements of general average loss, are given under the heading "observations." Then the division proceeds thus:—

LOSS.

1. Damage to ship, and damage or loss to ship's tackle or furniture.

(a) Examples.
(b) Voluntary stranding.

2. Damage to or loss of cargo.

jettison.

3. Loss of freight.

Then comes the heading "General Average Expenses," being, we suppose, a division intended to be contrasted with and separated from "Loss." After a series of illustrations of "General Average Expenses" we come to "Value of Interests contributed for;" then "Contributing Interests;" then "the Contributory value of Contributing Interests;" then "Place of Adjustment." Then comes a third and separate main division, "Recouping general average loss," subdivided into (1) Lien of Master, and (2) Legal remedy by

* Crump on Marine Insurance. Section 271.

"Owners," under which occurs a stray paragraph on "foreign adjustment," though why it should be placed there we are at a loss to understand, and we doubt if anyone would think of looking there for it unless his bewildered search were guided by an index.

But let us consider some of the matter of the title, and we shall take the most important part of it, namely, the definition of "General Average." Here, if anywhere, we might have expected accuracy and completeness; for the principles upon which general average depends have been frequently restated in English cases, since Mr. Justice Lawrence's well-known and concise statement of them in Birkley *v.* Presgrave,* which cannot well be improved upon, and numerous definitions have been given in the various foreign codes, all substantially alike. Yet, Mr. Crump has not availed himself of any of these materials, but frames a new definition which is both inaccurate and incomplete. His definition is "a contribution made by all the parties concerned in a sea adventure to make good a specific loss or expense incurred by one or more of them for the general benefit. †"

Before criticising the above definition we shall give the "essential elements" enumerated under the heading "Loss." Section 272. "The requisites necessary to make valid a claim to general average contribution are (*a*) there must be an imminent maritime peril. (*b*) The sacrifice must be extraordinary in its nature, and premeditated. (*c*) The object must be the general preservation. (*d*) The average act must be the proximate cause of loss."

Our idea of a definition is that it ought to be a compendious statement of the essential elements of the subject defined, yet we find that the above so called "definition" does not contain a single one of the "essential elements" subsequently enumerated.

* 1 East, 220.

† Crump on Marine Insurance. Section 271.

The definition is also absolutely incorrect in speaking of a specific loss or expense incurred for the general *benefit*. Nothing is more clearly established in English law than that no considerations of benefit would authorize a general average sacrifice unless it is made under the pressure of immediate danger. Of course preservation from danger is a benefit, and thus general benefit is in one sense a foundation of general 'average contribution,' but it is quite clear that 'benefit' has a much wider meaning than 'preservation,' so that it is not correct to say that all expenses incurred for the general benefit are recoverable as general average. Mr Crump, indeed, admits the inaccuracy of his definition when he gives as one of the 'essential elements' that 'the object must be the general *preservation*.'"

Then, there is no mention, in the definition, of the necessity that the loss should be *voluntarily* incurred, for the word "incurred" does not necessarily convey the idea of a voluntary act. A loss incurred through the direct action of the perils of the sea, without any intervention of man, for example, the loss of a mast, may well be, and often is, for the general benefit, and yet is not the subject of general average contribution. Voluntary sacrifice is the principal basis on which general average rests.

Then, again, there is, in the definition, no hint that the losses or expenses must be extraordinary in their nature. That they must be so is clearly settled, if it was ever doubted, by the case of *Wilson* v. *the Bank of Victoria*,* in which Mr. Justice Blackburne, delivering the judgment of the Court, says, "to give rise to general average, there must be a sacrifice or expenditure extraordinary in its nature, not merely the using of ordinary means to an extraordinary degree."

With all these omissions, and inaccuracies, how can the sentence with which Mr. Crump commences his title on, "General Average" be called a "Definition?" It would,

* L.R. & Q.B., 203.

we think, have been wiser to retain the admirably clear, accurate, concise, and exhaustive definition given by Mr. Justice Lawrence in Birkley *v.* Presgrave.* "All loss which arises in consequence of extraordinary sacrifices made, or expenses incurred for the preservation of the ship and cargo, comes within general average."

We do not mean to say that all the definitions in Mr. Crump's book are so faulty as those which we have instanced, nor to say that the book is a wholly useless one; on the contrary, there are many portions of it well arranged, and where the law is accurately and concisely stated.

Mr. Lowndes's book on the Law of General Average is not new, but we have selected it in order to deal with one or two of the subjects treated of in it. It is a great satisfaction to find such a book written on a subject so full of difficult and unsettled points as the Law of General Average. Mr. Lowndes grapples in such a masterly way with each one of the points of difficulty, and argues with such a comprehensive grasp of the general principles of his subject, as well as an accurate and extensive knowledge both of mercantile practice and legal authority, that he cannot fail to be a trustworthy guide. As a legal text-book, his "Law of General Average" deserves the highest praise for its acute analysis of some of the most important judicial decisions on the subject; as a treatise on a subject which has been developed into a science by such men as Mr. Lowndes, a science lying on the border-land between law and commerce, and regulated by principles and ideas from each, it is most masterly and philosophical, and, from a literary point of view, written in a very pleasant style.

Mr. Lowndes has carefully kept separate, "those portions of the law which may now be regarded as settled, and those questionable parts which, as yet, rest only on the authority

* 1 East, 220.

of custom, and which are liable to be overturned in the event of litigation." The care with which that has been done makes the book far more valuable to the practitioner than it would otherwise have been, and also makes it easy to select one or two questions, as we propose to do, for consideration. We intend to take points on which we do not feel quite convinced by Mr. Lowndes's reasoning. One of these, which is also one of the most interesting and difficult of the many questions connected with general average as yet unsettled in English law, is the subject of voluntary stranding. Should loss, or damage, caused to ship, cargo, or freight by the voluntary stranding of the ship because she is sinking or driving on the rocks, be made good as general average or not? There has been great diversity of opinion upon this question; the authority of jurists of the highest reputation can be quoted on one side and on the other. The natural result of this has been to create a diversity of law and of practice in different countries. It is very difficult to reconcile the various opinions upon the subject, or to deal with the arguments employed in any manner which would completely and satisfactorily meet all of them, because different jurists have come sometimes to the same, sometimes to different conclusions, by the employment of reasons and principles, which have little in common. Mr. Lowndes has criticised many of these authorities very ably, but we think that he is more successful in his destructive criticisms than he is in supporting the views upon the question which he himself adopts.

He commences by admitting that "if there is to be one rule for all such cases, it would seem that such damage," that is, damage caused by voluntary stranding, "being the result of an extraordinary measure taken for the common safety, and involving an exposure to unusual risk, ought to be the subject of general average. The balance of authority, so far as foreign codes, ancient or modern, or the opinions of jurists, or judgments in the courts of the United States,

can be said to constitute authority, is decidedly in favour of this view." * The practice of English average adjusters has, for the last fifty years, been to treat all damage caused by voluntary stranding as particular average, but it is difficult to see how such a practice can be supported when it is condemned alike by principle and authority. The origin of the practice is due to the views expressed by Stevens, in his Essay on Average, published in 1813. He there contends, and his conclusions were adopted in practice by English average adjusters, that damage caused by voluntary stranding should not be allowed as general average, for two reasons: first, that no specific thing was selected for sacrifice; and, secondly, that the voluntary stranding of a ship is never resorted to but when the situation is desperate, and loss is so imminent and certain as to preclude free volition. These reasons clearly go the length of excluding every case of voluntary stranding from general average, and accordingly the English practice has been, and still is, invariably to exclude it. Although, however, the practice has remained unchanged, both the reasons given by Stevens are considered by all modern writers on the subject to be erroneous. Seeing, then, that "there only remains a practice founded on reasons which are discredited—a practice modern, peculiar to this country, and, as yet, unrecognized by judicial authority," † it is almost certain that, when the question comes before the courts for decision, the existing practice will be condemned.

So far we agree with Mr. Lowndes. But when he goes on to argue in favour of substituting a rule which would make a distinction between some cases of voluntary stranding, which ought, in his view, to be admitted as general average, and other cases, which ought not, we think that he departs from the course recommended alike by principle and convenience. The view supported by Mr. Lowndes is that which the American courts have adopted, and is explained by Par-

* Lowndes on General Average. p. 77.

† Lowndes on General Average, p. 79.

sons in the following passage :—" There must be a voluntary sacrifice of some positive value. If, then, the ship must inevitably be cast upon the shore, and all that the master does is to select a place, a time, or a mode of stranding her, we should say that this is not that voluntary sacrifice which the law of general average requires; and therefore is not an average loss. But if the master had a substantial and valuable chance of saving his ship, and threw his chance away voluntarily, that he might make sure of saving the cargo, then the cargo should contribute to repay the loss, although the chance thus thrown away was less, and even much less, than a probability." *

If this mode of settling the question were clearly correct in principle, we should still regret that it should be adopted because of the inconvenience and litigation to which it must give rise, and to which it has given rise in America, where, as Mr. Lowndes remarks, the courts "have necessarily been driven to some nice and subtle distinctions." † Could any basis, upon which to rest the admission to or exclusion from general average, of damage by voluntary stranding, be found more uncertain and unsatisfactory than the distinction between actual and moral necessity? But we think that we are not driven to rest the settlement of the question in each case upon a doubtful state of facts of which it would be almost impossible to obtain reliable or accurate evidence. By applying the admitted principles regulating the law of general average we are led to the adoption of an invariable rule admitting in all cases damage caused by voluntary stranding as general average.

To constitute a valid claim for general average there must in all cases be a common danger and a voluntary sacrifice.‡

* 2, Parsons on Insurance, pp. 243-244.

† Lowndes on General Average, p. 83.

‡ Johnson v. Chapman, 19 C.B.N.S. 563, per. Willes, J. "The principle seems to be clear, that, if the danger is common, and the thing is voluntarily sacrificed, it is contributed for rateably."

Now, in a case, where a vessel, to take the instance selected by Mr. Lowndes, has parted from her anchor in a gale of wind, and begins to drift upon rocks, there is no question as to the imminence of a common danger. The whole adventure is at stake; and in imminent danger of destruction. These are the very conditions which not only authorize, but oblige, the master of the ship to avert or lessen the impending loss, if, by any voluntary act of sacrifice, he is able to do so. Does he, then, by running the ship ashore at a place selected by himself, in order to avert or lessen the impending loss, and thus to save the vessel and cargo from utter destruction, make any sacrifice? Mr. Lowndes thinks not. "The master," he says, "seeing that she is helpless, and if left alone must inevitably ground upon rocks, while a softer bed may be found for her by steering upon a sandback, shifts the helm, and perhaps hoists a sail, and intentionally puts her on the sand. Here, though the stranding is voluntary, all that is really done is to substitute a safer place of grounding for one more dangerous. It would be an abuse of language to call such substitution a sacrifice."* Mr. Lowndes, in a note, expresses some doubt whether even in the case put, the stranding on the rocks would really be inevitable, "for, until the ship has struck the ground, there is always a possibility of some sudden change of wind, or some unknown under-current, which may carry her clear." But we wish to take the case as if it were an instance of utter hopelessness, as it is treated in the text. To our view the more hopeless a case is, the more reason is there for treating the damage caused by voluntary stranding as general average, always bearing in mind that the hopelessness affects the whole adventure. The hopelessness consists in the reasonable belief that all must inevitably perish; the sacrifice, we think, consists in the fact that, to avert this inevitable destruction of all, the master attempts, by a voluntary act, the immediate effect of which is damage to

* Lowndes on General Average, p. 82.

one portion, to save all. It is quite true that by running the vessel on a sandback, he merely substitutes a sandback for a rock, but the effect of that substitution is, that the cargo, for instance, may be saved, when without that substitution it, as well as the ship, would, inevitably have perished. The part saved is thus not the same, but a different one from the part primarily affected by the master's act, and it cannot therefore be a case of *sauve qui peut.* Permissive destruction may be voluntary sacrifice, especially when, by means of it, safety has been secured for, and benefit bestowed upon, one part of the adventure by the voluntary act of the master, done with the motive of securing that safety and bestowing that benefit. Benefit to one part of the adventure, obtained by means of the voluntary destruction of another part, is the foundation on which general average rests, and contribution is still due, although the part sacrificed would have been lost without the voluntary sacrifice being made, or, in other words, although the sacrifice is made in anticipation of inevitable loss. Take the case of a jettison. "The master," says Lord Stowell, in the case of the "Gratitudine," 3 C. Rob 259, "is only justified in making a jettison of cargo by necessity, arising from extreme danger. Under this pressure he may, in case of need, throw over *even the whole cargo.*" Now, a case of jettison where the whole cargo is thrown overboard is strictly analogous to a case of voluntary stranding. In the one case, the ship is saved by means of the sacrifice of the cargo; in the other, the cargo is saved by means of the sacrifice of the ship. The sacrifice is similar and equally great. A jettison of the whole cargo and a voluntary stranding are each justified, only by the fact that, but for such jettison, or voluntary stranding, the whole adventure would inevitably perish. It is immaterial to the owner of the jettisoned cargo whether it be lost by the natural action of the elements or the voluntary agency of man, as it is immaterial to the owner of the stranded ship, whether she be allowed to strand upon rocks, or made to

strand upon a sandback, but it is highly important to the owner of the interest saved, or which can be saved, in each case, that the master, by means of the principle which constitutes him the general agent in the event of a common peril happening, should be at liberty to anticipate the natural action of the elements by selecting from all the interests at stake, one, the destruction of which will have the effect of saving the rest. The fact that the interest selected for destruction could not, in any event, be saved has, we contend, nothing to do with the question; the ground of contribution is the benefit derived by the interest saved from the destruction, in the face of a common danger, of the interest destroyed. In all cases of general average, the assumption is that, but for the sacrifice made, the whole adventure, including the article sacrificed, would have perished. And if that general principle is departed from, and inquiries into the extent of the common danger allowed, further than to determine whether the jettison was reasonable or not, where could the line be drawn? In many cases it could be proved that the cutting away a mast was the only way in which a vessel could be saved from destruction, and thus, but for the suggestion that a sudden lull of the wind might have taken place or some other contingency happened, so remote and extraordinary as to be altogether fanciful, the mast might be said to be virtually lost before being cut away. Unless, indeed, the suggested chances of safety are to be confined to what is usual or reasonably possible, no case whatever can be put in which the state of the adventure could be called utterly hopeless.

We cannot but think that it would be more convenient, and more in accordance with principle, to admit all cases of damage caused by voluntary stranding to general average. In all conceivable cases there must be two conditions, the joint effect of which would be to create a claim for general average contribution. There must always be a common

danger, for, if not, there would be no question of general average at all; and, secondly, there must always be some exercise of the will of man, for, if not, there would be no question of *voluntary* stranding. This view of the question has the support of Arnould's high authority. "If, indeed," he says, "the act of stranding be in no degree the result of human agency, then, *cadit quæstio;* but if the will of man was in any, even the least, degree contributory thereto, that is all which is required; it makes no difference that the pressure of circumstances was such as to prevent that will from being reasonably exerted except in one particular way. This forced volition is all that is required to give the party making the sacrifice a claim to contribution." *

Mr. Lowndes claims, by means of an argument from analogy, the authority of Mr. Justice Willes, in *Johnson* v. *Chapman*,† in support of the view which he takes of the subject of voluntary stranding. But the case of *Johnson* v. *Chapman* dealt with the sacrifice of articles which were at the time of the sacrifice in a state of wreck, a question between which and that of voluntary stranding, the analogy is, as Mr. Lowndes himself points out,‡ plainly "fanciful." *Johnson* v. *Chapman* was an action by the shipper of a cargo under a charter party which expressly allowed the carriage of a deck load, against the shipowner for contribution as general average in respect of some deck cargo which had been jettisoned. Part of the deck load, which consisted of deals, broke adrift in a storm. The deals, being loose, were drifting about the ship's deck, over which the sea was breaking heavily. They were thus themselves in imminent danger of being lost, and were likewise a source of danger to the ship. It was on this ground, chiefly,

* Arnould on Marine Insurance, 3rd edit.

† 19 C.B., N.S., 563.

‡ Lowndes on General Average p. 18 (note *a*).

that the claim for general average contribution was resisted, the shipowner contending that as the deals had broken adrift out of their proper place, and were themselves the cause of the danger, they could not be made the subject of general average contribution. The Court, however, decided in favour of admitting the claim as general average, pointing out that, if the weather had been moderate, the deals, though adrift, might have been secured again, and that they could not therefore be said to have been irrecoverably and hopelessly lost. But, although deciding that, in the actual case before the Court, there had been a real sacrifice, Mr. Justice Willes, in delivering the judgment of the Court, intimated their opinion that there might be cases where a jettison would not be admitted to general average contribution, on the ground that the article jettisoned was, at the time of jettison, hopelessly lost. "A lawyer," he said, "could not lay down as a matter of pure law that all cumber cut away is wreck; but what I say is, if it was virtually lost—if not recoverable—if the act of cutting the rope was only hastening the moment at which it would be lost, you would properly call that wreck, you would not say it was general average. The reason given is, because you cannot keep it. There is no intentional sacrifice in cutting it away. You must lose it; and the losing it a minute or two sooner can make all the difference of its doing great injury or not; but you cannot help losing it. But if, instead of cutting away what is virtually lost only, you cut away a portion of what is still on board and safe except for the common danger . . . you ought to receive average in respect of the portion you so cut away, because that you do sacrifice." *

Now, we think, with all deference to an authority so eminent and, in most cases, so absolutely trustworthy as Mr. Lowndes, that there is not in the cases of deck-load broken adrift, or wreck cumbering the vessel, any common danger in the same sense as in the case of a ship saved from

* Johnson v. Chapman, 19 C.B.N.S., 582.

drifting on rocks by voluntary stranding. In the former cases, there is never any question of the whole adventure being hopelessly and irretrievably lost. The deck-load, or the wrecked mast may, perhaps, be hopelessly lost, although, if loose deals floating about a ship's deck, in a storm so severe as to necessitate their being thrown overboard, are not thought to be irretrievably lost, it is difficult to conceive any state of circumstances, short of their having been absolutely washed into the sea, which would make the loss theoretically irretrievable; but, even if they are hopelessly lost, the vessel is not so. The whole adventure is imperilled by a common danger, but that common danger has placed part of the adventure in a condition so hopeless as to be virtually lost without the intervention of man, but has left the other part in a condition so safe, that it can be made absolutely safe by the act of clearing away the part which is hopelessly lost. But, in the instance of voluntary stranding which we have taken, the situation is altogether different. The whole adventure is imperilled by a common and equal danger, the whole may be said to be virtually lost; and, to make the case analagous to that of wreck cut away, the act of the master would need to be one hastening the destruction of the part of the adventure which is virtually lost, that is, the whole of it. Instead of that, he rescues part of the adventure, he voluntarily chooses a lesser loss to a greater, and the owners of the part saved ought not to benefit exclusively by the act of the master, done in his capacity of common agent to avert or lessen the common danger.

Although we think that there is a clear distinction between the cases of voluntary stranding and cutting away wreck, even if the latter is not allowable in general average, we are also inclined to think that the latter as well as the former is properly a general average loss. The same necessity which justifies the master in cutting away wreck makes the intentional act of cutting it away a sacrifice for the common danger. The master has no more right to hasten the de-

struction of anything than he has to commence the destruction of it. In either case his right depends upon the common danger, and the motive for his act is the common benefit. Either the wreck cut away was a source of danger to the ship, or it was not. If it was not, the master was not justified by necessity in cutting it away; there was no common benefit. If, on the other hand, the wreck was a source of danger to the adventure, the act of cutting it away was a common benefit. The case then stands thus:—the master did something which he had no possible right to do unless the common safety required it, with the motive of common benefit, and these are the very conditions of a general average sacrifice.

The law of France, which starts from the same definition of general average as the English law does, admits damage by cutting away wreck to general average on the footing of the actual value of the wreck when cut away. By French law, damage to ship and cargo caused by voluntary stranding is also treated as general average.*

We intended to discuss some of the questions connected with marine insurance, mentioned in the Final Report of the Royal Commission on Unseaworthy ships, which we have placed at the head of this article. But we have only space for a few remarks upon one of the recommendations in the report, that, namely, which refers to the question of seaworthiness of ships insured under a time policy.

There is no provision of the law of marine insurance more important in the interests of life and property, or more clearly harmony with the principles which form the basis of every contract of insurance, than that which implies a warranty, on the part of the assured, that the vessel insured is seaworthy. This assumption, or warranty of seaworthiness, has been justly called "the one fixed point among all the unstable, ever shifting, and uncontrollable elements, with which the

* Lowndes on General Average, Appendix C. The Law of France, p. 139.

contract deals." * Yet the protection of this salutary rule has been taken away from a whole class of policies, those, namely, under which the duration of the risk is limited to an agreed period of time, restricted by statute † to twelve months. The exemption of time policies from the operation of the law which imports into the contract of insurance a warranty of seaworthiness, has been accomplished by a series of judicial decisions of a comparatively recent date, and, although the extent to which the exemption would be carried was for some time doubtful, it is now settled beyond question, "that in all voyage policies, and in no time policies, there is such a warranty." ‡ The judges who have taken part in the decisions by which the law on this point has been settled, have been influenced by the supposed inconvenience of implying a warranty of seaworthiness in time policies. The Royal Commissioners on unseaworthy ships, who seem to have been always ready and willing, when they got even a meagre pretext for doing so, to raise the plea of inconvenience to shipowners, say, in their Final Report, page 14, "we think that the shipowner should not be entitled to recover his insurance, whether under a time or voyage policy, when it could be shown that he, or his agent, had not done everything reasonably within their power to make and maintain the ship in an unseaworthy state, and that unseaworthiness occasioned the loss." If, then, practical shipowners see no inconvenience in a law requiring the assured, in a time policy, to warrant the seaworthiness of the vessel insured, just as in voyage policies, it is strange that the supposed existence of such an inconvenience should have had so great an influence upon the decisions of judges on this point as it has had.

The first case in which the existence of a distinction be-

* Arnould on Marine Insurance, 3rd. Ed. p. 6.

† 35, George III, cap. 63, sec. 12.

‡ *Fawcus* v. *Sarsfield*, 25, L. J., Q. B. 249.

tween voyage and time policies, in respect to the warranty of seaworthiness implied in each class, was suggested, is the case, of *Dixon* v. *Sadler*,* decided in the year 1839. The counsel for the plaintiff in that case, which was upon a time policy, raised the contention, then without any authority in its favour, that in the case of a time policy the law implied no warranty of seaworthiness. But such a contention was unavailing as well as new. Chief Justice Tindal, in delivering the judgment of the Exchequer Chamber, said that in respect to the implied warranty of seaworthiness there was no difference between time and voyage policies.

Then, in the year 1849, the well-known case of *Gibson* v. *Small*,† was decided in the Court of Queen's Bench. The defendant's contention in that case was, that in every time policy, which attached while the vessel was at sea, there was an implied warranty that the ship was seaworthy at the commencement of the risk, or at the date of the policy. Such a warranty was, perhaps, too extensive to contend for; but as the case arose upon a question of a judgment, *non obstante veredicto*, a proceeding substantially the same as a demurrer, the exact point before the Court had to be adhered to, and the warranty contended for had to be upheld or refused, and could not be reduced more within the limits of what was practically possible and equitable. The Court of Queen's Bench, however, composed of Justices Coleridge, Wightman, and Erle, decided in favour of the plaintiff, holding that upon authority, both American and English, there was not, and upon principle there ought not to be, any difference "between a time policy and one for a particular voyage as to the implied warranty of implied seaworthiness."

The case was then carried to the Exchequer Chamber, where the judgment of the Court of Queen's Bench was reversed.† It is, however, useful to note that the judgment of the Court proceeded entirely upon the unreasonable extent of the warranty sought to be implied. In pointing out the dis-

* 16 Q.B., 128. † 16 Q.B. 140.

tinction between voyage and time policies, Baron Parke says that "in the case of the latter the assured does not necessarily know the condition of the ship at the commencement of the term." Knowledge of the condition of the ship being thus made the point upon which the analogy between voyage and time policies depends, it is clear that if the defendant had contended for a warranty of seaworthiness at the date of the ship's sailing, he would have succeeded. The judgment of the Court expresses an opinion to that effect. "We are," it says, "far from saying that there is no warranty of seaworthiness at all; so to hold would be to let in the mischief which the law provides against by the implied warranty in a voyage policy according to the situation in which the ship may be at the commencement of the term of the insurance * * * if she be at sea that she was seaworthy when that voyage commenced."

This great case was appealed to the House of Lords,* where the decision of the Exchequer Chamber was affirmed. The House, consisting of Lord St. Leonards and Lord Campbell, was assisted by nine judges, each of whom delivered an elaborate opinion. Upon the point at issue in the case, namely, whether in a time policy attaching when the vessel was at sea, there was an implied warranty of sea worthiness at the commencement of the risk, Justices Erle and Williams were alone in thinking that there was such an implied warranty; Baron Parke, on the other hand, was alone in thinking that, under no circumstances, was there any implied warranty of seaworthiness in time policies. Lord St. Leonards, Barons Platt and Alderson and Justice Maule, expressed their opinion that a warranty of seaworthiness at the date of the ship's sailing ought to be implied in time policies. Lord Campbell and Baron Martin, with some hesitating qualifications, intimated an opinion substantially the same. As in the Exchequer Chamber, so in the House of Lords, the decision was based upon the

* 4 H.L.C., 353.

supposed impossibility of the shipowner being acquainted with the condition of his ship when the risk commenced. "In a time policy," said Lord St. Leonards, "neither party can be supposed to know the state of the ship when the risk commenced, and therefore it will be unreasonable to imply a condition of seaworthiness at that period."

Seven years after the case of *Gibson* v. *Small* was decided, the question upon which so many of the judges had expressed their opinion, namely, whether, if the ship were in port when the risk attached, there would be an implied warranty of seaworthiness, although the policy was effected upon a time basis, arose in the case of *Thompson* v. *Hopper*.* In that case the policy, upon which the action was brought, was effected upon a ship, lying in Sunderland, by her owner, who resided there. One of the pleas put on the record by the defendant was, that the ship was lost on account of the plaintiff having sent her to sea in an unseaworthy state. On this plea the defendant recovered judgment, but on another plea, which did not allege that the loss of the vessel was actually caused by the wrongful act of the plaintiff in sending her to sea in an unseaworthy state, but merely relied upon the fact of unseaworthiness, to which plea the plaintiff demurred, the plaintiff recovered judgment, Justice Erle dissenting. Justice Erle, in his judgment, adhered to the opinion which he had expressed in *Gibson* v. *Small*, but the majority of the Court, consisting of Lord Campbell, C.J., and Justices Coleridge and Wightman, decided in favour of the plaintiff, on the ground that in time policies there is no warranty of seaworthiness. Lord Campbell, in his judgment, calls attention to the fact that they were altering the doctrine laid down in *Gibson* v. *Small*, and gives their reasons for so doing. After referring to the decision of the House of Lords that there is no implied warranty of seaworthiness in time policies, "unless

* 25 J.L.Q.B., 240.

peculiar circumstances are shown from which the warranty is to be implied," he proceeds to enunciate the new modification of that doctrine which the Court intended to introduce, "Much uncertainty and much litigation," he says, "would arise from the doctrine that a warranty of seaworthiness may be implied from special circumstances. Not only would there be great difficulty in determining what special circumstances shall be sufficient for the purpose, but a long course of decisions would be necessary to ascertain the period at which, in time policies, the seaworthiness must exist. I conceive that it would be much better to lay down the general rule that in time policies there is no implied warranty of seaworthiness."

The case of *Fawcus* v. *Sarsfield*,* the facts of which were similar to those of the last mentioned case, was decided in the same term and by the same judges. Justice Erle continued his dissent from the other members of the Court, and they likewise adhered to their decision in *Thompson* v. *Hopper* without giving any new or more satisfactory reasons. Neither of the two last mentioned cases were carried to an Appeal Court, and since *Fawcus* v. *Sarsfield* was decided the law as there settled has never been questioned.

We cannot deny that there is considerable force in the objections made to implying in all time policies a warranty of seaworthiness at the commencement of the risk. If the ship is at sea, it is no doubt true, "that the assured does not necessarily know the condition of his ship at the commencement of the term." † But is this the proper test to apply? The assured, in the case of a policy on goods, whether the vessel be at sea or in port when the risk attaches, as well as in the case of a voyage policy on a ship effected while she is at sea in the middle of a voyage, is held to warrant that the ship was seaworthy at the commencement of the voyage, yet in none of these cases, has the assured any knowledge of the

* 25 L.J., Q.B., 249.

† Gibson *v.* Small, 16 Q.B., 140.

condition of his ship more than he has when he insures a ship at sea under a time policy. The principle upon which the implied warranty in these cases rests, applies equally to the case of a time policy effected on a vessel at sea; it rests upon the very nature of the contract itself, and the nature of the risks insured against by that contract. The contract is one of indemnity, not however of indemnity against all loss, but merely against loss caused by extraordinary perils which a seaworthy ship is not able to encounter. No policy, unless it be a policy expressly upon an unseaworthy ship, which is, of course, a peculiar contract governed by its own special terms, covers the consequences of loss from the ordinary action of the winds and waves, or from the ordinary wear and tear of the ship in the prosecution of her voyage. That is undoubted law, governing not only voyage, but also time policies; and we cannot discover any principle by which an insurer can be made liable for the consequences of perils which are admitted not to be covered by the policy, on the ground that he was not aware of the liability of his property to these risks. It would be equally reasonable to hold that if the assured were unfortunate enough to lose his ship by some flaw or fraud in connection with his registered title to the ship, or by reason of any other mishap not falling within the scope of the perils insured against by the policy, the insurers ought to indemnify him for his loss.

The assured's knowledge or opportunity for knowledge as to the condition of his ship cannot, we think, affect the question. If the insurer has not agreed to be liable for the consequences of the unseaworthiness of the ship, and has agreed to be liable for the extraordinary perils covered by the policy only on condition that the ship was fit to encounter the ordinary perils of a sea voyage, how can the fact that the assured was not aware, at the time of making the contract, that the vessel was unseaworthy, alter or increase the liabilities of the insurer? If he had been aware of the fact and concealed it he would have been guilty of

fraud, and the policy would be void on that ground; if he was not aware of it, and the ship is lost in consequence of unseaworthiness, he loses nothing for which he bargained.

The above argument is, of course, incomplete unless the assumption, which is made, be correct, that the basis upon which the contract between the insurer and the assured proceeds, is the fitness of the vessel insured to encounter the ordinary perils of a sea voyage, or, in other words her seaworthiness. That this would be so, in fact, is not denied by the judgments in *Thompson* v. *Hopper*, or *Fawcus* v. *Sarsfield*. The position which these judgments take up, so far as they refer to the case of a policy attaching while the vessel is at sea, is that the insurer and assured deal with each other on equal terms as regards knowledge; that the condition of the ship is a fact to be inferred from the knowledge which is common to both parties; and that, under these circumstances, the insurer must be considered to have formed his judgment concerning the seaworthiness of the ship, at his own peril, because, if the assured were to warrant the actual seaworthiness of the ship, the insurance would not answer the purpose of indemnification to the assured. That mode of reasoning assumes that the assured is desiring to obtain, and the insurer agreeing to give a complete indemnity, not only against extraordinary perils during the period of time covered by the policy, but also against ordinary perils which may damage or destroy the vessel by reason of her unseaworthiness, which, as we have endeavoured to show, is not a correct view of the contract.

It is plain that some one must suffer the loss caused by unseaworthiness, and therefore one of the parties must warrant the seaworthiness of the vessel, for a warranty is nothing more than an agreement, express or implied, to be liable for loss resulting from the cause warranted against. The effect, therefore, of the decisions upon this subject is that in all time policies there is an implied warranty, on the part of the *insurer*, that the vessel is seaworthy at the

commencement of the risk. Let us test this by Mr. Justice Brett's definition of an implied warranty in the case of *Daniels* v. *Harris* * "When and to what extent," he says, "is a Court of Law bound to hold that there is an implied term in a contract? Whenever there is something not expressed which it is clear to all men of ordinary intelligence and knowledge of business, must have been either latently in, or palpably present to, the minds of both parties to the contract when it was made." Now from what evidence, and on what authority, could the court lay down as matter of law, for that is what has been done in the series of decisions with which we are dealing, that it is "clear to all men of ordinary intelligence and knowledge of business," that in effecting an insurance for a period of time on a ship at sea, "it was latently in, or palpably present to, the minds of both parties," that the insurer was to be liable, not only for the perils expressly and usually covered by marine policies, but also for all damage or loss occasioned by the unseaworthiness of the vessel insured?

We cannot but think that the materials from which a warranty could be implied, according to the conditions laid down by Mr. Justice Brett in *Daniels* v. *Harris*, were not only sufficient to enable the court to imply a warranty of seaworthiness at the time of sailing on the part of the assured, but that they made it obligatory on the Court to imply such a warranty. Take, for instance, a case of a shipowner offering a time risk on a vessel at sea to an underwriter, before the case of *Gibson* v. *Small* was decided. Both parties must be taken to have been aware that in all policies which had been brought before the courts a warranty of seaworthiness had been held to be implied; that even in cases of policies effected by owners of goods, having no knowledge of or control over the condition of the ship, Lord Mansfield had refused to dispense with the warranty, saying, "that the implied warranty could not be dispensed with in any case."†

* L.R., 10 C.P., 8. † Oliver v. Cowley, 1 Park Ins., 470.

They knew, in fact, to quote the words of Lord Campbell, that the implied warranty of seaworthiness in voyage policies had been established by "mercantile usage, with a long series of decisions and authorities from text-writers of the highest reputation,"* and that there had not, as yet, been any suggestion of a distinction between voyage and time policies in that respect. Clearly, then, there was nothing in the state of the decided cases, or authorities, from which the Courts could infer, that the insurer, or assured, in the case supposed, were contracting with the intention "latently in or palpably present to," the minds of each, that the insurer, and not the assured, as in other cases, was to be responsible for damage or loss caused by the unseaworthiness of the vessel.

There is as little ground for making such an inference, from the considerations which were probably present to the minds of both parties as prudent men of business. It has never been, and cannot be contended, that a time policy is different in its nature from any other policy. The risks to which a ship is exposed on a voyage are always the same, whatever the character of her insurance; those of the risks, which are expressed to be covered by the insurance, are also the same, and the amount of premium payable by the assured is substantially the same in time and voyage policies. The question, which is always the most important one for the insurer, is, whether the risk is ordinary or extraordinary, and clearly "that question never can be answered, unless the state of the ship is given."† The only circumstances from which an intention, on the part of the insurer, to dispense with the usual warranty of seaworthiness could possibly be inferred, is the fact that the shipowner does not himself know the condition of his ship, and that, consequently, he must be supposed to have agreed with the insurer, "what-

* *Thompson* v. *Hopper*, 25 L.J. Q B 240.

† Per Erle J in *Thompson* v. *Hopper*, supra.

ever is the condition of my ship, will you indemnify me against loss by perils of the sea occurring subsequently to this date?" But even that inference is impossible if the warranty sought to be implied is one of seaworthiness at the commencement of the ship's voyage.

We fully share the opinion that any law which would have the practical effect of preventing a shipowner from insuring his vessel at sea, if she had in fact been rendered unseaworthy, before the date of the insurance, by perils of the sea, would be most unjust and unsatisfactory. And as the English law contains no provisions similar to those in the German Mercantile Code* relating to time policies, the effect of implying, in all time policies, a warranty of seaworthiness at the commencement of the risk might be to prevent shipowners from so insuring.

But as the circumstances and intentions of the parties to a time policy are precisely similar to those of the parties to a voyage policy, effected on a ship at sea, we think that the same warranty ought to be implied in each case. Now, the implied warranty in such a voyage policy is that the ship was seaworthy at the commencement of the voyage. There can be no inconvenience in implying the same warranty in all time policies, and it is one which unquestionably ought to be implied. Such a warranty would not be open to the objection that the knowledge of the insurer with regard to its subject matter, is co-extensive with the knowledge of the assured. What the assured knows, or ought to know, about the condition of his ship at any period during a

* Art. 825. The following damages are not at the charge of the underwriter. In the case of an insurance on ship or freight, damage occasioned in consequence of the vessel having been sent to sea in an unseaworthy condition, &c.

Art. 835. Should the vessel be insured upon a time policy, and at the expiration of the period agreed therein be in course of a voyage, the insurance shall be considered, in default of an agreement to the contrary, to be prolonged until the arrival of the vessel in the next port of destination, and, if the discharge takes place in such port, until the termination of the discharge."—From the translation of the German Mercantile Law contained in Wendt's Papers on Maritime Legislation. 2nd edition.

voyage, is that, if she has not been rendered unseaworthy by the perils of the sea during the completed part of the voyage, she is seaworthy, that is, practically, that she was seaworthy at the commencement of the voyage.

Neither is it open to the objection which was made to the doctrine of *Gibson* v. *Small* as to implying a warranty from special circumstances, that much uncertainty and litigation would arise from it. The litigation would be no more than arises at present under voyage policies. A shipowner who insures an unseaworthy ship by two policies, one for the voyage, by description, one for the period of time which the voyage is expected to occupy, with the usual provisions for returns of premium in respect of uncommenced months, would no longer be able to recover upon the one and not upon the other. The immense protection to life and property resulting from the carefulness which this warranty induces those shipowners, who might otherwise be inclined to carelessness, to bestow upon their ships, would be extended to all cases where the existence of an insurance diminishes the shipowner's fear of loss; and we would no longer see instances of underwriters being forced to indemnify shipowners for losses caused by their own negligence, because the law has, as Arnould puts it, "granted a remarkable extension of philosophical indulgence to human infirmity."

VI.—FRENCH JURISPRUDENCE.*

WE desire to discharge our obligations to the publishers and authors who have kindly come forward to aid us in our object of making known in this country the progress

* Bulletin de la Société de Législation Comparée. (March, 1875.) Annuaire, do. do., 1874. Paris: Cotillon,

Revue de Législation Ancienne et Moderne. Paris: Thorin, (April, 1875).

Histoire des Contrats de Location Perpétuelle ou a longue durée, par J. Lefort, Avocat à la Cour d'appel. Paris: Thorin, 1875.

Etude sur la Législation Electorale de l'Angleterre, par Franck Chauveau, Avocat à la Cour d'appel, docteur en Droit. Paris: Cotillon, 1874.

Courrier de l'Enrégistrement, Revue Critique, Chérié, Directeur.

Gazette des Clercs et Notaires, Michaux, Rédacteur. Paris: Chérié, 1874-5.

of Juridical Science on the Continent, by at once mentioning their publications, though we must defer their close examination to a future number. It has been our good fortune, since the issue of the last number of our journal, to be able to make personal acquaintance with the excellent work that is being done by the French Society of Comparative Legislation. We were enabled, through the kind offices of M. Franck Chauveau, who has at various times distinguished himself by the knowledge he displays of English affairs, to be present at one of the general meetings of the Society, in the course of which English subjects happened to be on the list for the evening. Unfortunately, the discussions never follow immediately on the reading of a Paper, but are postponed till the next meeting. This system may enable the Society to discuss a greater number of Papers in the course of the year, but it seems to our notions a singular one, and likely to detract from the freshness which should be one of the first points in a discussion. However, we are not anxious to pick holes in the action of a Society so energetic in the field of Comparative Jurisprudence, and we cannot but hope that Englishmen, interested in juridical subjects, will come forward to help our neighbours in the varied and interesting field of work that they have undertaken. We shall return to the consideration, both of the "Annuaire" of the Society, and of M. Chauveau's able essay, in a future number. We regret to notice the death of two jurists, whose pens were much employed both for the Society of Comparative Legislation, and for the "Revue de Législation," namely, M. A. Demongeot, whose papers on "Self-Government" we mentioned in our last, and M. Emile Dufour, an article by whom is partly printed in the current number of M. Thorin's Magazine. We are glad to note that this number of the "Revue de Législation" contains an article on Greek Jurisprudence, a subject somewhat neglected among ourselves, in the shape of a Paper by M. Thonissen, of Louvain, on the "Penal Responsibility of Pleaders under Athenian law." M. Dufour had

undertaken the history of the customs of the Commune of Gramat in Quercy, A.D. 1324, which, when completed, will give an interesting picture of Mediæval Town Franchises in Southern France. M. Lefort's important contribution to the "History of Property," which obtained the honourable mention of the Academy, must be reserved for a full and separate notice, which it deserves alike for the vastness of its subject and the ability of its treatment.

VII.—COUNTY COURT APPEALS AND THE COUNTY COURT BILL.

THE County Court Bill of last Session provided for the repeal of 19 & 20 Vict. c. 108, s. 26. This section empowers a judge of a superior court to send down to a county court, for trial, any action of contract for not more than £50. This, however, can only be done *after issue joined*. The Bill of the present Session, very wisely we think, does not propose such a repeal.

The 30 & 31 Vict. c. 142, s. 7, (County Court Act, 1867) empowers a judge of a superior court to send down for trial to a County Court any action of contract for not more than £50 at any stage of the action and before issued joined.

A clause remitted under 19 and 20 Vict. c. 108, s. 26, may, after trial in the County Court, be the subject of an application for a rule *nisi* for a new trial, or to enter or set aside a verdict or nonsuit, after leave reserved, &c., in the Superior Court in which the action was commenced, just as if such action had been tried before a Judge of Assize. No security, either for debt or costs, is required on the application for such rule *nisi*, unless the Court thinks fit to grant the rule on such terms.

Actions remitted for trial in a county court under 30 and 31 Vict. c. 142 ss. 7, 10 (County Court Act, 1867), can only be the subject of an appeal from the ruling of a County Court Judge by means of a special case stated by the Judge whose ruling is challenged, and security for costs and the amount recovered (if the plaintiff has recovered in the County Court action) is a *condition precedent* to such appeal.

The right of appeal is virtually nullified by the restrictions to which it is subject. If an appeal is given at all, it should be as available to the poor as to the rich; at present it is the luxury of the rich alone, because they alone can give the requisite security for costs and the sum recovered.

Security should be provided against suitors being harassed by frivolous and vexatious appeals. This security against frivolous and vexatious appeals can be effected by a provision that security for costs, and the amount of the judgment, should be ordered to be given in proper cases.

The expense and delay of a special case are serious objections to this mode of proceeding, and can be avoided by providing that the appeal should be, by application to the Court or a Judge (in vacation), for a rule *nisi* to set aside the judgment recovered.

The Judicature Act abolishes appeal by special case in the superior Courts entirely, and substitutes appeal by motion for appeal by special case. There is no reason why an appeal by motion may not be made, cause shewn, and the appeal heard and determined in a shorter time than is required for the settlement of the special case by the County Court Judge, and that at a smaller cost. The cost of a special case in the County Courts is often very large. There is the labour of preparing it, the cost of the parties endeavouring to settle it themselves, the cost of attending the Judge for his signature, which is often attended with the cost of adjournments, and sometimes, even, with the cost of the case being remitted by the Superior Court to the County Court Judge for more sufficient statement.

The form of proceeding by special case having therefore been abolished by the Judicature Act, and a preferable form of proceeding adopted, there surely cannot be any danger in allowing suitors in county courts the same advantages as are provided for suitors in the superior courts. The only objection that can be raised to such a course, is that facilities would thus be given for appeal; a very poor reason when we find that in the years 1871, 1872, and 1873, there were 110 appeals in the superior courts from county court judgments, and that in 66 of these appeals new trials were ordered or judgment was given for the appellant. We would suggest some such a clause as the following in the Bill.

"In all causes, suits and proceedings other than claims within 9 and 10 Vict. c. 95, s. 58, tried or heard in any County Court, and in which any person aggrieved has a right of appeal, it shall be lawful for any person aggrieved by the ruling order, direction or decision of any County Court Judge at any time within eight days after the same shall have been made or given, to appeal against such ruling, order, direction, or decision by an application by way of motion to the Court to which such appeal lies, without the necessity of stating any special case, such motion to be *ex parte* in the first instance, and to be granted on such terms as to costs or security as to the Court to which such motion shall be made shall seem fit, provided that if the Court to which such appeal lies be not then sitting, such application may be made to any Judge of a Superior Court sitting at Chambers."

It will be observed that this clause gives no appeal where it does not at present exist, nor does it interfere with the summary jurisdiction for the recovery of small debts under 9 and 10 Vict. c. 95, the sole purpose for which the County Courts were first established. The clause proposed merely extends the practice at present in existence under 19 and 20 Vict. c. 108, s. 26.

VIII.—CURIOUS LAW EXTRACTS.—Part III.

WE give a third selection of extracts from the Law Reports by Mr. F. F. Heard, of Boston, Massachusetts. In this instalment, Mr. Heard has not confined himself to English Reports, but has taken from those of the United States:—

"The common law system of special pleading," said the late Mr. Justice Grier, "matured by the wisdom of ages, founded on principles of truth and sound reason, has been ruthlessly abolished in many of our states, who have rashly substituted in its place the suggestions of sciolists, who invent new codes and systems of pleadings to order. But this attempt to abolish all species and establish a single genus, is found to be beyond the power of the legislative omnipotence. The result of these experiments, so far as they have come to our knowledge, has been to destroy the certainty and simplicity of all pleadings, and introduce on the record an endless wrangle in writing, perplexing to the court, delaying and impeding the administration of justice." *McFaul* v. *Ramsey*, 20 Howard, 523. And in a later case the same learned judge observed: "It is no wrong or hardship to suitors who come to the courts for a remedy, to be required to do it in the mode established by the law. State legislatures may substitute, by codes, the whims of sciolists and inventors for the experience and wisdom of ages; but the success of these experiments is not such as to allure the court to follow their example. If any one should be curious on this subject, the cases of *Randon* v. *Toby*, 11 Howard, 517; of *Bennett* v. *Butterworth*, 11 Howard, 669; of *McFaul* v. *Ramsey*, 20 Howard, 523, and *Green* v. *Custard*, 23 Howard, 483, may be consulted." *Farni* v. *Tesson*, 1 Black, 315.

As an illustration of the absurdities produced by the "codes," the case of *Bennett* v. *Butterworth*, above referred

to by Mr. Justice Grier, is worthy of attention. In that case the court were unable to discover from the pleadings the nature of the action or of the remedy sought. It might with equal probability be called an action of debt or detinue, or replevin, or trover, trespass, or a bill in chancery. The jury and the court seem to have laboured under the same perplexity. *The jury gave a verdict for twelve hundred dollars and the court rendered judgment for four negroes!*

When Lord Eldon introduced his bill for restraining the liberty of the press, a member moved as an additional clause that all anonymous works should have the name of the author printed on the title page.

Christian quotes 1 Ld. Raym. 147, to the effect "that the court of Common Pleas, so late as the 5 W. & M., held that a man might have a property in a negro boy, and might have an action of trover for him, because negroes are heathens." 1 Bl. Com. 425, note.

In a case in the time of Elizabeth, the plaintiff for putting in a long replication, was fined ten pounds and imprisoned, and a hole to be made through the replication, and to go from bar to bar with it hung round his neck. *Milward* v. *Welden*, Tothill, 101.

Of the gratuities which Lord Bacon was charged with receiving, some were not gifts at all, but sums of money borrowed, and recoverable as debts. Three of these cases gave rise after Bacon's death to a curious question. Being claimed by the leaders as *debts* due to them from the estate, the executors pleaded that they had been decided by the House of Lords to be *bribes*. Bacon's Works, vol. xiv., p. 264, and note, ed. Spedding.

In May, 1874, a bill to limit the privilege of franking was sent from the Parliament of Ireland for the royal approbation. It contained a clause that any member who, from illness or other cause, should be *unable to write* might authorize another to frank for him by a *writing under his hand*.

In a bill for pulling down the old Newgate, in Dublin,

and rebuilding it on the same spot, it was enacted that the prisoners should *remain in the old jail till the new one was completed.*

"If one be in execution, and if he has no goods, he shall live of the charity of others, and if others will give him nothing, let him die in the name of God." Montague, Chief Justice, *Dive* v. *Mannington*, 1 Plowd. 68, quoted in *M'Lain* v. *Hayne*, 3 Brevard, 296.

In a recent case, the Supreme Court of the United States animadvert upon the practice of introducing children as witnesses in an angry family quarrel, Mr. Justice Wayne quaintly saying that "it can not be done without its being considered as a forlorn effort of parental obliquity." *Toby* v. *Leonards*, 2 Wallace, 425. 438.

BOOK REVIEW.

THE BANKRUPTCY ACT, 1869, AND THE DEBTORS ACT, 1869, INCLUDING THE RULES, ORDERS, AND FORMS. Illustrated by Notes of all the important divisions thereon since the year 1869. By Frank Pitt-Taylor, Esq., of Lincoln's Inn, barrister-at-law. London: Maxwell & Son. 1875.—This book may be of use, but we cannot but think that it might have been made much more valuable. The author seems to think that some excuse for his method of treatment is necessary, for he explains, in his preface, that he has purposely refrained from all mention of the procedure of practice in bankruptcy prior to 1871, on account of the excellent works which are already in the hands of the public. We agree with him in thinking an excuse necessary, but almost feel inclined to think that the reason given would have been a good excuse for not writing at all. No one can blame young authors for rushing into print, but it would be better for their own sakes and the groaning shelves of our libraries, if they waited until they discovered real wants, and had patience to supply them in the best possible way. Although we have found fault

with Mr. Pitt-Taylor's choice of subject, we must acknowledge that we are struck with the care with which he has performed the work he has undertaken. So far as our hasty perusal has enabled us to judge, we have found nothing omitted which ought to have been included. The cases referred to are succintly and correctly described as to their meaning; and there is a very copious index. Still it is a question whether it was necessary to undertake the trouble; and we must confess we would rather have Mr. Pitt-Taylor's talents employed on something more original.

Owing to want of space we are obliged to leave over till next month the reviews of several books which have come to hand, among which is a new work by Sir Peter Benson Maxwell, late Chief Justice of the Straits Settlement, "on the interpretation of Statutes," which we shall have occasion to notice at length. Another is a report of a trial for murder in America, with notes by Mr. F. F. Heard, of Boston, Massachusetts.

CALLS TO THE BAR.

Easter Term, 1875.

INNER TEMPLE.—Samuel Green, Esq., M.A., Cambridge; Alfred Gwyther, Esq., B.A., Oxford; Vernon Rudolph, Schalch, Esq.; Arthur Larcom, Esq., M.A., Oxford; John George Fawcus, Esq., M.A., Cambridge; James Lynch, Esq., London; Harry George Wedderburn, Esq., B.A., Oxford; Frank Rawling Dymes, Esq., B.A., Cambridge; Llewellyn Archer Atherley-Jones, Esq, B.A., Oxford; Edmund William Garrett, Esq., B.A., Cambridge; George Readman, Esq., Advocate, M.A., L.L.B., Edinburgh; Alexander Charles Boyd, Esq., L.L.B., Cambridge; James Duncan Stuart Sim, Esq., B.A., Cambridge; Edward Stafford Howard, Esq., B.A., Cambridge; Reginald Dowdeswell Charles Stonhouse, Esq.; Charles William Kennedy, Esq., B.A., Oxford; Walter Monnington, Esq., B.A., Oxford; Gordon Alexander Ouchterlony, Esq., B.A., Cambridge; Arthur Alison, Esq., Advocate, Edinburgh; Tyrrell Thomas Paine, Esq., B.A., Cambridge; James Herbert Fellowes, Esq., B.A., Cambridge; James

Wallace, Esq., M.A., Edinburgh; Josesh Hyacinth Hewetson, Esq., B.A., Cambridge; Hugh Neville, Esq., B.A., Cambridge; Joseph Chatto Lamb, Esq., B.A., Cambridge; and John Coussmaker Anderson, Esq.

LINCOLN'S-INN.—William Frederick Hunter, Esq.; Walter Nassau Senior, Esq., B.A., Oxford; Robert Skeffington Ross-of-Bladensberg, Esq., M.A., Oxford; Harry Hutchinson Baber, Esq., B.A., Cambridge; Henry Richard Cooper Smith, Esq., B.A., Oxford; Henry Tudor Parnell, Esq., B.A., Cambridge; Alfred Paget Humphrey, Esq., B.A., Cambridge; Alexander Carmichael Bruce, Esq., B.A., Oxford; Hugh Edward Pigott Platt, Esq., M.A., Oxford, Fellow of Lincoln College; William Charles Biss, Esq.; George Frederick Wellington Langdon, Esq., Ponnambular Arunáchalam, Esq., B.A., Cambridge; and Abbas Shumsooden Tyabjee, Esq., University of London.

MIDDLE TEMPLE.—Alfred Cromwell White, Esq., B.A., Christ Church, Oxford; Charles Summer Maine, Esq., B.A., Trinity College, Cambridge; Ernest Augustus Northcote, Esq, L.L.B., Trinity College, Cambridge; Ernest Augustus Northcote, Esq., L.L.B., Trinity College, Cambridge; James Anson Farrer, Esq., B.A, Balliol College, Oxford; Edward Legge, Esq.; Robert Johnstone, Esq.; Herbert Travers Tamplin, Esq.; William James Laidlay, Esq., B.A., L.L.B., St. Peter's College, Cambridge, Advocate at the Scots Bar; William Wastenays, Esq., B.A, Trinity College, Cambridge; William Hunter Rodwell, Esq.,; William Hastings Lawson, Esq.; and Henry Burton, Esq.

APPOINTMENTS.

Mr. Justice Huddleston has been transferred to the Court of Exchequer; and Mr. Nathaniel Lindley, Q.C., has been appointed a Justice of the Common Pleas; Mr. Morgan Lloyd, Q.C., Mr. Thomas Hennry Cowie, Q.C., and Mr. John Hosack, and Mr. William Speed, Barristers, have been elected Benchers of the Middle Temple; and Mr. F. Towers Streeton, Recorder of Worcester, has been elected a Bencher of Grays Inn. Mr. William Wynne Ffoulkes, has been appointed Judge of County Courts, for Circuit No. 7, (comprising parts of Cheshire and Lan-

cashire.) Mr. Æneas John Macintyre, Q,C., has been appointed Chief Commissioner, and Mr. Wyndham Slade, and Mr. Douglas Straight, Commissioners to enquire into the existence of corrupt practices in the Borough of Boston; and Mr. Ernest Bagallay, has been appointed Secretary to the Commission; Mr. William Clowes, has been appointed a Register in the Court of Chancery; Mr. Thomas Danger, Solicitor, has been appointed Clerk to the Property and Income Tax Commissioners, for the City of Bristol; Mr. Edward John Cox Davis, Solicitor, Clerk to the Commissioners of Taxes, for the Division of Bedwellty in the County of Monmouth; and Mr. Steven Brown Dixon, Solicitor, Clerk to the Commissioners of Land and Income Tax, for the Kinwardistone Division of Wiltshire. Mr. Holmes Gore has been appointed Clerk to the Magistrates for the City of Bristol; Mr. Edward William Haslewood, Solicitor, Clerk to the Magistrates of Bridgworth; Mr. Edward John Kendall, Solicitor, Registrar to the Yarmouth County Court; Mr. Joseph Martin, Solicitor, Clerk to the County Magistrates of Pershore; Mr. John Thomas, Solicitor, Town Clerk of Swansea; Mr. Robert Bristowe Berridge and Mr. Charles Morris, Solicitors, Clerks to the Magistrates for the Leicester Division of the County; Mr. T. W. Hartnoll, Solicitor, Clerk to the Commissioners for Land Tax, for Exeter; Mr. Richard Heningway, Solicitor, Clerk to the County Magistrates at Bewdley and Stoneport; and Mr. W. Henry Talbot, solicitor, Clerk to the Magistrates of the Hundredhouse Division of Worcestershire. *Jersey*—Mr. Augustus Apsley Le Gros has been elected a Judge of the Royal Court of Jersey. *India*—Mr. Arthur Hobhouse, Q.C., has been elected Vice-Chancellor of the Calcutta University in succession to the Hon. Edward Clive Bayley, C.S.J.; Mr. Arthur Phillips has been appointed to act as Standing Counsel to the Government of Bengal during the absence of Mr. John Pitt Kennedy; Mr. Patrick Ryan, barrister, has been appointed to act as Third Magistrate for the Poliee Court at Bombay, during the absence of Nana Morojee. *New Zealand*—Mr. Joshua Strange Williams, has been appointed a Judge of the Supreme Court at Canterbury; and Mr. Thomas Bannatyne Gillies, Judge of the Supreme Court at Otago. *New South Wales*—Sir Alfred Stephen, K.C.M.G., has been appointed a Member of the Legislative Council of New South Wales. *Fiji*—Sir William Hackett, Knight, has been appointed Chief Justice of the colony.

THE

LAW MAGAZINE AND REVIEW.

No. VII.—Vol. IV.—July, 1875.

I.—LORD SELBORNE ON LEGAL EDUCATION.

THE Annual Meeting of the Legal Education Association was held at the Incorporated Law Society's Hall, Chancery Lane, on Wednesday, June 2nd. Lord Selborne presided. Mr. Arthur Williams, Honorary Secretary to the Association having read the Report,* the learned President of the Association spoke as follows:—

Gentlemen,—I have now to move "That the Report of the Executive Committee of the Council be adopted." In so doing you will naturally expect me to advert to the topics which are mentioned in the Report and to the present position of the question in which we are interested. The Report is, with commendable brevity, confined to notice of what has been done in the way of introducing a Bill into Parliament, and of what, at the time the Report was drawn up, was the position of that Bill. You are all aware that since the Report was drawn up, both that and the Inns of Court Bill have, without opposition, received a second reading in the House of Lords; and, although we

* The Report will be found under the head, "Legal Topics."

ought not to be too sanguine as to the amount of success which this may eventually import, yet I think it is impossible not to congratulate ourselves upon the admission, so far as the House of Lords is concerned, by their Lordships' unanimous consent to the second reading, of the general principle of the Bill promoted by this Association. With respect to the other Bill I may have to say a few words; but I will speak, first, of that which alone is mentioned in the Report, because it alone relates to the objects and operations of this Association.

The Bill for the establishment of a General School of Law, as this Report correctly states, aims at the embodiment of certain principles, and, I think, adheres faithfully to the essential principles which this Association has always had in view. The first principle is one which I consider absolutely vital to this Bill, and to any other measure of the same nature, with the introduction or promotion of which I, at all events, may have anything to do. I mean the principle of comprehension—that the school, on whatever basis it is formed, shall be open, without any restriction or qualification, to all Her Majesty's subjects. We may, of course, be mistaken, both in our conception of the public want, and of the possibility of supplying it; but our conception of the want, such as it is, is essentially founded on the idea, that a great School of Law, to be useful to the profession and to the country, ought to aim at as large a work as it is possible for a School of Law to perform; that it should aim at that in the most liberal manner possible; and that it should endeavour to draw within the sphere of its benefits (whether these take the shape only of examinations, influencing instruction elsewhere given, or that of direct instruction also), all those who may, from any point of view whatever, or for any purpose whatever, desire to become acquainted with the principles of law, and especially with the laws of their own country; and among them, of course, first and foremost, those who con-

template actively pursuing the profession of the law, in any of its branches; without making premature distinctions, or invidious distinctions, or illiberal distinctions, between one branch of the profession and another branch of the profession, or between those who may and those who may not, by their actual status at the moment of receiving instruction, have already indicated to what branch of the profession they intend afterwards to attach themselves.

It has been a favourite saying of those who have been unfriendly to this scheme, that we propose to unite, under one system of instruction, articled clerks and barristers. I take the liberty of saying that this objection, if offered by persons intending to be candid in their criticism, proceeds upon a misapprehension of the objects of the Association. The Association aims — whether the proposed school of law is to undertake the work of examination, or the work of instruction, or both—it aims at supplying that which shall be needful for those who intend to follow both the great branches of the legal profession. But it does not aim at uniformity, or at compelling all who mean to follow either branch to submit themselves to the same precise course of study, or to go through the same precise examinations. It proposes to leave the choice of that to the students, comprehending within its system the means which are necessary—if instruction is to be given—for the best possible instruction which can be needed by either kind of student; and, as far as examinations are concerned, all those examinations of which either class of students can have any need. But it does not propose anything which can interfere with the operation of the law of natural and reasonable selection, by those who mean to follow one branch or another, or those who don't mean to follow the law as a profession at all, as to the lectures, (if we give lectures), which they may attend, or as to the examinations which they may undergo. And indeed, on the very face of the scheme, it is distinctly indicated, that it is

supposed there may be some steps essentially necessary to qualify for practice as barristers and other steps essentially necessary to qualify as solicitors; and that these need not, and probably will not, be the same; and that some authority is to determine what these steps, for the purpose of each kind of qualification, are to be. It would not on that account be necessary to prevent any man, desiring to be a barrister, from becoming acquainted with the manner in which a solicitor's business is done, by attending any instruction bearing on that subject, or any examination, if he desired to do so. Nor would it be necessary, or in my judgment desirable, to prevent any gentleman, intending to be a solicitor, from attending the highest course of instruction given in the institution, and offering himself for the highest class of examinations, and taking the highest honours, if he could.

It has been said, and I fear (to speak quite openly), it has been said not candidly, in a public criticism upon the proceedings and objects of this Association, that whatever may be intended by such persons as myself, (as to which some doubt seems to be suggested), yet that, in reality, to break down the distinction between barristers and solicitors is the main substantial object, either of this Association as a whole, or at all events, of its most influential and energetic promoters. I really think it would be an excess of charity to suppose that this critic was desirous of being accurately informed on the subject about which he wrote; because those, who wish to be accurately informed, are in the habit of going to those sources, where they are likely to get correct information; and I defy any one to read anything which has been reported as having been said at any public meeting of this Association, or in any of the papers emanating from it, and find there the slightest indication of any desire, on the part either of the Association, or of any of its members, to break down the distinction between the Bar and the other branch of the profession. For my own part, I have both from this chair, and on other occasions, whenever

the occasion was proper for expressing my sentiments on this subject, said, that I attach the greatest value to the present distinction between the Bar and the solicitors; the Bar representing—not indeed as a separate institution an absolutely indispensable element in any social system, because we know the distinction has been dispensed with in the United States and perhaps in some other countries—but an element of our own social system, which has been and is of the greatest possible value. By means of this distinction we train up in the practice of advocacy, and in the higher learning of the law, a body of men, some of whom may serve the State as judges, some as legal writers, and who, at all times of our history, have taken an important part in maintaining the principles of freedom, and the independence and dignity of the law. That has been the historical character of the English Bar; and, for my part, whatever may be the force of any arguments to the contrary, I think the distinction is productive of great benefit to society. On the other hand, the profession of the solicitor is absolutely indispensable to society. Wherever you have any law at all—and, whether the laws are good, bad, or indifferent, there must be some law everywhere,—wherever you have any law, you must have men to do the work which is done by the solicitor; and my impression and belief is that, if we were to enter into a comparison of the importance to society in this country of the two branches of the profession—a comparison which I entirely deprecate as invidious and unnecessary—it would be exceedingly difficult to shew that anything can be of more importance to society than the character, knowledge, and position in every respect, socially and professionally, of the body of attorneys and solicitors. So far from there being a separation of interests in that respect, the judges and the bar could not do their duty without the co-operation of the attorneys and solicitors. The interests of them all—I speak not of their private, but of their

public interests,—are so bound up together that it is a most unnatural thing to have them put in opposition to each other, which those seem to do who regard, as revolutionary encroachments, schemes intended for the common, impartial, and equal benefit of all.

On the part of this Association—I cannot, of course, know what may be the private opinions of all its individual members, but I have every reason to believe that the opinions of its members on this point are, in general, not substantially different from my own—on the part of this Association, I repudiate, as wholly unfounded, the suggestion that it is now, or has at any time been, any part of its objects, direct or indirect, to alter the character or substance of the relations existing for professional purposes between the different branches of the legal profession. If it should be said that (whether intended or not) such is the practical tendency of our proposals, I deny, not less emphatically, that assertion. We deal with the whole subject in the earlier stage before men are either barristers or solicitors; and at the moment of their entering either branch of the profession their relation to the scheme of education involved in the proposals of the Association would necessarily cease. I should be glad to know, how any candid man can reconcile the principle of that objection with even the small modicum of comprehension which is permitted under the present rules of the Inns of Court. If the objection, that gentlemen who are or who may be articled clerks must not be instructed in common, in the same room, with those who are or who may be students at the Bar, is sound at all, it is sound altogether; and why, upon that view, do the Inns of Court themselves permit, as they do permit by their present rules, their public lectures to be attended by all students who wish to attend them? They do not indeed permit this at the private classes, and that exclusion from the private classes, together with other narrow conditions of the present system of education given by the Inns of Court, goes far

to prevent any considerable number of gentlemen availing themselves of that permission—there being but 10 or 15 a-year, I believe. But if, in principle, this tends to obliterate the distinction between the two branches of the profession, why is it permitted in the public lectures? I turn, with satisfaction, from such narrow and groundless notions of class jealousy and exclusiveness, to the much more healthy and liberal tone of the present Lord Chancellor's speech, in the debate which took place in the House of Lords when the bills of last year were introduced. The Lord Chancellor then was, and is (I am afraid) still of opinion, that the whole office of teaching had better be undertaken by the separate societies—by the Inns of Court and the Incorporated Law Society—than by the aggregate body which we propose to constitute as the general school of law. Upon that subject, which is mentioned later in the report, I shall have something to say. But in advocating, from that point of view, the better regulation of the Inns of Court, the Lord Chancellor on the 10th of July last distinctly expressed his opinion to be in favour of that principle of comprehension in teaching, for which we contend. These were his words: "Care should be taken that the Inns of Court, as places of legal discipline and education, should be led to give an education as broad and liberal as possible, and without any attempt being made, at the earlier stages of that education, to draw lines of demarcation between the different branches of the profession, or to narrow the education to be given into a mere dry acquirement of legal rules. The education ought to be large and wide and liberal, and any statutes that did not contemplate that result ought not, he thought, to meet with approbation." As far as the principle of comprehension in the earlier stages of legal education is concerned, it seems to me to be thoroughly assented to by the Lord Chancellor in the words I have read.

I now pass to the next point mentioned in the report, as a principle of the measure I have introduced. It is proposed

that this general school of law shall fairly represent all existing institutions and all existing interests, and it is proposed to do that in a manner of which I need not mention the detail, because it is probably familiar to you all. The Bill provides, substantially, that in the Senate, or Governing Body, both branches of the profession shall have an equal share of representation, and that the judges and other *ex officio* members shall also have a certain proportion of power, and that there shall be a certain proportion nominated by the Crown. I believe that these propositions have been in substance approved by all who favour the principle of the measure. That part of the scheme makes it necessary for me to say a few words in explanation of what I have thought it right to do with respect to the other Bill, with which this Association is not concerned, I mean the Bill relating to the Inns of Court. From the beginning this Association has very properly disclaimed any intention of interfering by its associated operations with questions internal to the Inns of Court; and it may be asked, why I, in the position I occupy towards the Association, should have thought it right and necessary to deal with that subject also. In the opinion of some (and I am far from saying there may not be some ground for that opinion), it may have, in some respects, operated to the prejudice of our principal purpose. I will state the reasons which made it impossible for me to avoid that course. In the first place, when I first prepared the scheme of a Bill, I was not your president. I filled a public position which obliged me to take views as large as I could of all those public questions with which I proposed to deal, and I could not narrow my view simply with reference to the limits properly imposed upon itself by this Association. I found, in that situation, this state of things to exist: first, there were those great institutions, which nobody professing to deal with this question, in Parliament or elsewhere, could affect to ignore, and the bearing of which, upon the whole subject of legal education, must be examined whenever any branch of that

question is gone into. Next, in the very plan of this Association, it was not proposed to act altogether independently of the Inns of Court—it was proposed to act by a governing body, who were to be, in part, nominated by the Inns of Court; and, therefore, the Inns of Court could not be left out of sight, as constituents of the general body which it was proposed to create. Lastly I found, that the Inns of Court stood, at that moment, in this peculiar position—a select committee of the House of Commons, in the year 1846, had recommended legislation concerning them, of a character calculated to bring them into a more public and responsible position, and to give them a more distinct academical constitution: and a royal commission of later date had also made similar recommendations. Nothing had afterwards been done; though some, at least, of those societies had expressed opinions, not unfavourable to the principle of these recommendations. It was not possible for me, as Lord Chancellor, to avoid feeling, that the time had come for some legislation, with respect to the Inns of Court, and that such legislation ought to be attempted, *pari passu* with that as to a General School of Law, if any satisfactory scheme was to be proposed to parliament and the public. I could not, in my care for the interests of this Association, lose sight of the interest of the country generally, in the well-being and good government of the Inns of Court. I myself belong to one of them; and I have never entertained any other feeling than that of respect and goodwill to those learned societies, some of which, on former occasions, have, with great liberality, given us opportunities of meeting in their large and convenient Halls—like that which we now enjoy of meeting in this Hall, through the liberality of the Incorporated Law Society. Some of those societies also, when we first made communications to them, if not by their Benchers, at least by their Committees, expressed opinions favourable to the main principles of our scheme. This Association did not move a step, without first

communicating with those learned bodies, and asking for an opportunity of expressing their intentions and views to them, which was kindly granted, I am not sure whether by the Associated Inns of Court, or by Lincoln's Inn only; but in the Council-room of Lincoln's Inn a deputation, of which I formed one, was courteously received. I saw, in that publication to which I have referred, that, on that occasion, we made a very sorry appearance. I think there were amongst us some, who are now learned Judges and eminent Barristers, to say nothing of any of the Solicitors who were present. What took place at the time did not leave so very unflattering an impression upon our minds. We had been civilly received; we had obtained a certain amount of recognition, not to say encouragement, though it did not afterwards go much further; and, at all events, we had the satisfaction of feeling, that we had manifested our respect for the Inns of Court, and our desire to act in perfect friendliness and harmony with them. It was in the same spirit that, when I had prepared a Draft Bill as Lord Chancellor, I communicated it to the Inns of Court, not as a settled measure, nor as one adopted by the late Government, but as the outline of a plan, as to which I should be glad to receive the criticisms and, if possible, the assistance of those bodies. I ceased to be Lord Chancellor before their answers came; and in that state of circumstances, exercising the discretion which undoubtedly belonged to them, they did not think fit to give me any assistance as to matters of detail, but put the whole matter aside by simply saying, that they disapproved of that Draft Bill. All I could then do was, to separate the two parts of the draft, so that the question of the Inns of Court should no longer stand connected in the same Bill with that of the School of Law; and, in other respects, to place the scheme before Parliament substantially in the shape which had been submitted to the several societies interested in it, with a few amendments which I thought would meet some objections which had been made. It had been received with

favour by the Incorporated Law Society, and by this Association: it had been honoured with no criticism by the Inns of Court, and I thought it the best course then to put it upon the table of the House of Lords, in the hope that I might obtain some light as to any better course which might be afterwards pursued. That light was obtained; because the Lord Chancellor said, that he was of opinion the question ought to be dealt with, though not in that manner, and he indicated the way in which he thought it should be dealt with, and intimated that if I did not introduce such a measure, he contemplated himself, at some future time, doing so. I could not have shewn my respect for the Inns of Court more strongly, than by abandoning my own scheme, so far as they were concerned, and introducing, as I have now done, the measure which the Lord Chancellor recommended. I should hope that in this form it may no longer be so unacceptable to those learned bodies, whose welfare I have as much at heart as any other of their members possibly can.

I have thought it due to you to give this explanation of what I have done, with respect to the Inns of Court Bill; and I will only add, that it will be my object, as far as practicable, henceforth to keep it separate from that relating to the School of Law; but that it would, in my judgment, be quite impossible to carry any measure, if the whole subject of the Inns of Court were left out of sight. I, at all events, could not do it.

I now come to the next point touched by the Report, which speaks of the Bill in which this Association is more directly interested, as providing for an efficient staff of teachers in the proposed School of Law. I am bound to say that is a little too strongly expressed. The Bill provides for the establishment of a teaching staff, potentially and conditionally only, if and when the necessary means shall be forthcoming. Of course it cannot be done without the means. We have them not at present, and some persons doubt if we shall get them. The Report, however, expresses

great confidence, and I feel a good deal of confidence, that if the scheme receives the authority of Parliament, no very long time will elapse before the means are forthcoming. It is impossible, however, to feel sanguine (the opinion of the Lord Chancellor being, on this point, against us) that this part of the scheme will receive the assent of Parliament; and we must consider what ought to be done, if the Bill is altered, by leaving out those parts of it which relate to teaching. Of course that alteration will not be made with my concurrence or voluntary consent; but, if it should so happen, I do not think we need on that account abandon the measure, or despair of ultimate success, so far even as teaching is concerned. The matter as to that stands thus. The present system of legal education given by the Inns of Court has defects, which we have (I hope in a perfectly respectful and friendly manner) criticised on former occasions. If that had been sufficient for all purposes, the very reason of our own existence would, so far as teaching is concerned, have ceased. It was impossible, therefore, to avoid going into some statement of the reasons why that system appeared to us to be too narrow to have in it the elements of real success. I do not at all rejoice at the additional evidence which time gives of the truth of these views. On the contrary, I have the cause of legal education so much at heart, (in common, I believe, with all whom I address,) that I should have been exceedingly glad if the greatest amount of success which could possibly be hoped for, under a system the basis of which seems so narrow, had attended that system, and if every year it had appeared to be doing more and more good work. I am bound, however, to say that I believe the fact to be exactly the contrary. The statistics usually published about this time of the year or earlier have not, as far as I know, yet been made public; and I believe the cause to be, that the decline of the system has been so marked as to make it absolutely necessary that the whole matter should be the subject of investigation and enquiry; and that, until

that investigation and enquiry has been made, it is not thought expedient to present to the public the figures applicable to the preceding year. I have reason to believe that the falling off in the number of attendances, both on the public lectures and at the private classes, has been of an extraordinary character; that the examinations on the whole have not been remarkable for efficiency (though some students have passed excellent examinations); and that the system is going backwards, and not forwards, in spite of the increased endeavours of the Inns of Court and the Council of Legal Education, and the increased liberality with which they have contributed to it out of their funds. What is the moral? That whatever is done by the Inns of Court should be supplemented by something larger in its aims, larger in its comprehension of persons, altogether better than anything so exclusive in its professional objects as the system of the Inns of Court possibly can provide. The Bill, as it stands, does not propose to interfere with any use which the Inns of Court may think proper to make of their means for lectures under their own control. It is not proposed to take away that power. We hope that they would be found willing contributors to the teaching power of the School of Law when established; but that must of course rest with themselves. But we cannot dissemble our opinion, that, whatever instruction is given in the Inns of Court, or even if it were also given separately, by the Incorporated Law Society, it would be more useful and more efficient, if there were, in addition to it, other instruction given upon a larger system, and by a body having an aggregate constitution. No harm, certainly, could be done, and we believe a great deal of good would be done by such additional instruction. What reason have we for saying so? Why, this; that every considerable authority and writer, from Austin's time downwards, in this country, who has addressed himself to the subject, has uniformly and without exception advocated the establishment of an efficient system of instruction in the

general principles of law and jurisprudence. The system of teaching by lectures has been admitted by all those best qualified to speak, who have examined the matter, to be better calculated for that purpose than for most others. But private classes, of course, would be available under any scheme of instruction to be given in the School of Law, as well as in the Inns of Court. You want a large interest to be excited; you want your professors and teachers to be not on the precarious footing on which they are under the system of the Inns of Court, but upon such a footing of respect, zeal, and independence, as that of the leading professors and teachers at our own and foreign universities. In foreign countries a large and spontaneous interest is felt in the study of jurisprudence; a system of instruction exists, which is attractive not merely to those who have professional objects in view, but to men of intelligence generally. Why should it not be so in England? Because you have not at present a method of teaching calculated to produce those effects. I believe you may have it, if such a School of Law as that proposed supplies the means and the power, when the funds are forthcoming, to do whatever is desirable for that end, in the way of instruction. You would not interfere the least in the world with anything that is done elsewhere; but I should like those who take the other view to answer this question. Granted that the Inns of Court and the Law Society, (which would stand after these bills have passed in a relation to the School of Law, like that of the colleges of Oxford and Cambridge to the universities of Oxford and Cambridge,)—granted that they would give efficient collegiate instruction, why should you not have efficient university instruction besides? Nobody thinks that Oxford and Cambridge would be better for having no university teaching; on the contrary, the whole tendency of modern reform and legislation in those places has been, and still is, quite the other way. I may not be able to contend with superior force, in the place where the question must be practically decided, if the pro-

posal is made to strike the teaching clauses out of the Bill. It is possible it may be proposed to postpone the Bill altogether, for some reason or other; but supposing that we get into committee and that the Bill is allowed to pass through committee, I will assume that the Lord Chancellor, who has expressed a strong opinion in favour of collegiate rather than academical teaching in law, and of making the general body an examining board only, does what he will have power to do if he thinks it right, carries his point, and strikes out these clauses. Ought we to give up the Bill? I think not. For two reasons. In the first place we shall have gained, not all that we wish, but a point of considerable value and importance, if we get the central examining body and board. Examinations, wisely conducted, though in my judgment by no means an adequate substitute for academical instruction, will undoubtedly have a very powerful educating effect, by giving a direction and applying a stimulus to instruction, wherever it is given, whether in the Inns of Court, or in the University of London or any of the other universities, or anywhere else. The principle of comprehension, and the liberal representation of all branches of the profession will have been achieved; and if the instruction given by the Inns of Court is eventually thrown open and settled upon those liberal and comprehensive principles which the Lord Chancellor advocated in his speech last year, we shall substantially have the thing, although we may have it separated in point of form from the General School of Law. Further, I do not really think, that the absence of express powers given by the Legislature to establish a teaching staff would by any means prevent its being done hereafter, supposing the funds to be at some future time forthcoming. Suppose a large sum of money bequeathed to the School of Law for this purpose, do not you think either the Court of Chancery, by its power over charitable bequests, or the Legislature, if that were necessary, would

open its doors to enable the money when forthcoming to be made useful, and not shut it up, and say nothing shall be done with it? Even our own Association could continue, constituting trustees for the purpose of receiving those funds and administering them under the control and management of the School of Law, if, by the action of legislation, the School of Law had no direct powers to do it. I, therefore, do not think that the teaching objects of our Association would be ultimately defeated, even by such a change as that which has been mentioned, and I therefore should be unwilling to relinquish the Bill if that should happen. I do not want to dwell upon the other point about the examining body. It is perhaps right to mention that there is some controversy upon that one point, at this moment, between the Council of our Association and myself as the author of the Bill, on the one hand, and this excellent and liberal institution, in whose hall we are met, on the other. The point in controversy, as to which they are not yet satisfied, is simply as to how far the authority to determine what particular examinations shall be necessary to qualify for the practice of the profession, in its different branches, should remain where it now is, or how far it should belong to the Senate of the School of Law. One reason which led me to adopt the view which was taken by a sub-committée of the Council of this Association, fairly composed, on which there were both judges and members of the bar and solicitors,—one reason was this, that it would be next to impossible to avoid the difficulty of a divided authority, if we did not give that power to the Senate of the School of Law. You could not prevent the Senate of the School of Law from exercising authority over the examinations on those subjects—even if the subjects themselves were prescribed by some external power. I, therefore, thought that it was right to bring in the Bill in its present form. But, of course, if a different view should ultimately prevail we shall all be of opinion that this would not be fatal to the objects of the Bill.

Before I sit down, I wish to say a few words to some of hose who, though they have generally shown a friendly ıterest in our exertions and objects, nevertheless think, nat we may be Quixotic in pressing forward our views at he present time. They think it is not a time particularly ncouraging to public movements of any kind whatever. hey think that the popular mind has been a little exhausted y the vigorous legislation of some years past, and that it is ot easy to excite interest, at the present moment, in any lans of reform. I am far from saying there may not be ome truth in this. But I cannot admit, that we ought, herefore, to be inactive. In the first place, those people who vill never act till the right time comes, will never find the right ime come at all. The way to succeed is this: Make your own pportunity, if it does not come of itself. It may turn out to be the right time, and may be a better opportunity than some eople imagine it; and, even if you fail for the present, you ıay depend upon it you will be nearer your ultimate mark by constantly moving, than if you seem to have given the whole thing up in despair. By moving now we have gained the Second Reading in the House of Lords. All of you can judge of what has taken place in the House of Lords. I am not quite sure that it has been so reassuring to me as to the friends who prepared the Report; but at all events it is, in some degree, reassuring to have had the Bill read a second time—the principle of the Bill is, at least, accepted in some general way by the House of Lords; and nothing which has yet taken place need lead us to despair that it may, even in this Session, pass, in some shape or other, through Committee and through the House: though, on that point, it would not be wise to allow ourselves to be too sanguine. All I can say is that, if it does not, it will not be my fault. It is my duty, however, to remind you that this is not a work that can rest upon one man's shoulders. The time is come when, if we are really in earnest, and if there exists at this moment, or

can be matured and made evident by proper means, an adequate power of opinion in the profession, and in that part of the public generally who are in favour of our principles—the time has come for clearly and strongly expressing that opinion. I do not at all regret, what probably happens to all such bodies as ours, and has happened to us,—the fact that some who originally gave us the sanction of their names have afterwards fallen off. It must happen, in such movements, that some join them at first from a vague and general sympathy with objects which they have not reduced in their own minds to practical dimensions, and afterwards, when measures are formulated in a practical way with which they do not agree, or when difficulties appear which they did not anticipate, they fall off. We have passed through that stage. Those who now adhere to this Association do so because they approve of its objects, and understand its proposals, and are in earnest about them; and now is the time when I want their support. I want to have as great a weight as possible of real opinion (fictitious opinion I do not want, I do not care for that one straw, and would much rather not have it); I want as great a weight of real opinion as can be brought to bear upon the subject. I need not say, if it comes from the Bench, how much it will be valued; if it comes from the Bar it will be most highly valued; and, so far as it comes from the other branch of the profession, I, at least, am not the man who will undervalue it, or who would willingly allow it to be undervalued in Parliament or in the country. Of course, from the general public, we cannot expect a very strong manifestation of opinion without the lead of some of those of whom I have spoken; but I do appeal for support and assistance to all intelligent men who take a real interest in the subject. You may depend upon it, it is one of those measures which will be carried if people are in earnest about them, but not otherwise.

II.—COMPANY RATING.*

THERE are few matters which engage the attention of lawyers of more importance than the rating of occupiers under the 43 Elizabeth cap. 2, section 1. The poor we have always with us, and the poor must be supported by the rich, not only on the ground of Christian duty and charity, but because security of property depends, to a large extent, upon the inducements which the State holds out to honesty; and it has been found that while the poor cannot be secure of living, the rich cannot be secure of owning. As Mr. Browne points out, the poor law is to be regarded as a measure not merely of charity, but as a statute dictated by considerations of domestic policy or, in other words, police.

The necessity of the law being admitted the excellence of the law which exists comes to be discussed. That the Act of Elizabeth was productive of a great amount of good, no one, who is familiar with the history of the condition of England before and after the passing of that statute, can doubt. But since the time of Elizabeth the character of ownership has, to a very large extent, changed. In a country where property is insecure, where honesty is the exception, individual ownership is much more common than joint ownership; but just as the security of property increases, just as probity becomes more common, so does the necessity for and the excellence of combined ownership become apparent. It may, therefore, to some extent be due to the better state of things which the poor law was the means of introducing, that we have in this country so much combination of effort, or, in other words, so many company concerns. The advantages of the association of small capitalists for great objects

* The Principles of the Law of Rating of Hereditaments in the occupation of Companies. By J. H. Balfour Browne, barrister-at-law, author of "The Law of Carriers," &c. London: Stevens and Haynes. 1875.

need not be dwelt upon in this place. We are all familiar with the gigantic results of such association, and with the large and excellent uses to which these aggregate capitals have been put in this country. But this change in the character of ownership has not been without its interest to those who have to do with the principles of the law of rating. The Act of Elizabeth, as modified by the Parochial Assessment Act (6 & 7 Will. IV. c. 96), was applicable enough to the rating of hereditaments which were in the hands of individuals—and therefore limited in extent—to the relief of the poor, but these statutes were certainly inapplicable to the hereditaments which were owned and occupied by some of our modern companies. The fact that the rate has to be made in an individual parish upon the property owned in that parish, while—in the case of a Railway Company, for instance—the property in the individual parish is but a very insignificant part of a whole undertaking which sprawls, it may be, through 200 or 300 parishes, shows that the difficulty of applying these Acts in such cases must be very great. This point has been commented on by innumerable judges, and a good many of these learned judges have vainly hoped for a time when the legislature would interfere to relieve them of the difficult duties which devolved upon them under those Acts. But as yet that time has not come, and we have in the work before us a large and elaborate treatise on the principles of rating in connection with the occupation of companies, which has been written with a view to making the work of rating such properties less arduous to the parish authorities, and the principles of law which are applicable to such cases, more clear to lawyers.

This is, so far as we know, the first comprehensive work on this difficult and intricate subject. Mr. Warry has written a useful little book on "Railway Rating," and there are two books by surveyors on the "Principles of Railways," which are not without excellence. But they are small and meagre in comparison with this work which deals not only with the

rating of railways, but with the rating of gas works, docks, cemeteries, mines, bridges, and tramways. One of the great difficulties in all these cases is, that the rates are to be paid by the occupier according to his ability, as indicated by the rent he pays to his landlord. Such hereditaments are, for the most part, occupied by the person or company that owns them, and as no rent does actually pass, it becomes a matter of calculation and estimate as to what rent would be paid if the owner were not at the same time the occupier. That is by no means easy to arrive at, even when one has the fullest information as to the actual earnings of a company, and the actual expenses that the company has been put to in earning that amount. In all cases it is supposed that the tenant would give a rent which would bear some proportion to the profits to be earned. But what that proportion would be, is sometimes most difficult of ascertainment.

Let us, for our present purpose, confine ourselves to a railway—and let us suppose we have got at the gross receipts of the line. These gross receipts are the measure, not only of what a tenant would give as rent, but of the expenses of working the line, together with the profits of the tenant and the interest on the capital invested by him. Having got the gross receipts, therefore, we must deduct the working expenses. The net receipts, which we have now arrived at, include the tenant's share and the rent. From the amount of the net receipts, the interest on tenant's capital and the tenant's profits must be deducted; and by this means we arrive at the gross estimated rental. But the Parochial Assessment Act makes yearly rent "free of all tenant's rates and taxes and tithe commutation rent charge if any," and that rent after "the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent," the measure of the rateable value, consequently, even when the gross estimated rental has been got at, there are

those statutable deductions to be made before the basis of the rate can be ascertained. But the process, as described shortly here, is a most difficult one to carry out in fact. It is a question of much nicety to say what shall be included in and what excluded from the gross receipts. There have been many important decisions upon this point, and we see that in the most recent case—that which is described very fully in the pages of Mr. Browne's book (*The Manchester Sheffield & Lincolnshire Railway Co.*, and *The Trent & Ancholme Railway Co.*, v. *Caistor & Glandford Brigg Unions*)—which came before the Railway Commissioners, an important question as to the inclusion of the amounts received by a railway company, for collection and delivery, in the gross receipts, was raised and determined. Then, again, what expenses are to be properly included in the outgoings of a company, which are to be deducted from the gross receipts, to get at the net receipts, is sometimes a question of great difficulty. But in every rating case there is much dispute as to the second class of deductions; those, namely, which are classed under the words "occupier's share." Here the difficulty of deciding the rate of interest to be allowed on the capital invested; the worth of the stock and stores which represent the tenant's capital; the profits which a hypothetical tenant would have a right to expect; the allowance for depreciation of the stock and stores; the necessity for floating capital, and the like, have to be dealt with. The intricacy of the inquiry involved is very great, but when it is understood that these calculations and estimates have to be made—not for the whole line of railway, not for the whole of the docks, or the whole of the miles of a canal but for that part of the whole undertaking which is included within the parochial boundaries; the real nature of the difficulties will be appreciated, and the (we may almost say) impossibility of the enterprise will be believed in.

It is, however, to our thinking, wonderful what an amount of success has been attained. We are aware

that it is often alleged that if railways and other such undertakings were properly rated, the present ratepayers might be relieved of a very large part of the burdens they at present bear; and we admit that possibly, in many cases, railways are at the present time rated under their value,* and that, as Mr. Gladstone said, in one of his great Budget speeches, "the exemption of one man is the taxation of another," but still we do think, that on the whole, a very great amount of accuracy has been attained to, and that, on the whole, as much justice as was possible under the circumstances has been done. But we cannot shut our eyes to the fact of the very great difficulties which were thrown in the way of parish authorities by the Parochial Assessment Act—difficulties which are amply proved by the necessity of a book of this size and importance, and we admit the want of such a work upon such a subject. To those who are fond of exercising their ingenuity upon riddles and word-puzzles, we can recommend the solution of some of the more difficult questions of allocation or apportionment which have to be dealt with in relation to the rating of companies, as affording an ample field for unlimited exercise of faculty. These questions of apportionment are nice, to a degree, and there are one or two which seem to us still to call for judicial solution.

We confess that we had, before we read Mr. Balfour Browne's book, a belief that the much disputed question of contributive value had been disposed of, and that the Llantrissant case was an authority for holding that if contributive value were allowed the parochial principle of apportionment could not be acted upon. The doctrine of contributive value is briefly this. Many branch lines earn no profits, but are

* In the Manchester, Sheffield, and Lincolnshire case, to which we have referred, it appeared that a mile, in the parish of Stallingborough, had, previous to the rate appealed against, been assessed at £388. The rate appealed against made the rateable value of a mile in that parish £1,566; and the appellants admitted that it ought to be regarded as having a rateable value of £788. (See appendix to Mr. Browne's book.)

worked by companies owning other lines on account of th traffic which they are the means of bringing on to the othe parts of the system. Looked at in themselves, they migh be regarded as losing concerns; but when considered in rela tion to the profits which are made upon the main line, the are very valuable additions. The profit is made on the mai line, but the branch line has contributed to the earning o that profit by procuring the traffic, without which profit o the main line would have been out of the question. It wa said that if the branch line were in the hands of an in dependent company, and it had an option as to which o two lines it would work in connection with, it would b worth the while of either of the companies owning either o these lines to pay the branch line company something fo its co-operation, and it was argued that as that payment would have given the branch line a rateable value, so, when the branch and main lines were in the same hands, there ought to be an attribution of some of the profits of the main line to the branch, or that the branch line should be credited with some portion of the profits it had contributed to earn. As we said, we were under the impression that the Llantrissant case, following as it did the Haughley case, had disposed of this doctrine, and decided that nothing in such a case but direct earnings were to be attributed to the branch line. We are, however, not so certain that that is the present state of the law. Our author seems to think that the weight of authority is the other way, and argues ably in favour of the admission of the doctrine of contribution, and shews, we think, conclusively, that the admission of that doctrine is not incompatible with the parochial principle of rating, as Mr. Justice Mellor asserted. We think, too, that notwithstanding the decision of the Railway Commissioners, who seemed to take it for granted that the question was no longer an open one, the decision of the Court of Queen's Bench, in the case of the *London and North Western Railway Company* v. *The Bedford Union and the Overseers of Goldington*,*

* 43 L.J. (M.C.) 81.

throws grave doubts on the correctness of these decisions, and points to the Dorking case* as the binding decision. At least sufficient doubt exists in connection with the question of contributive value to make it expedient that the careful opinion of the Court should be taken on it, and we hope that it will be raised at no distant date.

There has been one important modification introduced into the law of rating by recent legislation. The Act of Elizabeth expressly made coal mines rateable to the relief of the poor, and the express mention of coal mines was held to be an exemption of all other mines from rateability. This circumstance led to several anomalies. Quarries, which are simply open mines, were rateable, while mines which are simply burrowing quarries, were exempted from rates. Again, while the mine was exempted, it was held that the ore taken from the mine was not. Therefore the occupier of any reserved ore was rated on account of that occupation. Now, however, by the Act of last Session, which came into force in April, mines were made rateable, and it cannot be doubted that their contributions to the rates will be a very material relief in many districts, to those, who, at the present time, are taxed to the relief of the poor.† There is a long and clear chapter in the work before us on the rating of mines and quarries, which cannot fail to be of use in the present juncture. Mr. Sclater-Booth, in introducing the Bill of last Session to the notice of the House of Commons, remarked, if we remember aright, that there was no longer any difficulty felt in relation to the rating of coal mines, and he inferred that there could be no difficulty in rating other mines in the same way. We think, however, that he made too light of the difficulties. So far as we know, there are

* Reg. *v.* The South-Eastern Railway Co., 24 L.J.M.C., 84.

† It is calculated that the value of the minerals annually raised in England and Wales amounts to about £5,600,000, and that the aggregate amount of rateable value upon which rates are now being levied, will, by the recent Act, be increased by about £1,100,000.

many most puzzling questions as yet undecided in connection with this most important subject, and we see, from these pages before us, that the difficult question of apportionment in relation to those parts which directly and those which indirectly conduce to profits is still open in relation to mines. That the West Middlesex case would be followed we cannot doubt, but that the whole matter is free from difficulties, as Mr. Sclater-Booth would have us believe, we must deny.

The whole subject of Company Rating is full of difficulties, and these difficulties, which have called for the work before us, call also for a reform which will make this work unnecessary. When that reform will come we cannot predict; but that it cannot come too soon we confidently assert. Our space will not allow us to say more at present upon this curiously interesting subject. There are many points in connection with rating which invite discussion, but we must content ourselves with the very short reference which we have been able to give to some of these. There are many other parts of Mr. Balfour Browne's book which might call for comment and praise, but we must be satisfied with what we have said.

The fact that the Railway Commission has arbitrated in two important cases in which the rating of a railway was involved seems to us worthy of mention. We have in these pages more than once referred to this tribunal. It is interesting in many ways. It is, however, we think, turning its undoubted capacity to good account in using any spare time it may have in deciding such important questions as those which were raised in the Manchester, Sheffield, and Lincolnshire cases. Their decisions in these cases, which are more than once referred to in the text of this volume, and which are printed in their entirety in an appendix, seem to us remarkably able. We miss the pleasant flowing clearness of Cockburn, and the sledge-hammer down-rightness of Blackburn; and we have to deal with an involved and crabbed style in some places; but, on the whole, this judgment is

praiseworthy, and the tribunal has proved its capacity to deal satisfactorily with such questions. We cannot doubt that the Commissioners will be asked to act in many other cases of the same kind.

The tables and specimen valuations which are printed in an appendix to this volume will be of great service to the parish authorities, and to the legal practitioners who may have to deal with the rating of those properties which are in the occupation of Companies; and we congratulate Mr. Browne on the production of as clear and concise a book of the system of Company Rating as the intricacy and difficulty of the subject will admit of. There is no doubt that such a work is much needed, and we are sure that all those who are interested in, or have to do with, public rating will find it of great service. Much credit is, therefore, due to Mr. Browne for his able treatise—a work which his experience as Secretary of the Railway Commission peculiarly qualified him to undertake.

III.—ON THE FACILITY OF ADMINISTERING LAW WHICH INCLUDES EQUITY.*

By Sir EDWARD S. CREASY, Chief Justice of Ceylon.

I AM afraid that the title of this paper may seem to be rather quaint and cumbrous; but I could not find any other words to express my meaning, which did not involve a fallacy, or imply the abandonment of a principle. If I had said that I was going to talk about the ease with which one and the same court can administer both law and equity, I should have used words readily intelligible; but then I should, *ex vi termini*, have conceded that law and equity are

* A Paper recently read before the Law Amendment Society.

things essentially different from each other—a distinction which I utterly repudiate, and which I regard as having been the source of very great mischief in the English system of jurisprudence. I wish to use the word "law" in the full, comprehensive sense, in which it answers to the Latin word "*jus;*" and, when so used, "law" embraces all rules and doctrines which are forensically practicable as to the *Æquum ac bonum*, and as to protecting the fair interests of all parties, who have rights or liabilities connected with any matter which has become a subject of litigation.

I need not remind such an audience as the present for how many centuries in England suitors have been sent to special courts for remedial measures of this kind, for remedies such as the courts of common law (as they have been generally termed) could not or would not supply; or how it often has been necessary to carry on litigation before two (and sometimes before three) distinct tribunals, in order to measure the full enforcement of right, and to guard against monstrous injustice being perpetrated under the form, and according to the approved rules of common law. Common law, as contradistinguished from equity, means (to my mind) maimed and purblind law—law which has been thus maltreated and enfeebled by the solemn folly of its own zealots and ministers. I believe that John Austin is perfectly right when he says (Lec. 36, p. 635) of equity, as understood in the English system of jurisprudence, that—

"Equity arose from the sulkiness and obstinacy of the common law courts, which refused to suit themselves to the changes, which took place in opinion, and in the circumstances of society. If the courts of common law had not refused to introduce certain rules of law or of procedure, which were required by the exigencies of society, the equitable or extraordinary jurisdiction of the chancellor would not have arisen; and the distinction between law and equity would never have been heard of. If the court of common law would have consented to enforce certain trusts, trusts as a subject of the jurisdiction of courts of equity would never have been heard of."

At last, however, after some hundreds of years of standing, or rather of floundering, *super antiquas vias*, the profession and the public in England have had hopes held out that a great change is about to take place. We are to have what is called the "fusion of law and equity." Though glad enough to see a chance of obtaining the thing, I dislike the word for a reason already indicated. I remember hearing, many years ago, Lord Westbury (then Sir Richard Bethell) address the Law Amendment Society on this topic. He spoke of the desired process as one by which "law was to be swallowed up in equity." I would rather think of it as a restoration of effective and enlightened justice—a restoration after which law will decline to shut her eyes any longer to realities. She will rid herself of her self-imposed fetters, and resume her full natural powers of upholding good and repressing evil.

The promised reform still hangs on hand. It is not for me, nor is this the place, to discuss the causes or the causers of the delay. But I may remark that, since I have returned to England, the chief objections which I have heard made to that reform by its ill-wishers, have been pointed, not so much against its principle, as against its practicability. "It will never work." Such is a common form of vaticination. And prophecies of this kind, however ill-founded they may be, are, unless their hollowness is promptly exposed, like many other prophecies, apt to work out to a great extent their own fulfilment. I have ventured, therefore, to come here to-night, not so much to discuss theories as to narrate facts—facts which make me believe that the new system in England *will* work, and work right well, if vigorous and sustained efforts are made to carry it into execution and to maintain it in untrammelled operation. I have for thirteen years taken active part in the administration of justice in a colony mainly under Roman-Dutch law, and allow me to say that, although I am not going, *magnis componere parva*, to compare Mantua with Rome, or Ceylon with England,

our colony is not wholly unimportant as to population, wealth, or commercial activity. The number of its inhabitants is more than 2,500,000. The value of its imports during 1873 exceeded £5,500,000; the value of its exports was nearly as large. A large number of active, intelligent Europeans are practically interested in its prosperity, as capitalists, as planters, as merchants, and in other capacities; and I never heard of any class complaining of the system of Roman-Dutch law, which we found prevalent in the colony when we conquered it in 1796, and which we have retained there in substance. It will be understood that I am speaking of civil law only and not of criminal.

With the exception of cases of small amount, which are disposed of by Courts of Request, or by the lately-restored native village tribunals called the Gangsebas, every civil claim is preferred in one of the district courts of the island, subject to an appeal as to any question of law, fact, or discretion to the supreme court of the colony, from which, again, an appeal lies in most cases to the Judicial Committee of the Privy Council. As was written by one of the most eminent of our Chief Justices, Sir Charles Marshall, to whom the last reorganization of our district courts is mainly due, these courts, like the Dutch courts, of which they are successors, "decide, as in the civil law, according to the rules of equity blended with those of strict law." "An equitable jurisdiction was inherent by the Roman law in every magistrate." This last sentence is one of my late colleague's, Mr. Justice Byerly Thomson; and it is quite true of Roman law, after the legislation of Justinian, which is the phase of Roman law perpetuated to a great extent by the mediæval and modern jurists of Holland and other countries.

I do not see how I can make myself intelligible without a sketch of our proceedings; but that which I will trouble you with shall be a very short one, and I by no means hold up our law of process as a model of perfection. But our

general system, though I would gladly vary it in many details, and make some important additions, is, I believe, sound and good; and I have been confirmed in this opinion by reading a paper by Mr. Arthur Wilson, which appeared in the *Times* of Friday last, as to the aims of the framers of the new Judicature Act. I think that any one who compared that paper with the description given in Byerly Thomson's Institutes of Ceylon, the proceedings in our district courts, would find that we have for long years been working most of the best parts of the system, which that excellent paper truly describes as so desirable for introduction in England.

Each district court has full power to try, as a court of civil jurisdiction, "all pleas, suits, and actions;" meaning by the last words all such "*actiones*" of the Roman law as obtained in the courts of Holland. We keep the old Roman term of "*libel*" for the statement which the plaintiff is required to file in court of his cause of action or complaint, and of the relief or remedy which he seeks. By our power as to payment of costs and as to amendments, and by our authority over the practitioners before the court, we do much to secure a plain and intelligible statement of what it is that a plaintiff asserts and wants, without prolixity or trickery. Different causes of action may be joined, if not repugnant to each other. The defendant may, if he pleases, demur at once to the libel as disclosing no cause of action. Such an objection may be taken afterwards, but at the peril of losing costs if it seem to have been needlessly delayed. The defendant, if he does not so demur, and if he does not plead to the jurisdiction, or "*Lis Pendens*," or some similar plea, is required to confess and avoid in his answer the facts asserted in the libel, or to deny them. But all technicalities are discouraged; and judgment is ultimately given on the whole record (which includes notes of the evidence) on what appears to have been the true contention of each party, and without regard to any defects by which the substantial rights of a party have not been prejudiced. The supreme court is

expressly required, by a short but most salutary ordinance, to determine all appeals on this principle. Replications are seldom needed, except where there is a plea of set-off, or by way of reconvention: but the facilities for pleading these are much greater in Roman-Dutch law than in English; it being considered desirable that one suit should, if possible, conclude all matters of litigation between the disputants.

Full opportunities are given for all persons who may have reason to think themselves interested in the subject matter of a suit to become parties to it by intervention, and the court can appoint guardians or *ad litem*, to protect the interests of married women, and minors. The courts have ample powers as to issuing injunctions, and as to compulsory orders of reference, when the nature of the case is such as to make the investigation of accounts by an arbitrator essential for the ends of justice. The judge can examine the parties; and the parties can examine each other with all the latitude of cross-examination at any stage of the trial, if the judge considers that it will conduce to the purposes of justice.

The judge may, at his discretion, direct that three assessors shall be associated with him at the trial of any cause or proceeding. The assessors are taken from the jury lists prepared for the criminal sessions of the supreme court.

At the trial, witnesses are examined and cross-examined, as in an English common law court, as to disputed facts, counsel are heard, and the court gives a judgment as to the whole matter. If assessors have been summoned, each assessor gives his vote and opinion in open court, and the judge is bound to record it. The judge may give his own opinion either before or after the assessors; and if he differs from the majority of them, or even from all of them, his opinion still prevails, and is regarded as the judgment of the court; but, of course, in such a case the court of appeal is likely to be influenced by the fact that the assessors thought differently from the judge, especially if the point be one of mere fact, and if the opinions of the assessors, as expressed on the record, are supported by sensible reasonings.

It is obvious that the same judge must have to deal with matters like those which come before the English common law courts, such as actions for bills of exchange, for goods, for labour, for assaults, for libels, for horse-warranties, for trespass to land and the like, and also with matters about trusts, and guardianships, and partnerships, rights of married women, remainder-men, and a host more, such as now come before the English courts of equity. The same suit often embraces claims of both these English descriptions.

"Can the same judge deal with them?" I do not mean, "Can he have power given him to make his edicts about all these things valid?" but "Is he reasonably likely to be able to deal with them readily and sufficiently?" Now, here I must be allowed to speak, in the character of a witness, of a kind of expert; and I must be allowed to state the extent of the training which I received in England for the work which I had to execute in Ceylon. I was brought up at the feet of the Gamaliels of special pleading, at the very time when the rules of 1834 were raising the science of special pleading towards its full glory of logical correctness and fidelity to archaic precedent, and also to its full mischievousness in ruining unhappy litigants by a grovelling worship of technicalities, and a sublime disregard for common sense at the bar. I had a fair amount of pleading practice and also, as a quarter sessions barrister, I had considerable experience of the still more monstrous system of special pleading, on which poor law appeals were, for many years, principally determined; and according to which the statements of paupers as to their hiring and services, or as to tenements which they once lived in, were judged (as were the objections of the parish officers who did not want those paupers) with a subtlety (not to say a captiousness) which seemed to be inspired by the combined spirits of St. Thomas Aquinas and Saunders. I never had the advantage of reading with a Chancery barrister or an equity draftsman. But, of course, I was not wholly unacquainted with Story or with Potier;

and my fondness for the classics and for history had made me read much about Roman, and also about international law.

I knew already, pretty accurately, the excellent chapter in Arnold's "Roman History" on the legislation of the Decemvirate, and the still more valuable chapter in Gibbon on the legislation of Justinian—a chapter which, with the notes and comments of Warnkœnig (to be found in Milman's edition of Gibbon), has long been a text-book in several German Universities.

With this preparation, I found the study of Sander's Justinian, and of the elementary works of Grotius and Vanderlinden on Roman-Dutch law, both easy and agreeable. The great work of Voet on the Pandects must, I think, be learned by those who come to his volumes late in life, by portions, and *pro re natâ*. Burge, Van Lewen, Christinæ, Matthœus, and others, are books of reference easily used as such; and, with the combined aids which I have mentioned, an English common lawyer need fear no grievous difficulty in mastering the equity principles of Roman law. During the last few years the writings of the German jurists, Goudsmidt and others (most of which have been translated), and, in England, Postes' Gaius, the work on "Modern Roman Law," by John Jenkyn; and, above all, Sir Henry Maine's "Ancient Law," have given increased facility and interest to the study, when it is carried on by a man who seeks to imbue his mind with principles, who tries to carry science into art, and not to set up a mere show—a mere Eidolan of science out of the fragments of art, which he has been cunningly raking together.

At the risk of seeming egotistical I have been speaking about my own case, because, of course, I know it the most accurately. But I have also had English colleagues on the bench; and I have seen English counsel become advocates at our Bar, whose legal education and legal career in the old country had been (if I may use the phrase) as one-sided as

my own; and I never knew a man of fair natural ability and industry fail in rapidly acquiring sufficient knowledge of our more comprehensive Roman-Dutch system for practical purposes, provided that he first applied himself to master its theoretical maxims and principles. John Austin's "Lecture on the Study of Jurisprudence," which is near the close of the second volume of Austin's Jurisprudence, as lately edited by Mr. Campbell, sets out most clearly the special value of Roman for the acquisition of principles of jurisprudence, such as will aid an advocate or a judge afterwards in the administration of any particular system of municipal law. He aptly quotes Savigny, who says that, "In the science of law all results depend on the possession of leading principles, and it is exactly this possession upon which the greatness of the Roman jurists rests."

I have spoken the more willingly of the beneficial effects of an early study of Roman law, because this is a subject which, as I understand, will be henceforth necessarily learned to a considerable extent by all candidates for admission to the Bar of England, according to the Educational Reform so well and so wisely instituted by the Inns of Court. Looking forward to the time when the students of to-day will supply our Bar and our Bench, I feel more and more convinced that the enlightened wisdom of the framers and promoters of the Judicature Act of 1873 will eventually receive their due meed of praise and gratitude; and that the system of administering justice, introduced by that Act, will be found as free from difficulties to those who will have to dispense it, as it will be found full of advantages to the suitors who require its aid.

IV.—THE MAYOR'S COURT.

"THE Court of Our Lady the Queen, holden before the Lord Mayor and Aldermen, in the Chamber of the Guildhall of the City of London," is the real title of the ancient Court of the City of London—the most ancient Court in the United Kingdom—which has been abbreviated by an Act of Parliament, and which is now better known to us by the less dignified but more convenient name of "The Mayor's Court" (see section 54 of the 20 & 21 Victoria, c. 176—local and personal).

The City of London had real reason to be proud of this Institution, which is probably of pre-Roman origin, for there was no other Court like it, and the citizens had the proud privilege, possessed by no other Corporation, of an exemption by Royal Charter, and at a period when a Royal Charter was equivalent in weight to an Act of Parliament, from all interference or intermeddling by any judge who was not of their own choosing—the Charter of Henry the First declaring expressly that none other than the Justiciary chosen by the citizens shall be Justiciary over the same men of London; and so jealous were the citizens, in old times, to preserve this privilege, that no appeal could be made from their Court to the King's Bench, but only directly to the House of Lords. As this was found in practice to be inconvenient, it is related by Fitzherbert that Lord Chancellor Parham, the first common lawyer who held the Great Seal, and a man of great learning, about 1341, devised a scheme by which he constituted a special Court of Error, formed of Commissioners appointed by the Crown, in each successive case, and which Commission sat in St. Martin's-le-Grand. This, however, appears to be a mistake, as is proved by the following entry from a Coram Rege Roll of Easter Term 9 Edward II. (rot. 6).

"London major et vic London inplito p pbacoe testamentor renuunt mittere dictu recordum Cora Rege ad errores inde corrigendos quia oretenus dicunt qd est contra consuetud civitatis qd errores . . . . . non corrigantur qua apud Scm Martinum Sup quo dns Rex p breve suum sub magno sigillo mandavit justic hic quod mittat dictu recordum cora Rege in Cancellar Et sup hoc H. le Scrop, Capital Justic, misit tenorem recordi in Cancell."

This entry is a curious illustration of the importance of a full knowledge of our Common Law Records, for it is clear from it that we cannot rely upon the accuracy of any of our writers, but that we ought to resort to the Rolls themselves for our information on every important point. It is needless to observe that this privilege was enjoyed by no other city in the Kingdom. Error lying from every other City Court to the Courts at Westminster. To secure the citizens in their privileges, the Courts at Westminster were bound to take judicial notice of the Mayor's Court and of the customs of the City. They were not to be proved, like the customs of other Courts and places, but were simply declared by the mouth of the Recorder, whose dictum was decisive upon the custom he declared.

That this distinction, which actually gives a kind of superiority to the City Court over the Courts at Westminster, should excite envy in the breasts of the Judges at Westminster, is not to be greatly wondered at, for no Judge cares to own a superior authority; and the reign of Queen Victoria will be memorable in the annals of the City as that in which its ancient privileges were destroyed; for it is by a statute of Queen Victoria that this had been indirectly accomplished.

The Act before referred to appears to contemplate the preservation of the ancient glories of the City, for it still retains an appeal to a higher Court than those at Westminster, and only seems to aim at modernizing its course of procedure. But, by the aid of certain Judges at Westminster Hall, a tortuous construction has been placed upon it, and those Judges now venture wholly to ignore the Charters of the

City, and, in direct opposition to them, to act as justiciars over the same men of London.

The assumption of jurisdiction over the City affairs necessarily raises a conflict on many points which otherwise would never have arisen. Every step taken at Westminster exposes the error of those Courts in making the annexation of the City jurisdiction, and brings to light more clearly the true construction which ought to have been placed upon the statute.

This has been particularly exemplified in the recent decision of the Court of Common Pleas, in the case of *Evans* v. *Nicolson*, not yet reported, which was several times before the Court last Term.

In that case the issue was a very simple one. Goods were selected and purchased by the defendant at a well-known shop in Cheapside, and ordered by the defendant to be delivered to him in Regent Street. According to the decision of all the Courts at Westminster, and of one Chancery Judge, the Master of the Rolls (happily the point has not yet been mooted in the other Chancery Courts, and they may yet give a conflicting decision), this is a case in which a City Court has no jurisdiction, because part of the cause of action, that is the delivery of the goods, took place out of the jurisdiction of the City; and, assuming the City Court to be a Court of inferior jurisdiction, it could not entertain this plea, for a Court of inferior jurisdiction cannot try a case that does not arise wholly within its limits.

Of course, if the Common Law were followed, the Recorder of the City of London could have stepped down to the Court of Common Pleas at Westminster, and there and then, by word of mouth, prohibited that Court from interfering in the matter by showing that the City custom entitled its Court to entertain the matter; but we live in curious times, and the trembling citizens of whom Lord Coke writes, "*propter civitatis dignitatum et civicum antiquam libertatem Barones consuevimus appellare*," hesitate to assert their rights. At the last recep-

tion of the Judges at the Mansion House, the Master of the Rolls, in a moment of bliss, cried up the City Court, which he only a few weeks since had ventured to snub and prohibit as a model for imitation by the Legislature, as a Court possessing a larger jurisdiction than any Court in the Kingdom, a double jurisdiction in law and equity, which was only now for the first time (he alleged) about to be conferred upon the Courts of Westminster and of Lincoln's Inn.

Have none of the Superior Courts ever possessed a double jurisdiction in Law and Equity? Within the learned Judge's own memory, the Court of Exchequer possessed an Equitable as well as a Legal jurisdiction; and not very long ago the High Court of Chancery itself had its Common Law side. Only the other evening, at a meeting of the Law Amendment Society, a paper was read by Sir Edward Creasy upon this very point. Chancery counsel of the highest eminence exposed their ignorance of the Common Law procedure. They had never heard of Equitable defences of the administration of interrogatories, and the user of powers of injunction. It will take several generations of lawyers before the practitioners and judges of either branch of the law will be competent to deal safely with the matters hitherto relegated to the other; their several jurisdictions are so clearly separate in practice.

The observation of the Master of the Rolls is entitled to the greatest respect. This is a model Court, in many respects; and it is curious, to say the least, that modern law-makers should uphold it as a pattern for future legislation. Great encouragement may be taken from its working by those who are in favour of the creation of local Courts of First instance. Here is a Court which has never been so altered or remodelled as to lose its general characteristics, and which exhibits the great benefits to be derived from Courts of this kind; though it may still be questioned whether its peculiar circumstances may not contribute to its great

success, and whether these characteristics might be found existing in remote country districts, where it is proposed to erect such Courts. In the City so highly is this Court respected, that cases have been brought within it respecting enormous sums of money, frequently very large, and once or twice affecting a million sterling. Surely such a Court as this ought not to be treated with the disrespect it meets with at Westminster Hall.

The Judges assume to overrule the Charters of Henry the First, and of his successors, by virtue of a decision of the House of Lords in the well-known case of Cox and the Mayor of London; but, on examination, this case will be found to warrant no such construction.

The only point under consideration in that case was whether the City could exercise jurisdiction in a case where neither party was resident within the City, where no part of the cause of action arose within the City, but where certain goods of the defendant, as money in a bank, was within the City. The House of Lords held that was a bad custom, although the case was argued most learnedly by the present Lord Chief Baron; and it is perfectly clear that the Statute of Westminster, upon the construction of which this case was decided, was utterly misunderstood and misinterpreted. That Statute prohibits inferior Courts from attaching the goods of those passing through, but it expressly reserves that right to all the King's Courts, of which this, by its very title, is one. It is curious to see that no King's Courts but the Mayor's Court has retained this ancient custom, and its retainer by this Court is of course the strongest proof that it is a King's Court.

The House of Lords invited the assistance of the Judges to consider this point, and they relegated their authority to the late Mr. Justice Willes, who, though very eminent in the learning of the pleading of the last century, was unfortunately unversed in the learning of more ancient times, and who, in the course of his lengthy judgment, fell into the

most ludicrous mistakes, in some of the worst of which he was followed by Lord Chancellor Cranworth. It is almost unnecessary to point out that this opinion is of no weight, judicially, except within the four corners of the case to which it was applied, and they comprise only a small point.

Lord Westbury, who, for some private causes, had a special grudge against the City, scarcely concealed his malignity, as he rejoiced "to think that their judgment would have the effect of reducing within its proper and just bounds the jurisdiction of the City of London, which he had long felt, certainly for the last twenty years, had silently been attempted to be unduly extended. Now, as Lord Westbury should have known perfectly well, this is the reverse of the fact, the jurisdiction of the City having been impaired and frittered away from generation to generation, until, at last, this judgment was given, which is calculated utterly to destroy it, by reducing it to that of a class of inferior Courts to those of the cities of York, Bristol, Lincoln, and others, which only possess a jurisdiction subordinate to that of the superior Courts at Westminster.

Lord Westbury was far too good a lawyer—it is long before we shall see his like again—to dream of following the illogical and erroneous judgment of Mr. Justice Willes with any remarks of his own; he could not do that without betraying his knowledge of its errors; and, although he had been contemplating, certainly for the last twenty years, (and probably particularly since, certain unpleasant personal squabbles with the City,) the dangerous assumption of jurisdiction by the City, he did not give one word in explanation or in illustration of his judgment, but threw the sole responsibility of it upon Mr. Justice Willes.

Lord Westbury's prophetic utterance have been partially fulfilled. Ever since that decision the Judges at Westminster Hall, and recently the Master of the Rolls, have ignored the noble history of the City Court, and have not scrupled to trample upon its privileges and curtail its powers.

The dictum of Westminster Hall is that it is a Court of inferior jurisdiction—logically it follows that the King, whose Court it is, is an inferior King—and they do not hesitate to prohibit the Court, in spite of the protests of the Recorder, just as they would control the proceedings of any county or other inferior tribunal.

But they have not been allowed to do this with impunity, or, at any rate, without protest. From time to time solicitors, who do not fear the terror of the Courts at Westminster—there are some brave men in their ranks still—and others, perhaps, in ignorance of the feeling of the Courts, or perhaps of the facts of their cases, continue to use these Courts, and to proceed, as they have done from time immemorial, to try cases, in which, as in the case of Evans and Nicholson, above cited, the whole cause of action may not have arisen within the City.

How have these men been treated? The Courts at Westminster have determined to stamp out the City Courts, and, therefore, they have treated these solicitors as criminals ever since a certain decision, at the request of the defendant, who will not pay his debts, they are made, personally to pay the costs of the application to the Courts at Westminster. This may not be very much, possibly not more than £10 or £20, but it is an indignity to which they ought not to be subjected, a stretch of power on the part of the Courts which it would be hard to defend upon principles of equity and common justice.

If the Courts were right in their construction of the law, it would be hard enough, but if they are utterly wrong, they are themselves usurping a jurisdiction to which they have no possible claim, and the wrongs of the solicitors who suffer are intolerable.

The injury to the citizens is also very great. It is surely no great and unnatural privilege, no unjust custom, that a citizen should have power to sue in his own Court all those persons who take the trouble to come into the City to

purchase goods. Every custom is in derogation of the Common Law, and it is good if its antiquity can be established, and there is nothing morally wrong in it. This custom is not only not immoral, but it is positively just. The deprivation of this privilege is causing great pecuniary injury, and a stagnation of trade, for it stops credit.

An attempt was made to invoke these arbitrary powers in favour of the defendant in the case already mentioned, and and counsel, hoping to do something towards obtaining a settlement of this vexed question, requested leave of his client to take the unusual course of pleading to the jurisdiction, instead of applying to the Superior Courts for a writ of prohibition, and accordingly a plea was filed. The Recorder, before whom this issue came on for trial, having ascertained from the Registrar of the Court that this was precisely a case which the Superior Courts thought fit to prohibit (their prohibition being of daily occurrence), determined that he would not decide the point himself, but leave it to be decided by the Court above. Accordingly, he offered counsel to give either of them the verdict, giving leave to the other to move the Court above to enter a nonsuit or a verdict for himself. The plaintiff's counsel elected to take a verdict, leaving to defendant the important matter of a choice of Courts, as the Court of Common Pleas has been, perhaps, in deference to the opinion of Mr. Justice Willes, the most decided in the crusade against the City Courts, that Court was selected in which to moot the question.

The Court, as they were bound to do, for the Act of Parliament before referred to leaves them no option, unanimously refused the rule.

The section, the 12th, is as follows: "When the debt or damage claimed in any action shall not exceed the sum of fifty pounds, no plea to the jurisdiction shall be allowed, provided, amongst other things, that the cause of action either wholly or in part arose therein."

The Act, then, clearly contemplates the continuance of the

customary procedure, when part of the cause of action arose within the City; and, in the course of the argument, Mr. Justice Grove pointed this out.

Counsel, of course, was quite ready to admit this; but he pointed out to the Court that their daily decisions were directly in the teeth of the section, and he cited from the case of Gold and Turner, decided in that Court, an observation by the Lord Chief Justice Coleridge, that, when any part of the cause of action arose out of the jurisdiction, that Court would issue writ of prohibition.

The Lord Chief Justice Coleridge endeavoured to distinguish that case from the present by pointing out that, in the present, the defendant himself took the objection; whilst, in the other, by a fiction of law, it was brought before the Court by a stranger; and he cited the 15th section of the Act, which declares "that no defendant shall be permitted to object to the jurisdiction of the Court, in or by any proceeding whatsoever, except by plea."

Counsel contended that there was, in effect, no distinction between the cases, that this Court could not interfere by prohibition, except when a wrong was being done in an inferior Court, and that none was done here; for it was expressly decided in the case of *Manning* v. *Farquharson*, which was cited with approbation in the judgment in the case of *Cox* v. *The Mayor of London*, that the City Court cannot be stopped by prohibition from trying the case, as between plaintiff and defendant, in the Court below, if the defendant chooses to have it tried there, and does not plead the want of judgment, according to the provision of the statute. That, inasmuch as section 15 declares that by plea only, and by no other proceeding, can the defendant object to jurisdiction. That any other proceeding, including that of prohition, if there was such a mode, is virtually taken away, as prohibition can be by express words, such as those in the statute.

The Court, however, unanimously refused the rule, and

thereby virtually decided that the Mayor's Court had jurisdiction to try the case, and this by the statute; for it is a rule of law that the parties themselves cannot give jurisdiction by any act of their own.

The following day the same counsel, in the same case, instructed by the same attorney, moved the same Court for a writ of prohibition to prevent the Court from trying this case, which this Court had decided it might legally do.

This is, indeed, a *reductio ad absurdum*, and the Court struggled to escape from the dilemma, but ultimately, on the following day, the Lord Chief Justice Coleridge granted the rule, very kindly observing that counsel had better not move it with costs, as, in the event of its being discharged, the rule was that costs should be paid by the applicant; and counsel therefore took the rule without costs.

This rule was ultimately discharged upon another ground; but in numerous other cases the Court has followed the rule laid down in Gold and Turner. It appeared that the defendant had written a letter, posted out of the jurisdiction, but received by the plaintiff within it, which, by a strained construction, was held to be a statement of account, and the Court held overruling numerous decisions of its own, and of all the other Courts—one case having been very recently decided, in the Court of Queen's Bench, directly the other way: that, although that statement was made out of the jurisdiction, yet, as all the cases showed that it was a continuing statement until received by the plaintiff, that it was not, in fact, a continuing statement at all, but one made to the plaintiff wholly within the City.

Counsel could have quoted numerous decisions to show that it was a continuing statement, but the Court, admitting that point, he presumed that they had decided that there was a continuation beyond the jurisdiction. The Court, however, decided otherwise, and whilst this decision is unreversed the City will now have jurisdiction in all cases where part of the cause of action arose out of the City, and when a letter, though written without, has been received,

through the post, within it. This will considerably enlarge the City jurisdiction, and, as the Court of Common Pleas held, only the other day, in another Mayor's Court case, that it could not consistently, with regard to its honour, correct any error it might have committed, it must uphold this decision till set aside by another and a higher Court, and consequently, until that event happens, suitors will cease to trouble this Court to prohibit the City Court in all such cases, and will thus relieve it of a considerable part of its daily practice.

Lord Chief Justice Coleridge went further; he discharged the rule, with costs, so that the Court has now arrived at this glorious state of confusion. It holds that the City Court has no jurisdiction where part of the cause of action arose out of it; and if any solicitor shall dare to assert that it has such jurisdiction, and shall sue within it, he shall be mulct in the costs of the rule for prohibition.

It also holds that, in precisely the same case, the Court has jurisdiction, and that if any solicitor shall dare to assert that it has not such jurisdiction, and shall venture to apply for prohibition, he, too, shall be muclt in the costs of the rule for prohibition.

Probably no such complete contradiction has been arrived at by any legal authority since that great and pious monarch, Henry VIII., burnt, at the same stake, a Catholic and a Protestant.

It may be said that the deadlock should be settled by appeal to a higher Court, but, unfortunately, without the consent of the Court, which they cannot be prevailed upon to give, there is no appeal allowed in cases of prohibition, and the only remedy is to go from Court to Court, at the cost to the attorney of personally paying the costs of each application.

The City of London owe their thanks to the defendant in this case for so clearly putting the Court into a dilemma, and they ought, at once, to settle the question, which they might do in the following way:

strikes, still bow the neck for the foot that tramples?

Select a case, like the one under discussion, but where there has been no letter or acknowledgment; let the defendant, as in this case, plead to the jurisdiction, let the Recorder again decide as to the validity of the custom, giving leave to the defendant to move the Court above to set aside the verdict and to enter a nonsuit. That Court must follow its decision, and then the defendant, under the Common Law Procedure Act, would be entitled, without leave of the Court, to appeal to the Exchequer Chamber; cotemporaneously with this procedure, let him, as in the leading case, apply for a rule to prohibit and compel the Court to make it absolute, or allow him to declare in prohibition. This will prove the utter absurdity of the decision.

Up to this time the Court has always, from a mistaken notion of preserving its own dignity, refused to allow the parties to plead in prohibition, because, by doing so, there might be a demurrer, and so a decision be obtained in a higher Court. If such a decision could be compelled, it must, necessarily, dispose of all the erroneous decisions upon this point, and restore to the City its ancient privileges, and it is not to be supposed that if the Recorder of the City of London were himself to request the Court of Queen's Bench to allow the defendants to declare, that the Judges of that Court would for a moment hesitate between the question of their own dignity and that of the justice of the case; or, if the Court refused the permission to test the accuracy of its own conduct, could it any longer continue the practice of imposing pecuniary fines upon the solicitors who venture to differ from it in opinion? If a refusal was given, under such circumstances, Parliament would very quietly cut the gordian knot by a special and public Act of Parliament.

Has the counsel for the City the courage to take this course, or will its chiefs still submit themselves to the delusive voice of the charmer, still lick the hand that

What matters it that the frowns of the great are incurred, if only truth and right prevail! Rank and honours are not worth possession if they are only to be purchased at the cost of honour, by truckling to those in power, or by pandering to the worst vices of those who possess the gifts of preferment. This is a grand question for the men of London; let us hope that they will venture to settle it.

P.S.—Since this article was written the judgment of the Master of the Rolls in the case of *Jacobs* v. *Brett* has appeared. It is, unfortunately, of no value to the elucidation of this important question; for it is based upon the erroneous assumption that, prior to the passing of the Act, the custom was invalid. If that assumption is rightly made, *cadit quæstio.*

V.—ON THE CONTEMPLATED DESTRUCTION OF THE ORDER OF SERJEANTS-AT-LAW.

No. III.

THE more closely we examine this question the less do we feel inclined to accept the proposed change as a beneficial one. Last month we considered how hardly it would bear upon the poor prisoner, and what a cruel mockery it is to pretend to allow him counsel to defend himself, when all the leading men at the bar are retained by the Crown, so that he cannot procure their assistance without its assent. We propose, this month, to consider very shortly the effect of the proposed change upon the *morale* of the members of the bar.

There has been a great outcry, lately, and some extravagant things have been written, upon the want of independence amongst the members of the bar, and their subserviency to

the Judges. It must be admitted that there is some truth in these charges. There are very few men now at the bar who care to challenge the conduct of a Judge, however overbearing and arrogant it may be; of course, insolence of demeanour and offensive conduct to those in authority is utterly wrong, and is as great an evil as the opposite extreme, though probably not so disastrous to the interests of the public. But there is a great difference between insolence of conduct and a firm but respectful defence of what the learned counsel believes to be right. The Judges might for a time endeavour to frown down such a man, and might indeed deter many solicitors from employing him; for the solicitors are mostly afraid of the Bench, and are responsible very frequently for the cowardice of counsel. If solicitors would support a man who properly withstood the improper pressure of the Bench, there would be more bravery at the bar; for it takes a very brave man to withstand the Bench at the risk of offending his own clients, and most solicitors would prefer to undergo any amount of obloquy and humiliation to a conflict with the Bench. But, provided that counsel is in the right, and acts respectfully in its defence, though he may, perhaps, even feel himself compelled to use the keen weapons of satire or of ridicule, yet he will, in the long-run, command the respect of the Judges, and receive from them more attention than those who are ever ready, at the nod of a Judge, to eat their own words, and to surrender, at the slightest pressure, all that they have been retained to defend. The Judges—all who are manly and honest—must despise such men, however convenient they may find it for the moment to play upon their fears and want of steadfastness.

It cannot be denied that, of late years, there has been a strong tendency amongst the judges to put down any man who is too independent, and many have suffered in consequence. There are few men now at the bar who possess the gentlemanly firmness of the advocates of the last generation. A learned judge addressed the late Mr. Justice Cresswell,

when he was at the bar, somewhat in this fashion, "Mr. Cresswell, you have been addressing the Court, for the last three hours, as if you were God Almighty, addressing three black beetles, but I do assure you that we are vertebrated animals."

There is no counsel in the front ranks of the bar, in these days, to whom such a reproach could possibly be addressed, and the reason for the change from manly independence to something like servility is to be found, partly in the fact that of late years the Chancellors have usurped the power of the judges in the selection of men for rank, and that there has been a determination to crush all aspirants for the honours of the coif. It is an ill day for the bar that the sole right of selection of men for silk falls into the hands of one man, whoever he may be, and however honest. Amongst the last dozen Chancellors there have been men who have been no honour to their profession, and whose ideas of fairness may be weighed by a regard to their passions. There is safety in numbers. Petty feelings of spite against an individual rarely pervade a body of men, at least a large body, and certainly not one formed from various grades and orders. The selection of men for rank would, therefore, be entrusted far more judiciously to the whole body of the judges, than left in the hands of one man. There would be a better chance of the selection of the best men, and little of the intolerable jobs which are but too frequently perpetrated, and barristers would have less temptation to be subservient, if they were thus selected, than if they depended upon the whims and crochets of an individual. Another great evil in the present arrangement arises from this fact, that the Chancellor does not know the bar, and frequently the best men are passed over, because they will not trouble their friends to job for them, for, hard as the word is, the present system is tainted with jobbery, and this increases, as the order of Serjeants is dying out, and will flourish most when they are gone, for this order in the profession, opposed as it

is to the order of Queen's Counsel, is the representative of popular will as against regal ideas.

Everything which tends to lower the *morale* of the bar is to be deplored, and the destruction of the order of Serjeants must have this effect. Its destruction will affect the bar in many ways, in one most particularly, that of encouraging the power of cliques to destroy men who, from some cause, have become obnoxious to them. The spirit of the circuit mess is, unhappily, but too easily conveyed to the Benchers of an Inn of Court; but there is little fear, at present, of the judges catching it, for they are not Benchers but members of Serjeants-Inn, where an unhappy man, who is disbarred by the Bench, resorts, in appeal, against them. Certainly, at the present day, every barrister feels confidence in the tribunal of Serjeants-Inn. Then why destroy it? Shameful things have been done, in private, by some Benchers before now, but the terror of an appeal to the judges at Serjeant's-Inn has, hitherto, restrained them from carrying out to its full extent the misconduct which had been contemplated.

If the Serjeants-Inn is destroyed, and the produce divided amongst the Serjeants and the judges (£1,000 to £1,500 a-piece, it is said) where is the safeguard of the barrister, what check is there upon the conduct of the Benchers?

In such a case the judges, it is said, will be called to the Bench of their Inns of Court, just as the Vice-Chancellors and Master of the Rolls are called at the present time. The appeal, in name, to the judges will be retained, but its spirit of fairness will be gone; the Benchers will do as they like, carry out their vicious intentions to the bitter end, and sacrifice the victim of their passions to their bitterest revenge, for they will have no fear of the judges, inasmuch as they will have the sanction and assistance of some of them—those belonging to that particular Inn of Court in advance; in fact, a section of the Court of Appeal will have committed itself to the very question under appeal, and they will

naturally strive to uphold their decision, and save the honour of their Inn of Court.

It is suggested that the judges who may eventually be called upon to sit in appeal are not actually to take part with their bench in the proceedings before them, that they are, in fact, to be Benchers in everything but in sitting upon the Bench. But this is an absurdity; if the judges are still to form a Court of Appeal in cases affecting the honour or conduct of the bar, they must not be members of the Inns of Court. So that it comes to this, that if the order of Serjeants is destroyed, if any life is to be left in the members of the bar, a fresh tribunal must be erected to try these cases affecting them. Is it to be by a jury? And, if so, from what class? Of their peers? Then it would be a verdict of rivals —an unseemly exhibition, in public, of the frightful scenes of the circuit mess—or if twelve fellows, like unto the prisoner, were chosen, the worst acts of the bar might be tolerated and legalised. Which horn of this dilemma is to be preferred?

It may suit our enlightened lawyers to revolutionise the law, to destroy our ancient landmarks, and to Americanise our institutions; this is to be deplored, certainly, but there appears to be no help for it. Madness has seized upon our legislators, yet there will be no very great difference at present if we can still retain an honest bar; but what hope will there be of honesty or independence at the bar, when the worst acts of a circuit mess may become the rule of the profession, and this may be the direct consequence of so slight a thing as the destruction of the ancient order of Serjeants-at-Law. There is, certainly, greater value in our ancient institutions than modern law-makers can see. How are their eyes to be opened to it, and their understandings formed? At present we can see nothing before us but ruin and degredation, and the destruction of all that is great and noble in the profession of the law, which will soon cease to be an honourable one, and will degenerate into an unworthy

craft; its attributes of honour squelched, it will become the safest and best field for the display of the peculiar talents of the light-fingered gentry who must be growing tired of their vulgar process, with its vulgar consequences of picking pockets, and who must be anxious to Americanise their institution also, in conformity with the principles of modern law-makers. *O tempora, O Mores.* P. Y.

VI.—THE B.C.L. DEGREE, OXFORD.

IN these times, when so much stress is laid upon examinations, it seems only fair that there should be settled and well defined relations between examiners and examinees. And, granted that there may be a slight reactionary tendency just at present, it cannot, however, be denied that qualification for most relations in life depends mainly on the result of an examination. If, then, an examination may make or mar a youth's prospects, it is the duty of those who institute such ordeals to see that there are no surprises on either side. By this we mean—firstly, that the statutes, regulations, or orders, as the case may be, which notify to the public that a candidate's knowledge is to be tested in certain subjects, shall clearly, and not obscurely, declare what the said subjects are. Secondly, the standard of what is necessary to obtain a successful result should not vary at different times and with different examiners, nor be raised suddenly and unexpectedly. We cannot, of course, get any two men to have precisely the same opinion—we will not say crotchets or hobbies—on any one subject, because one may reckon it as important, while the other treats it as of little concern; but it is possible so to temper one's prejudice as to listen to the opinion of others, and not to judge of a candidate's

general merits by the fact that he does or does not come up to the extraordinarily high standard we require in that subject. We make these prefatory remarks with reference to the examination for the degree of Bachelor of Civil Law—a degree more commonly known, from its initial letters, as the B.C.L.—and, from all accounts, they seem fairly applicable, but in what manner will be shown further on.

As we were in Oxford during some part of last term we had the opportunity of seeing how the examination was conducted, and several of the papers were submitted to our notice; so most of our remarks come fortified with good authority. At this point we should like to observe that, on comparing the papers of last term, which were submitted to us, with those of previous years, on the same subject, we came to the conclusion that the scope of the questions had been extended suddenly and without due warning; and that those of former years, with very few exceptions, gave no clue at all as to what would be required in this last examination. A tentative examination, easy at its commencement, must necessarily be made more searching and difficult, but in each successive set of papers there ought to be symptoms that in the future a higher class of questions will be put, and a more thorough knowledge of the subject required. And this is exactly what we miss in the case of the previous and last sets of papers for the degree examination.

The examination for the B.C.L. has been only instituted, in its present form, for three years; the first, under the new statutes, taking place in Trinity Term, 1873. It is held but once a year, a circumstance which must press hardly upon some candidates who may not be ready by the one term, but would be in the subsequent; and as the examination is chiefly conducted by professors, the University would not be much out of pocket by holding it twice a year. To show that it is quite impossible to institute a comparison between the examination under the old system and that under the new, we will submit the subject matter necessary for

both. Formerly the following had to be taken up:—The Institutes of Justinian;

Or some part of them, with some work illustrative either of the Institutes, or of the science of Civil Law; as Recitationes in Elementa Juris Civilis secundum ordinem Institutionum of Heinecius; or In quattuor libros Institutionum Imperialium Commentarius of Arnoldus Vinnius.

But now the candidate must offer—

I. Jurisprudence:

(*a*) General, *i.e.*, Jurisprudence and the theory of Legislation; or,

(*b*) Comparative, *i.e.*, some department of a foreign code, which means, at present, certain chapters in one or either of the following:—Indian Penal Code, French Code, German Code, and Italian Code.

II. Roman Law—

In this the candidate has his choice of one of the five following subjects:—The Law of Family Relations, Ownership and Possession, Theory of Contracts generally. The four Consensual Contracts, and the History of Roman Legislation and Roman Judicial Institutions.

III. English Law—

Here the candidate must show a general knowledge of the English Law of Property, Family Relations, Contracts and Torts. He will also be examined in two special subjects, to be chosen from the following list, but he must not choose his two subjects from the same group.

DIVISION A

1. General Principles of the Law of Contracts.
1. The Law of Agency.
3. The Law of Sale.
4. General Principles of the Law of Torts.

DIVISION B.

5. Outlines of the Law of Real Property.
6. The Law of Easements.
7. Leading Principles of Equity.
8. The Law of Trusts.
9. The Law relating to Trade.

DIVISION C.

10. Outlines of Criminal Law.

DIVISION D.

11. Principles of the Law of Evidence.

IV. Private International Law; or, the Law of Prize.

We can now see how, from being a mere pass examination, it has the very respectable proportions of an honour degree. There is no such thing as a pass in it, for, although candidates who are more than 26 terms' standing are not eligible for a place in the class list, yet their work must be up to a third at least—the honours running 1, 2, and 3. The words of the statute thus run: "If, in the judgment of the examiners, his [the candidate's] work be of sufficient merit to entitle him, but for such disqualification [viz. his being more than 26 terms' standing] to a place in the class list, he shall receive a certificate to that effect."

The rest of this article will be devoted to a short inquiry into the probable reasons for instituting this examination, and to what uses it can be applied, and whether any practical advantage can be derived from it. There must have been some reason for making such an organic change in the nature of the examination, which is not, however, apparent on the face of it. It has been suggested that there was a wish to revive the decayed importance of the old law degree, for which students from all parts were wont to resort to Oxford. But to deal with less ambitious schemes, was either of these two ideas present to the minds of the members of

Board of Studies when framing the examination statutes?—(1) to tempt men to study the law more critically; (2) to further the knowledge of the Civil Law, which to most Englishmen is a sealed book.

If the authorities had the first in their mind's eye, we fancy that they have hit on an erroneous method; for although the test in particular branches of law may be fairly severe, yet so circumscribed are these that, practically, very little advantage can be derived from them. Again, men too senior to be classed will fight shy of undergoing the worry and preparation for an honour examination for the barren reward of being entitled to write B.C.L. after their name, while they see their juniors revelling in the glories of Firsts and Seconds. It is all nonsense to say that men, passmen, or honourmen, when they have an examination before them, ought not to read for the examination itself but for the sake of knowledge; or that they are not stimulated by the hope of reward: we, therefore, hold it is too much to expect men who may be busily engaged in other matters to submit themselves to the same ordeal as others without obtaining a similar recompense.

Was this examination instituted to further a knowledge of the Civil Law? Here we arrive at one of the most important points to be discussed. What is to be understood by the term Civil Law? Roughly speaking, it is Roman Law proper, or Roman Law as the groundwork of the foreign codes; and to study the Civil Law will then mean either thoroughly to study the Roman Law as we find it in the Digest; or one of the foreign codes comparing it with the rest, both for the purpose of showing the Roman influence in that particular country, and how modern institutions have modified it in the respective societies which have made it their common law. That the B.C.L. does not do this is patent to any one who reads the statutes; and it is a curious fact that the style of the last set of papers has been altered from that of preceding years, namely, from "examination for

the degree of Bachelor of Civil Law," to "examination in the Faculty of Law." This implies a change in the nature of the degree, for previously to 1873 the subject-matter, though of small range, was altogether connected with Roman Law; but since then, the Roman element is very small, and the preponderance is given to English Law. This desire for change is furthered by the alteration in the nomenclature of the examination.

As to the educational utility of the degree, we do not hold it to be of a high order. Though importance may be claimed for it, there is a general feeling that it is subsidiary to the school of Jurisprudence, a state of things which ought not to be predicated of such an examination. If it was desired to make it a kind of finish to the education begun in the School of Law, the range of its work should have been widened, instead of curtailed into a series of special subjects. The more than superficial resemblance between the requisite matter in the two schools bears this out. But there is an apparent contradiction to the foregoing, which, while it ought to be mentioned, at the same time reduces the examiners in the respective schools to a dilemma. We state it here, on very good authority, that it is possible for a candidate, taking up very nearly the same subjects in both to obtain a class in jurisprudence, and to meet with a reverse in the B.C.L. after an additional six months' reading. As the examiners in these schools are almost identical, their dilemma consists in either having two different standards of excellence in the same subjects; or in not objecting to stultify their former judgment of a candidate's merits.

The use to which this degree is likely to be put can be disposed of in few words. It is a degree not understood by the public, and accordingly is not eagerly sought after. It will not be going too far from the truth to say that men will only take the degree for the purpose of saving themselves the trouble of going in for the examinations in Roman Law,

and real and personal property which, at the recommendation of the Council of Legal Education, must be passed before a call to the bar. This is more than a mere surmise, for by the 53d Clause of the Consolidated Regulations, the Council induce men to go in for it, by saying that they may accept as an equivalent for their two previous examinations a law degree granted by any university in Great Britain or her colonies.

The above remarks have been made not in a captious but disinterested spirit, and with a desire to see the examination placed on a more intelligible basis, either as a school for instruction in the civil law proper, or as a real assistance to men intending to make the bar their profession; we put this in the alternative, for we are sure that the two together are incompatible, and tend rather to nullify the good effects that might arise from the study of one or either singly. We want a more thorough and properly organized system of legal education in this country; and if it is to be carried out to a successful end, it must be taken in hand by both Universities, and helped by their moral and pecuniary support. But at the present time—we speak of Oxford—the candidates for the law schools are very badly off in the matter of their legal education. There are but few and fitful courses of lectures upon certain subjects, which do not cost much brainwork to their composers. The candidates are left principally to the tender mercies of professors, who, being more thought of elsewhere, do not care to provide for their own University more than the regulation intellectual pabulum. The colleges, not excepting All Souls, have steadily refused to acknowledge the awakened vigour evinced in the pursuit of legal knowledge in this country, because they think it would not pay to have jurists instead of scholars on their foundations. We ourselves are sanguine that the present chaotic and crude method of teaching law which now prevails at Oxford, will shortly give place to a more polished and intelligible system of legal education. We have thus been led to

assume the rôle of a critic rather than of an advocate as far as touches the existing constitution of the examination for the degree of Bachelor of Civil law. We have not taken this onerous task upon ourselves solely on our own unaided authority, but also on that of competent judges who take a real and lively interest in the progress of legal reform and of legal education. In conclusion, we leave it to those who have it in their power to rear a beautiful and substantial structure, to devise some method for bringing about results which will reflect honour on the ancient University of Oxford, and which will train up a succession of men to be no mean rivals to our Continental neighbours in philosophical and juristic knowledge.

VII.—THE STUDY OF JURISPRUDENCE.*

By R. M. PANKHURST, LL.D. (Lond.), of Lincoln's-Inn, Barrister-at-Law.

IT is now many years since I first made the acquaintance of the Manchester Law Students' Debating Society, and when one has been some time in a laborious profession like that of the law, it is at once saddening and interesting from time to time to come in contact with those who are preparing to enter upon its duties and responsibilities. For after some years' experience in the profession, one's early difficulties come into what may be called historical perspective, and their relation to one's work and duty becomes clear and impressive; therefore one's sympathies with those who are students still, so far from being less, are very much greater. But, above all, there is one feeling predominant—anxiety that the student should feel the priceless value of the time at his command. There is nothing in human life which we

* An Address delivered before the Manchester Law Student's Debating Society, on the occasion of the opening meeting of the Session.

regret so deeply as the comparative carelessness with which we regard the time of preparation for work, when we have it, and the bitterness with which it is regarded after it is gone by. Now, first of all, we must remember that the law is a branch of practical human business: that it deals with the realities, facts, and duties of ordinary daily life; therefore, no information touching the law is worth anything unless it is exact, vivid, and practical. These qualities the information cannot possess unless founded upon a clear, firm, and precise appreciation of the principles which underly the practice and the rules of law. With regard to those principles, if they are to be anything other than the very outside of our thoughts, or if they are not to be an encumbrance upon practice, these principles must not be merely laid upon, but must be made part and parcel of the almost unconscious action of the mind.

Well, one difficulty presents itself, *in limine*, a difficulty which, upon examination, branches out in several directions. In the first place, we must remember that the law is as extensive as human business considered as a matter of practical operation in daily life; therefore, the mere magnitude of the matter which we have to deal with impresses the student with a sense of very grievous depression, and not unnaturally so, because the more me know of the law, the more there seems we have to know. This is as to the matter of magnitude, but other difficulties present themselves. In the next place, the law is associated by alliance and affinity with a number of other branches of human knowledge and interest; it touches morals, on the one hand; it comes into contact with religion, on the other. The rules of law are originally confounded with the rules of morality and religion, and there has been going on historically a gradual process of differentiation. These three spheres have got marked off with more and more precision and definition: religion on the one hand, and morality on the other, law being, as it were, a middle term between them. Then there

is the intrinsic complexity and involution of the rules of law themselves. The rules of law, what are they? Abstract statements of the several rights and duties, which the practical necessities of the world impose under the form of general rules of jurisprudence. That is to say, the concrete facts with which the law deals are expressed in abstractions through the rules and principles of law. Well now that brings us in the presence of this difficulty; you cannot get at the real meaning of and value of an abstract expression without reference to the concrete facts from which the abstraction is derived. It is a well-known logical canon, a well-known law of thought, that the meaning of the abstract is to be sought and discovered in the concrete facts, but I suppose you will easily see that of all the operations of the mind, there is none which is attended with more difficulty, and there is none which is more liable without great care to get mixed up with uncertainty and confusion, than the process by which we pass from the concrete facts to the abstraction derived from them, and pass back again from the abstraction to its concrete facts. Now when you deal practically with the law you have this operation to be always going through; you have a rule of law which is an abstraction; you have to study the state of facts which are the concrete; you have then to discover in the concrete the facts which are necessary to the abstract rule, and finally for leave to pass from the concrete to the abstract, performing therein a delicate and difficult logical operation. Thus you discover what a high order of mental training is involved in this operation of discovering the abstract rule which emerges from the concrete facts, and their correlation and adjustment one to the other. The law, too, considered as a whole, is an organism in a state of perpetual growth. It has to adapt itself to the ever new exigencies of the social system, and consequently it is always moving onwards. It is an historical organism constantly developing itself as new needs and new circumstances arise in the state of society within which its rules operate.

Looking, then, at this field of contemplation, we see that the comprehensive study of the law considered, as it truly is, as an instrumental art and a means to ends, the comprehensive and thorough study of the law, viewed in that direction, involves a dealing with the law according to several distinct methods, all contributing to supply some indispensable branch of teaching, of training, or of information. This study of the law, therefore, is like the investment of some fastness which is to be assailed by all possible modes of attack. The operations of the storming party are to be so conducted that there shall be no point at which the fastness can be assailed, where some hostile action or operation is not going on. I say, therefore, that one may, with benefit, approach the study of the law, in the first place, historically. The historical method of studying the law has performed for society and politics most signal services. It has shown us what ideas have, from time to time, developed institutions and practices, and shown us also that by reason of the rigidity and durableness of institutions and practices, they have continued to exist, under modifications, in many cases, and in more instances still continue to exist long after the ideas and opinions which gave them birth have either died away or become discarded. The whole history of law reform, both in England and elsewhere, has generally been an attempt to modify the rigidity of institutions which have been created by past ideas, in order to put them in accord with new circumstances and new conditions. The history of institutions philosophically regarded gives in sum the record of the perpetual action and reaction of ideas and institutions. But the line of historical continuity, which the institutions and practices of the law have maintained, has always been an admirable illustration of the way in which the law has, from time to time, performed its function and office of establishing rights and imposing duties in order that the civil and social welfare of the community might be promoted.

Now, in studying the history of the law, we never can have before our minds a more admirable model of historical continuity than the history of the Roman law. It is peculiarly valuable for this reason: first, because the history of the Roman law is a true continuation; secondly, because the history of its development has been written so gradually and so steadily that you are able to trace the transition of an institution from stage to stage under modifications of ideas, from its first origin down to the time when it either becomes totally transformed or ceases to exist. Surely this is a most valuable instrument for preparing the mind for legal studies. It is, as it were, a case in point perpetually before the mind as a guide and illustration in the study of any system of law, but particularly our own. Now, in regard to the Roman law, we find two branches of it of pre-eminent value in directing our studies. First, as to the history of the Roman Law of Persons as based upon the institution of the family; and, secondly, as to the history of the Proprietary Law, particularly the Law of Property in Land as founded upon the Institution of the Association of Households in Rome. When we have clearly in our mind these two institutions, the Roman family with the Patria Potestas lying at the root of the Law of Persons and the Roman Association of Families, with the collective ownership and cultivation of the soil by groups of men either in fact or assumed to be relations by blood, we have brought before us the historical rudiments out of which have sprung the two great branches of the law now existing in their present shape. The next method of studying the law which presents itself to us in a clear and precise form, may be regarded as the logical and scientific; that is to say, the method of studying the law, as it is, through abstraction, analysis, and classification, of studying the law as an existing organism opening up to the student several leading ideas and principles which lie at the base of all well constituted legal systems. Now, looked at with a scientific view, what does the law, as it is, present

before our minds? The historical method shows us the rudiments and evolution of legal conceptions and institutions. The scientific method shows us what those legal conceptions and institutions became, or will become, under a final course of development.

Looking at a system of law, scientifically, in this way, we have presented to us a series of conceptions, logically classified, so that they may be grasped by the mind as a whole, and arranged upon a simple plan, and so that the whole series of conceptions may hold together as a single organism. Just as in the human skeleton, the articulations are distinguished into members principal, and dependent, according to a fixed plan or type; so here we see certain fundamental and cardinal principles, as the structural base around which are hung all the mutually dependant doctrines and inferences. Contemplating a body of law scientifically just as you would a human skeleton in order to take in its structure as a whole, see what such a scientific method presents us with, and what an enormous economy of thought such a procedure furnishes us with. Well, the first thing that we are brought into contact with, adopting in particular the scheme of Austin, is an exact conception of what is meant by a command, for a law proper is a species of command. A command is defined to be the intimation of a wish that a person should do or forbear from some act with the further element that non-compliance with the wish will be visited with an evil. Then from that you turn to the power that imposes the command and to that which obeys the command, which consideration brings us into the presence of two correlative ideas, superiority and inferiority: the power that commands and that which obeys. Superiority implies the power to enforce compliance by inflicting the evil; inferiority implies obnoxiousness to the infliction of the evil. Then next in continuity of evolution you are brought into the presence of the idea of that order of influences which leads us to obey the command. This gives us the

idea of duty; for duty is liability to evil on non-compliance. Here, then, we have two more correlatives: command, duty, each term implying the other. Then we come to the proposition: "What induces to obedience of the duty?" This is a sanction, for a sanction is the conditional evil which induces the will to compliance, obligation being liability to the evil in the event of disobedience. This term sanction, scientifically treated, is the key to many and deep differences between a rule of religion, on the one hand, and a rule of morality, on the other, as compared with a rule of law. Having mastered the idea of a sanction, we find in the result that a sanction is evil or punishment to be incurred if command be disobeyed. As for instance, in the proposition that people are bound by law to pay their debts. This imports that the obligation to pay a debt is sanctioned by law, and so is made a legal duty, and that means if the debt is not paid, that is to say, if that duty is not performed, the power of society, organized under certain rules of procedure and formalities, will apply the sanction, that is, will, in the last resort, inflict some bodily punishment.

So it comes to be that the ultimate sanction of a rule of law is physical force directed by public authority specifically defined as a political superior. These are the great leading ideas with their implications which scientific jurisprudence has evolved by abstraction, generalisation, and definition. Now let us see their bearing upon the simple question of how it is that, and to what, extent law is an instrumental art, namely, a means to ends. That brings us into the presence of the word "right." What is a "right"? A legal right as a matter of scientific jurisprudence, is a creature of law, and has for its basis a duty. It is a right to call upon some one to perform a corresponding duty, and the right to call upon one to perform a duty means the right to demand from some one that he shall either do or forbear from some external act in a certain way and in certain circumstances. This is

what we understand by calling the law an instrumental art, that is, a means to effect certain ends. I say I have a right to a piece of land; what do I mean by that assertion? Looked at as a matter of scientific jurisprudence, I mean several things, and in this order. First of all, persons are under a duty not to infringe on my rights over the land, but that, in the second place, means that all persons must so demean themselves in respect of forbearances, that those forbearances may in the result give me the right to deal with the property within the limits of my right, as I choose. So that when I say I have a right, I simply say certain acts or forbearances which would otherwise affect the subject of my right, are to be done or omitted by other persons, so as to leave me in a state of freedom with regard to the subject of the right. Upon these leading ideas with their several correlatives and implications including, with others, the terms injury, negligence, intention, will, and motive, the whole body of scientific jurisprudence is constructed, take again that word "right." Rights are scientifically divided, in respect of their compass, into two classes; first of all, rights which avail against all the world, such as the ordinary property rights, and those you know are called *jura in rem*. Others, on the other hand, are rights which do not avail against all the world, but avail only against particular persons; these are defined to be *jura in personam*. This view of rights which goes down to the base of all our ideas of legal right is simply this. The object of the right is a duty, but again the object of the duty is acts or forbearances of other persons. When the acts and forbearances are general, to be exercised by everybody, you have *jura in rem;* when the acts or forbearances are only available against particular persons, being then only *jura in personum*, as in the case of a contract, then those acts and forbearances are limited to those persons who have entered into such a relation with us as entitles us to call as against them for those acts or for those forbearances. As these acts and forbearances of persons are the things to which the law

looks primarily as its means to effect its end, you see that all such questions as injury, guilt, and innocence become to be matters of intricate and yet exact treatment. If a man, who is called upon to do or to forbear from an act, could not help the act or was unable to forbear, you see at once you are in that region of culpability or innocence, about which there are very numerous rules of practical law, but scientifically regarded they are reduced to a minimum by the doctrines relative to will, motive, intention, negligence. Now, for instance, take, as an illustrative case, that of alleged lunacy. Suppose a person who, by the rules of law, is called upon to perform a duty by way of act or forbearance, omits the act prescribed or does the act forbidden. Now, looked at scientifically, what have we to enquire after? We have to enquire, first of all, did the person know, or could he help what he did, or omitted to do? Then you are in the region of motive, volition, intention, negligence, matters, which can, to a large extent, be reduced to precise and exact terms as far as principles are concerned, but which in their application must always be attended with very great difficulty, and must involve the most delicate considerations. Well that implies, did the person know what the rule of law was? which also brings you again into the consideration of intention or negligence; because, before you can really be in the predicament of guilt in respect of an act, you must know first of all what the act involves as an executive proceeding; and, secondly, you must know how far it infringes the rule of law which you are called upon to obey. Such considerations show you that all the doctrines which regard lunacy and other cases of exemption are doctrines which scientific jurisprudence reduces to a minimum by showing you the principles on which responsibility for acts in respect of guilt or innocence finally, and as matters of ultimate thought, rests. Take again the presumption of ignorance of law. In that case you see, before you can raise the presumption of ignorance of law, you have, or would have, to enter upon inquiries of a large and indefinite

kind. You know the maxim, *ignorantia juris non excusat sed facti.* Well, now these two maxims rest, scientifically regarded, upon clear principles of the difference in the extent and character of the inquiry as to the acts and matters with which they are concerned in order to discover the essential element of injury in intention or negligence. Scientific jurisprudence, therefore, takes doctrines and reduces them, first of all, to their ultimate terms ; secondly, it so arranges the result as to make the conclusions dependent upon one another, so that the whole of the doctrines being brought into the simplest form, can be grasped, as it were, in a single view by the mind. The facts and principles of law in scientific jurisprudence are arranged and classified so that they may be grasped and held with the minimum exercise of thought. This mode of viewing the law brings before our mind the law as a whole so that it may stand before us as a model of procedure and action, so that in practical matters when we are, as it were, in a forest of details, hardly knowing which way to turn to find the legal road, or what may be involved in the facts we have, as it were, this model before us, this light to guide our enquiries, and to direct our path. Somebody has received what he calls an injury, and he goes to his legal adviser. What he calls an injury consists of certain events, facts, allegations, and circumstances. These the practitioner has to collect together, and therefrom to discover what legal right emerges, and find, secondly, what legal remedy they disclose. In that he is, as it were, performing in a particular case what scientific jurisprudence has done once for all by defining the whole scheme of rights and injuries which the law, as a whole, contemplates and secures.

Since scientific jurisprudence began to be dealt with in the large and comprehensive way in which it is now treated, a wholly new period of law-reform and reform of all legal studies and training has been introduced into our own country and elsewhere. You observe, therefore, that there

is the historical method which shows us how law has grown and evolved itself, and the scientific method which takes these things in their ultimates, and reduces them to the simplest form, and classifies them logically. These methods mutually throw light on each other. I will not go into detail, but will revert to the illustration to which I first referred, I mean the Law of Persons. Just see what account the Law of Persons gives of itself when we look at it as a branch of the Roman family, and what account it renders of itself when we consider it as touching ourselves in England to-day. In ancient Rome, and down for many a long year in the history of Rome, the Roman family was constituted in this way. The whole rights and duties of the household were practically concentrated in its head, as invested with the Patria Potestas. All the members of the family, as between each other and as between themselves and their head, had no personal rights. They were the subjects of an irresponsible despotism. From that rude and savage original, by a series of emancipatory steps, the several members of this collective aggregate, or family, freed themselves from the *status* of subjection, and passed into the state of individual right, so as to become possessed of individual personal rights and duties. It would be wearisome to detail the particular way in which this was done: first, the eldest son, then the sons generally, then finally the daughters. Here, again, the history of the *status* of married women with regard to property, as manifested in the development of the Roman family, is paralleled in the modern phase of the same question down even to the recent Married Women's Property Act. Indeed, the whole subject stands in intimate historical relation to the old Roman family, and there is a great light of illustration derived through it from the beginning to the end of the whole course of dealing with the rights of women in regard to their property. Again, the rights of persons in our own day from being, as they were in Rome, corporate, are, as you know,

now in our own country particularly, intensely individual. But all these terms implying the rights of persons, which have been used for centuries would really be unintelligible unless viewed in the light of history, which shows the gradual process of evolution by which rights and duties attaching alone to the head of the family have, in process of time and gradually come to attach to individuals, as they now do. But the point to which I wish to call your attention is, the contrast and yet connection between, on the one hand, the extreme historical rudiment of the ancient institution of the Roman family, and, on the other, the scientific method by which the rights of persons are now defined and classed, considered as a matter of mere interest independent of teaching and training. There is nothing so calculated to interest and instruct as the mutual reflection which is cast by the history of law, on scientific jurisprudence and *vice versa*. I hardly know a single subject in practical life which would not receive new and valuable light from this kind of historical investigation, as a means of removing prejudice and elevating the view and estimate. Take, for instance, proprietary rights. There has been there a complete historical inversion of ideas. Proprietary rights, in respect of land, were in origin not individual but corporate. The exception to corporate proprietary rights was an historical evolution after very great difficulties extending over a large space of time. What exists now in many parts of modern Europe and in England above all? Proprietary rights are in the general individual, and in the exception corporate. Take such a matter as the right of common. It is a matter of daily experience that these rights are regarded as exceptions to the great proprietary rights existing in the country. Historically they are, the old form surviving the attacks of the new system. How much light is thrown upon the whole history of our land system, upon the principles of the tenure, and transfer of land by that single historical circumstance that ancient proprietary rights were corporate and only by degrees became individual, and that now they stand,

as it were, in direct exception to the ordinary rule. What a light this throws upon conveyances and upon all the procedures now so many of them done away with by law reform, upon all the procedures connected with interests in, and the devolution of land and the modes in which it is transferred or conveyed. Why, it is certainly one of the most luminous historical ideas that could possibly enter into the conception of the land question when we grasp it fairly. What, then, is the historical relation between individual rights and corporate rights in property in land? Here again we see the action and re-action of the historical and scientific method; the latter, taking proprietary rights in their emerging results, generalises them, classifies them, and co-ordinates them and presents them to you as a scientific whole. If we, first of all, come to look at the historical evolution; and, secondly, at the existing practice of our own day, we are able to measure the tendencies to improvement and progress in the existing system, and we are able intelligibly to view the direction in which reform is going on.

In the beginning of the historical *status* of proprietary rights in respect of land in Rome, we find, as I say, a corporate system, with a collective ownership and cultivation, but in process of time other property comes into value, and here a distinction arises. The old property is embarrassed by old forms of procedure both as to tenure and transfer. The new property is emancipated from the ancient procedures, and is dealt with in simpler and more convenient ways. Then at Rome there takes place what has in part taken place in England also. Convenient new modes of transfer applicable to new property were introduced, and that gradually went on until one common rule of convenience and simplicity attached to both kinds of property. The result is expressed shortly in the history of the gradual indentification in point of procedure between *res mancipi* and *res nec mancipi*. What has been the progress of matters in our own country? There are modes of tenure and transfer applicable to real as there

are those applicable to personal property. In England, as in Rome, the rules applicable to real property are more cumbrous, intricate, and costly than those which pertain to personal. In England, as in Rome, there is a gradual approximation between the old methods and the new. By this process the law applicable to dealings with moveable property gradually becomes applicable to inmoveable property, though the classification into moveables and inmoveables marks an essential difference. Those applicable to real as well as those applicable to personal, show that prevailing tendency, and the final result will be to apply to real property the same simple methods which now attach to personal property. You see, therefore, in Rome as in England, a gradual process of simplification and identification. They illustrate one another in a most striking and valuable way. Probably if there was any cardinal improvement which you might at a moment strike out with success, it would be to have for real property the same kind of representation that you have for personal. If you had a real representative of an estate, as you have a personal representative, that would be simply a recognition of the great historical rule embraced in the history of law in Rome and England, and to apply it further, can you doubt but that, in the procedure of law reform, this irresistible historical tendency will be obeyed?

Well, now, take another line of thought, which brings us to a third mode of enquiry into the law. The first is the historical; the second is the scientific or analytic, namely, the application of logical rules, methods, and principles of classification to the subject matter of the law; the third mode is what may be termed the philosophic. It asks questions of the highest interest and of the greatest moment. What are the conditions of human nature which render it expedient and even necessary to have a system of law at all? Why is it necessary to go the length of creating a great instrumental art like the law, with its vast and elaborate machinery of rights and duties, commands, sanctions, acts,

and forbearances, intricate and involved rules, its costly machinery, its skilled and trained body of professors, and its large space in human affairs? Why is this necessary? All this philosophic jurisprudence asks. It enquires what is there in the constitution of man and human society that caused a system of law to evolve itself first of all, and next, assuming law to have evolved itself, what are the rules and principles which should constitute its living and being, what should it command, and why should it command it? These are the questions of philosophic jurisprudence. Now, it is here that that great doctrine of the differentiation of the rules of religion and the rules of morality from law come into play. There are reasons in the nature of things why some matters should be made rules of law and why others should not, and that enquiry principally turns upon the doctrine of sanction. What would be the use of commanding by law that persons should only make gifts for charity out of a willing heart? All the value of charity depends upon its being given out of a willing heart, and what earthly use would it be to command that by the law of the land? How could you discover the state of the heart, how get up evidence, or if you got up evidence how decide with sufficient certainty? All these are only to be answered by looking generally at the facts of human nature, at the way in which force can, and does, operate. There are some things that cannot be commanded.

It used to be said that the power of Parliament was so great that it could do everything except make a man a woman and a woman a man. That is a broad and even a rude way of saying there are things which the law cannot do and ought not to do. The inquiry into the limits of law is a deeply interesting and most thoroughly instructive part of jurisprudence. It is this which gives its high character to the art of legislation, which is the mode of bringing law, not into the condition in which it now is, but into the condition in which it ought to be, as the master science of human government, because nobody

can hope to practice the art of legislation with wisdom and effect unless he thoroughly knows not only why the rules of law should be changed from one condition into another, but the great underlying principles of human nature which lead to the establishment of legal doctrines and practice generally. These are the deeper and larger questions of law, which lift it into an atmosphere of so much dignity and importance, and it is in the study of these questions that law has done so much for civilization and progress. If, in the old days of this country, and of other countries, the masters of the law have done valuable and priceless service to constitutional liberty and personal right, it has been because they grasped firmly what things the law ought to do, and could do, and saw clearly and exactly that when the law intrudes itself into regions either of religion on the one hand, or morality on the other, it enters upon a barren and dangerous career. It is the sense of this distinction, sometimes conscious, sometimes unconscious, that has guided the masters of the law, who have rendered, as I say, such valuable service to this and other countries. Perhaps there is no more sufficient reason for the fact that the English, as a rule, are a constitutional and a constitution loving people, than that clear, firm sense of rights and duties daily demonstrated in law in respect of things that are properly the subject of law. It is this sense which more than any other has made our people what they are, because it is clear that they are of all others the people who have grasped most thoroughly the principle and doctrine of a legal system, so far as regards what law ought or ought not to command. Well, these three methods mutually conspire to constitute a solid system of legal training.

I have spoken of the relation between the historical and the scientific methods of jurisprudence; now look at the relation in which the historical and the philosophic methods stand toward each other. Here I call your attention to a point which, to my own mind, is of prime importance as a matter, not only of law and government, but also of morals

branching out into considerations relative to the distinction between law and equity, and to the foundations of International Law. You know that old doctrine of the Roman law, respecting the *jus gentium* and *jus naturale*. The history of the *jus gentium* and *jus naturale* constitutes the key to the progress of Roman thought, and also in great part of mediæval and even modern thought in respect of some of its most important legal and political aspects. Look at the matter in its original. The Roman people had a law, *jus civile*, which could not be applied to any but Roman citizens, because the Roman law was a family law, based on the patristic relation. The Roman law was then mixed up with religion and morals. The earlier rule of law in ancient times was compounded together of legal, moral, and religious elements, and nobody but a Roman citizen could have the advantage, or could call for the protection of the Roman law. But then this state of things arises. Relations take place between Rome and Roman citizens, and those who are not Roman citizens, and then some rules of practice had to be adapted, some mode of adjusting rights and duties had to be applied. They proceeded as a practical people in a practical way. They found out what they, from examination of the existing systems of law, thought were the common principles applicable to the case, and they proceeded in fact, if not in form, by a process of induction and general rules. Conceive this process going on continuously for generations; conceive a body of law growing up which consisted of the general principles common to the various systems of the law of property, and of contract with which the Roman people came in contact, and you will see that, in course of time, these common principles and rules would grow up into a system and into a body. These rules and that system were called *jus gentium*, the law of nations. That was a practical conception drawn from practical experience to meet a common exigency. Conceive next the effect of the habit of dealing with large generalisations and the influence of a philosophic system adopted by the Roman people, and you have

a process taking place which is not confined to law, but lies deep in human nature. When they had got the *jus gentium* into a large working system by a process of thought and idea, they turned that *jus gentium* into the so-called law of nature, *jus naturale*. They thought or assumed that the law of nature, *jus naturale*, was a system of law which had once existed in some ideal state of society perfect and wise, which ideal system of law, modified and twisted and distorted, had passed down into states of society degenerate and evil, but yet which ideal system still survived in the heart of their own and other actual existing systems, and when they, by a process of practical induction, drew out a general rule from several conflicting systems, they thought to themselves that they were, as it were, taking out whole branches and pieces of the old ideal system of a perfect natural law which had existed in some hypothetical and Utopian condition. To put it in logical terms, they gave an objective existence to a subjective idea. There existed a body of principles collected from a number of conflicting facts and systems. They took that body of principles and they gave it an objective, independent existence, and called it the *jus naturale*, law of nature. Was there not here a gradual submission of law in principle and practice and procedure to the doctrines of convenience and general utility? Was there not here an unconscious performance of the philosophic treatment of the law which asks, what is there in human nature which calls for such a rule, and if human nature calls for such a rule, what are its limitations, and upon what precise procedure does, or ought it, to rest? They unconsciously performed in creating the doctrine of *jus naturale* what philosophic jurisprudence now consciously performs in obedience to the great doctrine of utility, and such a man as Bentham is the historical complement of this great conception of the theory of *jus naturale*. He took the great maxim of general utility, and applied it as a measuring rod to all the branches of English law in substance and in procedure, and in all its diverse processes of adjudication. When,

therefore, you look at the immense service which that man rendered to the English law by simply applying in theory and upon a fixed scheme this doctrine of utility as the real method of viewing the law, you instantly see how philosophic jurisprudence is doing for modern law what that doctrine of *jus naturale* did for ancient law. What did the doctrine of *jus naturale* do for ancient law? Why it created that perfect model of elegant jurisprudence which is almost the despair of mankind for imitation even now. If it did this unconsciously under the guidance of immediate practical necessities, if it did so much for a people so far back in civilization, and with such limited conceptions of human nature, and human duty, what do you think will be done by it under the form of philosophic jurisprudence in modern Europe, and, I hope, particularly our own country, by the application of the same method consciously, scientifically, and persistently in obedience to the highest views and conceptions of the interests of civilization? Hence we may expect the process, which has been going on since the beginning of human institutions, may be carried on in these days under happier and more fortunate conditions.

What, then, is the progress and evolution which presents itself to us in viewing jurisprudence from the earliest historical times down to our own day. That view presents us with progress in two subject matters. First of all we have a moral progress. Society, in virtue of its continuous existence and increased experience and higher intelligence, gives to rights and duties a higher, purer, more humane form and frame. Consider the position of the law of persons in old Rome and the law of persons to-day. We see respect for liberty, personal freedom, respect for rights of culture and character, absolute freedom from repression and limitation except where such repression and limitation would prevent interference with other persons' equal freedom. The doctrine of proprietary rights exhibits a similar development. Underneath the legal form of institutions, there is moral progress,

respect for liberty, respect for rights acquired by effort and cultivation. But what, on the other hand, is the progress of institutions? Why, a parallel one. Every time morals make progress, the law, with its creatures, being a fixed institution, stands still, and you either have to push the institution on by modification, or to create new institutions, you have to adapt the machinery and procedure of the law to the change in morals. Well, but the further you go back in society, and the more conservative society is. Why? Because, amongst other reasons, institutions in ancient times were not only political and social, but they were religious also, characteristics which gave them highly conservative tendencies. In ancient times, therefore, you find society insensibly and underneath making progress, but you find the institution above rigid, petrified as it were, and it is only by fictions, by equity, or finally but only in a limited way, by legislation, that you are able to adapt the old institution to the new morality.

Here, then, is a mutual progress that has been going on now since the beginning of civilization. Moral progress always in advance and leading the institution, the institution rebelling and sometimes moving only after the coercion of a revolution. Very often in ancient times, nothing but a revolution would induce a change in institutions to meet the new exigencies of the time. How many times did the plebians of Rome revolt against some ancient privilege which was inconsistent with their then needs and necessities. The whole history of Rome is bound up in that long struggle to adapt old institutions to new ideas, and surely the same double progress under happier conditions is going on in England and Europe, and everywhere where civilisation is. With this difference, amongst others, you must remember that one cardinal difference between ancient and modern times is the rapidity of circulation, the rapidity with which ideas become universal in Europe as soon as they are once launched. Such doctrines as the recent scientific dis-

coveries: how many years would it have taken to make them known in ancient times, but how rapidly, how universally, how almost instantly they become known in modern times. Therefore in modern times you find moral progress ever going on with increased speed, while there is the same and even greater necessity for bringing the institutions of each country into harmony with that progress particularly in the case of the law. How are we to do that? Why, philosophic jurisprudence gives us the doctrines which should for ever direct the adjustment of institutions to ideas. Having given us the large and general doctrines which should govern the conditions of progress, so that institutions and ideas may stand as it were in a happy concert and conciliation, it transfers its doctrines and maxims into the art of legislation, and gives us in that art the practical rules which should direct all law reform.

Then, finally, when we have taken from historical jurisprudence its enormous and splendid contribution, when we have taken from scientific or analytic jurisprudence its definitions, its exact and precise values, its exhaustive and complete classification; and when philosophic jurisprudence has given us not principles only, but efficient rules for directing reforms, then there arises the period of codification. The whole subject of the law of the country is then reduced to a simple and scientific form. It then takes a shape of completeness and elegance which enables it to perform efficiently and economically its function in the State. Then, if it is well established and defined, it not only comprehends in general all the law of the country, but it gives, as it were, a simple and economical method for its own reform. Then the power of accommodating institutions to ideas becomes simple, easy, and almost unconscious. With such a body of law to guide us, you, as students, and ourselves, who are in the practical work of the profession, in our daily work are furnished with the right agency. How much assistance is thus given to us is in the study of the law after

having made it a mental and moral discipline! What a field of culture and education it becomes, what dignity it lends to the years we spend in study, what service it renders to us in preparing us not only for professional, but also for public duties! And who can doubt that as society enlarges, social and philanthropic duties will dominate over interested and personal ones, and that every man's part in public must be larger and more responsible. But as a civilization becomes higher and more complicated so it becomes more sensitive and delicate; so that it is possible by a rude treatment of the legal or political organism to do vast and incalculable injury, and so that it is possible to do something which immediately seems to produce no obvious or dangerous result, but which, by its secondary operations, may disastrously operate over the whole field of rights and duties, both public and private. So if the means to do efficient service increase, the necessity of doing it also increases, and in dealing with the law in this large and comprehensive way we not only prepare ourselves for our own daily work and duty, but we make the law what it ought to be,—an efficient and true minister of the public good, and we make those who practice it and those who obey it more fitted and able to do their general part as units and citizens of the State. And surely it is when we bring the law into this elevated region of culture and influence, that jurisprudence becomes almost the master science, and the fitness of that language of high approval and applause as to the effect which its study and pursuit have been stated to have upon the mind and character becomes obvious to us all. Therefore, taking light and inspiration from those who have gone before, let us try to do our duty both in preparation and practice, carrying on the great traditions of a great profession, and making it also, with the other leading factors of social good, an efficient agent of private usefulness, of public safety and of general human civilisation.

VIII.—THE JURY IN SPAIN.

"El Jurado y su Establecimiento en España," por D. Tomas Rodriguez Pinilla. Madrid, 1873.

"El Jurado, exámen critico de los Titulos 4 y 5, Lib. 2°, de la ley de Enjuiciamento Criminal," por D. Telesoro Gomez Rodriguez. Madrid, 1873.

"El libro del Jurado o sea Procedimiento Criminal ante el Tribunal del Jurado," por D. José Fernandez. Madrid, 1874.

WORKS on Spanish Law so seldom come across our path that we think it well to devote a few lines to mentioning the chief points brought out in the above books, for a knowledge of which we are indebted to a recent number of the excellent "Bulletin" of the French Society of Comparative Legislation.

The first is devoted, as its title implies, to the discussion of the establishment of Juries in Spain. It is, therefore, quite as much a work of legal history as of practical law. Its earlier portion is devoted to the origin and advantages of the institution of Trial by Jury, both from a Juridical and Political point of view; its latter portion gives an account of the organization, composition, and powers of the Jury. It points out the differences between the English, French, and Portuguese Jury systems, and winds up with a project of Judicial Reform presented to the Cortes in 1869. Señor Pinilla thinks that he finds traces of the early existence of the Jury in Spain in the Fueros of the towns, and in some old institutions still existing—*e. g.* the Water Jury at Valencia, the Assessor Judge at Iviza and Formentara, the "audiencia" of the twelve alcaldes, &c.

The second work on our list belongs chiefly to the domain of Comparative Legislation, as Señor Gomez Rodriguez compares certain portions of the Spanish Law of Criminal Instruction with the Legislations of England, Malta, France, Geneva, and the Swiss Confederation. He gives in an Appendix the Law of 22d December, 1872, which was abrogated by a decree of January, 1875. It is hard to say what may be the present or future condition of the Jury system in Spain. Señor Rodriguez is opposed to the French, Swiss,

and (late) Spanish systems, which recruited the Jury from among the general body of electors, under Universal Suffrage; and he is in favour of the English rather than the French type of Jury, the latter being that which served as the model for Spain.

Señor Fernandez, who is a Councillor at the Court of Valladolid, had in view the composition of a "Vade-mecum" at once for the Magistrate and the Juryman. He protests against the supposed impossibility of finding in Spain the elements of a Jury, and declares himself a warm partizan of the institution. At the head of each section he gives the law-text belonging to it, and then proceeds to give explanations and offer criticisms. His first section is devoted to a general outline of Penal Law according to the Spanish Code of 1870; his second to the composition, competence, &c., of the Jury; his third and fourth to the preparatory formalities for constituting the Jury, and opening the examination; the fifth to the challenging, swearing, &c., of the Jury; the sixth and seventh to the modes of revising verdicts, and decisions of the Courts of Assize; while the rest of the book is concerned chiefly with the criticism of proof, and the nature of the delicts that come before a Jury. Whatever the future may have in store for the Spanish Jury, the above works are of a permanent value in the history of foreign law.

LEGAL TOPICS.

LEGAL EDUCATION.—The following is the Report of the Executive Committee of the Legal Education Association, referred to at p. 671:—"The Bill for establishing a general School of Law, which Lord Selborne has introduced in the House of Lords this session, is substantially the same as the measure originally introduced by him, and is based upon the principles for the promotion of which the Association was originally formed. It proposes to create a general School of Law, which shall be open, without any restriction or qualification, to all Her Majesty's subjects, which shall fairly represent all existing institutions and all existing interests, and which shall be provided with a staff of well-paid and efficient teachers, as well as with a competent and independent examining board, whose certificate shall be essential

as a qualification for practising in either branch of the profession. The manner in which the Bill has been received is reassuring, although the Lord Chancellor limited his expression of approval to that part of it which provided for an examining body, his chief reason for so doing being the absence of satisfactory proof that the funds needed for such a school as is proposed would be forthcoming. The committee think there will be no difficulty in showing, when the proper time comes, that an income equal to all the educational needs of the school will be available, and they earnestly hope that the Association will continue to urge upon the profession and the public the absolute necessity for providing, not merely an examining body, but a sufficient staff of highly-qualified teachers. After meeting all ascertained liabilities of the Association there will remain in the hands of the treasurer a balance of £243 18s. 3d."

IRELAND.

GOSSIP OF THE COURTS.—The venerable Chief Justice Monahan, of the Common Pleas, who has occupied that position for 24 years, is not equal to the fatigue of sitting in Court, and he has in fact done no judicial duty since the autumn of 1874. It is not known whether his retirement is contemplated, or whether it will be deemed necessary to appoint another judge, in case he may consider it right to send in his resignation. It so happens that in his Court there are active, learned, and able *puisne* judges, all of whom are in the prime of life, so that the public have had no cause hitherto to complain of the absence of the chief. A Serjeant or Queen's Counsel will be appointed in his place to go to the Summer Circuit in July.

It is rumoured that some new silk gowns are about to be conferred. Of the 98 gentlemen holding the rank of Q.C. in Ireland, not more than 60 are actually practising at the bar, and several of these hold county judgeships. In some counties a month's work through the year is sufficient, leaving ample time for private practice. In others the Chairman (as he is called) must devote two or three weeks to each of his four circuits. The Home Rulers declare that these appointments were invented to captivate the bar; and beyond question their political effect is not inconsiderable.

LAW REFORM IN IRELAND.—It is a tolerably safe assertion to make, that theoretical perfectness of law is just now at a discount. For a long time past there have been no serious attempts made towards the improvement of legal administration, with an exception which may now be commented

on. In response to the Judicature Act for England, one for Ireland was brought forward, last year; but its reception by the judges, and by all inferior ranks of the legal profession here, was in a high degree unfavourable. So many objections were urged against it, that the project fell through; and the present session of Parliament has seen no attempt at the revival of a scheme which did not commend itself to any section of the legal community. In truth, excepting the few personal acquaintances of the Lords Cairns and Selborne—and a very few officials who hope to gain something in the scramble—no lawyer expects anything but mischief and confusion as the result of a Judicature Bill. The most experienced members of the bar seem now to have arrived at this clear conclusion, that a Judicature Act is not required at all. It is on all sides admitted that the powers of the existing courts have been, and still may be, usefully extended. Each court should evidently be empowered to do full justice in any case that may come before it. But it does not follow that the old distinctions of title and of practice should be swept away; and that, under pretence of scientific reconstructions, there should take place a series of changes which only the vulgar word jobbery can fully describe, and which would result in benefit, if to any others, certainly not to the suitors. The judicature scheme has been, in short, condemned by the best authorities; and notably by the acutest of legal critics and the first of Irish lawyers—Lord Justice Christian, who has declared that it would bring in a state of "simple chaos." With regard to a court of final appeal, every Irish lawyer of note adheres to the belief that the House of Lords appeal, with (it may be) some modification of practice and enlargement of jurisdiction, would be far better than any newly-invented substitute, with whatever ingenuity devised. As far as law is concerned, it is, therefore, for the present, a case of "rest and be thankful." There seem to be no legislators here, with both ability and willingness to grapple with the question of Land Transfer; and this, as well as other matters calling for amendment, must await the advent of the favourable hour and the competent hand. Even in so simple a matter as the amendment

of the assistant barristers, or County Courts, there is not any whisper of improvement. Evident it long has been to all, that to these courts there should be given, within some reasonable limits, a jurisdiction as regards equity, probate, and landed estates business; but there is, notwithstanding, a general quiescence, and a certain willingness to endure all present evils. As the law makes no provision for the arrangement of small matters of this kind, the little farmers take them into their own hands—for fear of large bills of costs their farms are handed down by means of unproved testamentary papers—then little legacies are either paid or abandoned as hopeless—as the case may be—without recourse to the Courts—and their cherished hope of purchasing farms with their hoarded savings is frustrated. And all this because law reform is just now unheeded and unfavoured. The Courts may be said to exist, and the laws to be administered, for the benefit of the comparatively wealthy—not of the poor. And Ireland is essentially the land of small farmers and traders, for whose benefit the laws are very ill-designed. Will it be believed in England and in the colonies that, to give an example, in the Landed Estates Court—which was instituted in modern days—there is no lower scale of costs adapted for small transactions? The Duke or Marquis who wishes to part with an extensive domain is subject to exactly the same tariff of professional charges as the small tenant of twenty acres who has occasion to sell his little leasehold. It should be here noted, that the Master of the Rolls, an upright and vigilant judge, lately commented, in very strong terms, on the defects of a legal system which obliged poor suitors to resort to his expensive Court, where a very small amount of property was concerned. Meanwhile no jurisdiction whatever as regards equity, probate, or landed property is conferred on the Irish county judges, who are all handsomely paid, and several of whom may be said to enjoy positions not far removed from sinecures. So much for the present state of legal administration in Ireland.

BOOK REVIEWS.

THE INTERPRETATION OF STATUTES. By Sir Peter Benson Maxwell, late Chief Justice of the Straits Settlement. London: William Maxwell & Son. 1875.—This is an admirable book, excellent in its method and arrangement, and clear and thorough in its treatment of the different questions involved. Sir Benson Maxwell was known as a sound and accurate lawyer before he went to the East, and we are hapyy to find that during his sojourn there, he has been accumulating fresh stores of learning and keeping himself perfectly *au courant* with recent decisions of the courts both of law and equity. No apology was necessary for bringing such a treatise as the present before the profession. We cannot say that we ever derived much enlightenment from the work of Sir Fortunatus Dwarris, and, such as it was, no edition had appeared for more than a quarter of a century. Mr. Sedgwick's book, though valuable, is founded chiefly on American decisions, and does not deal with the immense array of cases, arising on the construction of statutes, which have come before our Courts during recent years. All the more important of these have been brought forward by Sir B. Maxwell for the purpose of proving or illustrating the rules for the interpretation of statues which have guided our courts. The work will be found of great practical utility, as affording a key to the method adopted by our courts in the construction of statutes, and it will be of much value as showing the uniformity which has in general marked the application of the principles of interpretation to a vast variety of legislative enactments. The author says of his work, in the preface, "Its object is to present in some order the leading principles which govern our courts in the interpretation of statutes, with illustrations of their application, selected as much as possible from recent decisions, and in sufficient number to explain and give precision to their meaning and scope; in the hope that it may be useful not only to the legal practitioner, but to the numerous unprofessional authorities, such as justices of the peace, local boards, commissioners and others, on whom the task of construing statutes is imposed with increasing frequency." That the work will be highly useful for all these classes of persons, we cannot entertain a doubt. We trust, also, that it will show those individuals amongst us who are always complaining

of the unscientific character of English law, that some parts of it at least are based on principles which a patient and painstaking writer, gifted with sufficient ability, may clearly discover and logically enunciate. We can scarcely imagine a better model of a law-treatise than the present, and we propose, therefore, on a future occasion, to enter on the subject at greater length.

THE ENDOWED SCHOOLS ACTS. By E. W. Eyles. (London: Longmans, Green & Co. 1875.) Although the powers of the late Endowed School Commissioners were summarily transferred last year to the Charity Commissioners, no alteration was made in the powers conferred or in the duties imposed by the original Act of 1869. The subject is of practical interest to very many who are concerned in the work of education, and Mr. E. W. Eyles has done good service in issuing a copy of the several Acts arranged according to their subject matter under various heads, with a carefully drawn summary and index. The arrangement is good and the references easy and complete, and the pamphlet forms a useful guide to the whole of the legislation affecting endowments in England.

CATALOGUE OF THE LIBRARY OF THE SUPREME COURT OF VICTORIA. Second Edition. Melbourne: Stillwell & Knight. 1875. The number of books on the shelves of this library has increased from 4447 in 1861, to something like 10,077 in 1875. During that period there were several presents of especial value made to the library,—the late Lord Langdale, Lord Redesdale, and Lord Ossington alone having contributed upwards of 1600 volumes of parliamentary papers. The library has been formed and is kept up out of the fees paid by barristers and attorneys on their admission to practice in the Supreme Court, which gives a permanent right to the use of the library without an annual subscription. The number of persons admitted to practice in the Supreme Court is barristers 227, attorneys 604. The admission fee of the former is £50, of the latter £40. A new system of legal education has been introduced and new Law Courts are in course of erection to keep time with the growing importance of the culture and study of the law, and the practice of the profession. The preface contains some interesting statistics of the progress of the law since the formation of the library in 1854. Since its establishment 67 barristers from this country, and eight natives have been admitted, and during the same period 208 attorneys of the mother country and 34 of the colony. The

volume contains a variety of semi-legal information, as lists of the governors, the judges, attorney and solicitor-generals, ministers of justice—for it appears the colony has a public prosecutor—the roll of barristers and solicitors, public notaries, board of examiners and particulars as to the Supreme Court sittings and the Circuits. This enhances the value of the volume as a book of reference in the library or practitioners chambers. As regards the contents of the library, on its shelves are to be found complete series of reports of cases from the earliest times in all the Superior Courts here, and most of them belonging to Ireland and Scotland, together with the Acts of the respective parliaments, added to which are all the known text books of value of Great Britain, and the text books and reports of the United States. There is also a large selection of the most approved authors, both ancient and modern and universally, and the jurist, the lawyer and the scholar, will here find ample material for carrying on his studies.

A PRIMER OF THE ENGLISH CONSTITUTION AND GOVERNMENT, for the use of colleges, schools, and private students. By Sheldon Amos, M.A. Longmans, Green and Co. (2nd edition). 1875.

THE AMERICAN LAW REVIEW, (Vol. ix., No. 3, April, 1875.) Boston: Little, Brown, & Co. London: Stevehs and Haynes.

THE SOUTHERN LAW REVIEW, (New series, Vol. i., No. 1, April, 1875.) St. Louis: Sould, Thomas, and Wentworth.

JUDGMENT OF THE LORD CHIEF JUSTICE (Queen's Bench, Ireland) ON THE NEW TRIAL MOTION, the Rev. Robert O'Keeffe v. Cardinal Cullen, 13th and 15th February, 1875. Dublin: Hodges, Foster, and Co. London: Ridgway.

We desire to acknowledge receipt of the above, though we can only now mention them briefly, as space will not admit of our giving them, in our present issue, the consideration which the importance of their various subjects demands.

Constitutional history is, happily, coming much to the front, as a necessary portion of education, and is attracting to itself the energies of some of our ablest historical writers. We hope to devote some portion of an early number to this important feature, both of legal and general education, and must therefore content ourselves at present with pointing out that the general characteristic of Professor Amos's "Primer" is the indication of the principles and practice of the administration of government in the United Kingdom and its Colonies. It is not and does not profess to be, a constitutional history, but a handy-book to an

understanding of the machinery and working of the British Constitution.

The two American law periodicals which are lying on our table contain much matter upon which American jurists may be congratulated. An article in the *American Law Review*, of Boston, on the "Criminal Practice of Saxony," and a reprint in the *Southern Law Review*, of St. Louis, on an article of our own, on "A French School of Law in Japan," shows that jurists in the United States are alive to the desirableness of that increased study of foreign law systems which we ourselves advocate. We shall return with pleasure to the publications of our Trans-Atlantic brethren, and shall always be glad to be kept fully informed of the issues, whether "down East," or in the South, or the Far West.

The gravity of the points varied by the O'Keeffe case warrants us in saying that we shall feel bound to give its consideration the space to which it is so thoroughly entitled as one of our *causes celebres*.

THE SKULL AND BRAIN: their indications of character and anatomical relations. By Nicholas Morgan, author of "Phrenology and how to use it in analysing character." (London: Longmans & Co. 1875.)

This work, dedicated to W. A. F. Browne, Esq., M.D., late Commissioner in Lunacy for Scotland, has nothing to do with law, though perhaps with lawyers, and then only so far as the characteristics of mental physiology go. The volume contains many interesting comparisons between the brain structure of men of great minds. The engravings of the heads of the Rev. Rowland Hill and Jeremy Bentham illustrate the fact that high mental attainments are not always associated with mere mass or weight of brain, but with the preponderance of certain of its parts over others. The following are examples the author gives of this theory:—

"Bentham's head is also large, yet it is less than Hill's; but his intellect is considerably larger, while the moral and social regions are less, especially the latter. The deficiency in Bentham's moral region is in what are called the Selfish Sentiments, or those that are common to man and animals. His sign of Benevolence is quite as large as Hill's and that of Veneration is nearly so; but the signs of Firmness and Self-Esteem are considerably less. This difference of Cranial form indicates that Bentham would be naturally more humble-minded than Hill,—

that he would incline to estimate his social status in accordance with the intellectual standard; while the intellect of the latter would be influenced in the estimate of himself by the self-regarding principle. The intellect of Bentham is extraordinary; the only deficiency being in the sign of Causality; but the signs of the Perceptive Powers and Comparison,—those which indicate discriminative and analytical talent are very massive, and considerably in excess of Hill's. And, notwithstanding that the head of Hill is much larger than Bentham's, and indicates a very capacious mind, Bentham's head is indicative of far greater intellectual capacity, depth of penetration, and life-like acuteness of discrimination. It is not an uncommon occurence to find some of the compositions of authors obscure who have the sign of Comparison and all the perceptive signs large, as Bentham had. This may be accounted for in two ways: *first*, by a deficient development of Causality, and consequent incapacity of the writer to clearly perceive a subject in all its bearings that involves abstruse relations of cause and effect; and, *second*, by his having extraordinary faculties of perception and analogical discrimination, so that that which is quite transparent to him may appear obscure to a certain class of readers. This does not arise from want of ability in the author to write lucidly, but from his not taking into consideration that all his readers are not similarly endowed, and as well versed in the subject of which he treats as himself. He presumes that what is clear to his own mind will be equally clear to them. A person having only a moderate development of Self-Esteem, but a gigantic intellect, is likely to err in this way, especially when his perceptions are very active when he is treating on a subject involving exquisite nicety of discrimination. Whether or not some of Bentham's writings appear cloudy, I am unable to say; but I have been told that such is the case."

CURTIS'S DECISIONS OF THE SUPREME COURT OF THE UNITED STATES. By F. F. Heard. (Boston: Little, Brown & Co. 1875)

REPORT OF THE TRIAL OF LEAVITT ALLEY, INDICTED FOR THE MURDER OF ABIJAH ELLIS, IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS. By F. F. Heard. (Boston: Little, Brown & Co. 1875) The indefatigable writer on American legal subjects, Mr. F. F. Heard, has sent us two contributions, the second an addition to his already large store of legal literature. The first appears to be a reprint of an article from some legal publication in the United States, and treats of the importance and value of a well

edited collection of leading cases. As regards the science of reporting, the author says :—

"To report a case well requires a complete mastery of its details. A full report resolves itself into three divisions,—statement, argument, and judgment,—each separate from the other, but all correlated, and in their unity making a full but not a redundant report. Accuaacy is the first duty of a reporter; clearness in another; brevity is also essential. To convey the fullest information in the least space is, therefore, one canon of reporting. To borrow the quaint language of Sydney Smith, the reporter "should think upon Noah and the ark, and be brief. The ark should constantly remind him of the little time there is left for reading; and he should learn, as they did in the ark, to crowd a great deal of matter into very a little space." To reconcile brevity with clearness is another canon. These canons the editor has rigorously observed. Consequently, we have, to all intents and purposes, new reports of the old cases, and entirely different, with the exception of the judgments, from them in all the details which enter into a good report. By this mode of reporting, the principles established by the cases, and their application to the facts, can be ascertained with the greatest facility, without being obliged to struggle through a wilderness of dry, perplexing, and irrevalent matter."

A Digest forms the twenty-second volume, and completes the series of Curtis's Decisions. It bears evidence of the diligent and intelligent labour of the author.

The case of Leavitt Alley is one of the most atrocious murders that was ever committed in Massachusets. The mutilated remains of the deceased were found floating in barrels in the Charles River, and the clue to the supposed murderer was the finding of an address upon a piece of brown paper in one of them. The evidence against the prisoner was entirely circumstantial, and in this lies the remarkable features of the case. The argument of the Attorney-General was regarded as a masterly effort. The trial lasted ten days, and resulted in an acquittal. The appendix to the book is in reality the pith of it, as it contains comments on the nature of the evidence which had been adduced in the report preceding it. Mr. Heard here illustrates the various phases of the trial by reference to precedents and dictums laid down by the judges. Thus he has his observations on, first of all, the arraignment, then the view, citing *Queen* v. *Martin*, L.R., C.C. 378, and other cases, the testimony of police, of experts, and of hearsay and other evidence. In this way he has made the book interesting to the profession.

BAR EXAMINATIONS.

Trinity Term, 1875.

General Examination of Students of the Inns of Court, held at Lincoln's-inn Hall, on the 10th, 11th, 12th, 13th, and 14th May, 1875. The Council of Legal Education have awarded to Charles Bramley, Esq., of Lincoln's-inn; Miles Walker Mattinson, Esq., of Gray's-inn; Studentships in Jurisprudence and Roman Civil Law, of One Hundred Guineas, to continue for a period of two Years. Goddard Henry Orpen, Esq., a Studentship in Jurisprudence and Roman Civil Law, of One Hundred Guineas, for One Year. Arathoon Arathoon, Esq., of the Inner Temple; John Gorell Barnes, Esq., of the Inner Temple; William Mortimer Baylis, Esq., of Lincoln's-inn; Cecil Hugh Wriothesley Beresford, Esq, of the Middle Temple; Thomas Beven, Esq., of the Inner Temple; James Beverley, Esq., of the Middle Temple; Augustine Birrell, Esq., of the Inner Temple; James Algernon Brown, Esq., of the Inner Temple; Robert William Burnie, Esq., of tho Middle Temple; George Russell Butler, Esq., of the Inner Temple; Samuel Whitty Chandler, Esq., of the Middle Temple; Cameron Churchill, Esq., of the Inner Temple; Fielding Clarke, Esq., of the Middle Temple; John Ashton Cross, Esq., of the Middle Temple; Jacques Henry Charles Durup De Balaine, Esq., of the Inner Temple; Daniel De Castro, Esq., of Lincoln's-inn; Edgar John Elgood, Esq., of Lincoln's-inn; William Westropp Flemyng, Esq., of the Middle Temple; George Edmund Septimus Fryer, Esq., of the Inner Temple; John Haviland Dashwood Goldie, Esq., of the Inner Temple; Edward Allecock Hall, Esq., of Lincoln's-inn; John Haller Hutchinson, Esq, of the Inner Temple; Andrew John Leach, Esq., of Lincoln's-inn; Reginald Raoul Lempriere, Esq., of the Inner Temple; John George Llewellin, Esq., of the Inner Temple; Manmath Chandra Mallik, Esq., of the Middle Temple; Angus George Milward McIntyre, Esq., of the Middle Temple; Robert Burleigh Muir, Esq., of the Middle Temple; Eardly John Norton, Esq., of Lincoln's-inn; John Paterson, Esq., of the Inner Temple; George Puckle, Esq., of the Middle Temple; Arthur Radford, Esq., of the Inner Temple; George Herbert Rant, Esq., of the Inner Temple; William John Birch Reynardson, Esq., of the Inner Temple; John Sayer, Esq., of Lincoln's-inn; Frederick William Slingsby, Esq, of Lincoln's-inn; Oliver Smith, Esq., of the Inner

Temple; William Gordon Smithies, Esq, of the Middle Temple; William Hutchinson Spiller, Esq, of the Middle Temple; Arthur Hewett Spokes, Esq., of the Middle Temple; Edward Egremont Sutton, Esq., of Lincoln's-inn; Arthur Mills Tarleton, Esq., of the Inner Temple; Thomas Frederick D'Arcy Todd, Esq., of the Inner Temple; John Symonds Udal, Esq., of the Inner Temple; George Harold Urmson, Esq., of the Inner Temple; Daniel Vawdrey, Esq., of Lincoln's-inn; Charles Edward Howard Vincent, Esq., of the Inner Temple; Stephen Henry West, Esq, of the Inner Temple; and John James Wilson Esq., of the Middle Temple; Certificates that they have satisfactorily passed a public examination.

CALLS TO THE BAR.

Trinity Term, 1875.

Inner Temple. John Pitt Kennedy, Esq., B.A, Dublin; Frederick William Verney, Esq., B.A., Oxford; Philip Perceval Hutchings, Esq.; George Edward Baker, Esq., M.A., Oxford; Oliver Smith, Esq., M.A., Oxford; Arthur Mills Tarleton, Esq., B.A., Cambridge; William Ramsay L'Amy, Esq., B.A., Cambridge; Robert Seton Græme, Esq., B.A., Oxford; Zachariah Twamley, Esq., B.A., Cambridge; Richard Ffolliot Crofton, Esq., Oxford; Charles Jack, Esq., B.A., S.C.L., Oxford; Thomas Beven, Esq., B.A., Oxford; Arthur Charles Cherry, Esq., B.A., Cambridge; Charles Melbourne Fletcher, Esq., B A., Cambringe; William J. Birch-Reynardson, Esq., B.A., Oxford; Arathoon Arathoon, Esq., B.A., Cambridge; George Herbert Rant, Esq., B.A., Cambridge; Henry Arthur Kakewich Hall-Dare, Esq.; Richard Moon Perkes, Esq., B.A., Cambridge; Cameron Churchill, Esq., B.A., S.C.L., Oxford; John Haviland Dashwood Goldie, Esq., B.A., Cambridge; Joseph William Pullen, Esq., M.A., Cambridge; Avetick Arratoon Shircore, Esq., George Russell Butler, Esq.; John Robert Dunlop, Hill, Esq., LL.B., Cambridge; John Patterson, Esq, B.A., Cambridge; John Channon Lee Bassett, Esq.; Walter Byron Prosser, Esq.; Charles Janvrin Robin, Esq., M.A., Oxford; Philip Baylis, Esq., B.A., Cambridge; John Conrad Gie Kunhardt, Esq., B.A., Cambridge; Seymour Frederick Harris, Esq., M.A., B.C.L., Oxford; William Izard, Esq, B.A., Cambridge; Reginald Gray, Esq.; John Haller Hutchinson, Esq; Jacques Henry Charles Durup de

Balaine, Esq.; Henry Alan Scott, Esq.; Reginald Raoul Lempriere, Esq.; Richard Henry Tidswell, Esq., B.A., Oxford; Arthur Radford, Esq., LL.B., Cambridge; and William Lawson, Esq., B.A., Cambridge.

Middle Temple.—James Fegan Rochford, Esq. (of the Irish Bar), B.A., London University; John Asshton Tross, Esq., M.A., University of Glasgow, B.A., Oxford; Henry Kisch, Esq., University of London; Robert William Burnie, Esq.; James Henry Deakin, Esq.; Manmath Chanda Mallik, Esq.; William Westropp Flemyng, Esq. (of the Irish Bar), M.A., Trinity College, Dublin; John Earle Raven, Esq., B.Ar, Caius College, Cambridge; William Hutchinson Spiller, Esq.; John Brumell, Esq.; Ebenezer Nash, Esq.; Richard Mears Sly, Esq., LLIB., University of Loneon: John Henry Martin Weitbrecht, Esq., B.A, S.C.L., Oxford; Frederick James Cornish-Bowden, Esq., Edmund Desanges Purcell, Esq., University of London; Brajendra Nath De, Esq., St. Mary's Hall, Oxford; Athelstane Braxton Hicks, Esq.; Dahiel Sturdy, Esq., University of Paris; Walter Henry Wilkin, Esq; Cecil Hugh Wriothesley Beresford, Esq., B.A., Trinity Hall, Cambridge; Edward Jones, Esq.; and Ernest Badinias Florence, Esq.

Lincoln's Inn.—William Henry Crowe, Esq., of Her Majesty's Bombay Civil Service; George Waugh, Esq., of Queen's College, Belfast; David Frederick Schloss, Esq., of Corpus Christi College, Oxford; Edward Robert Masters, Esq., B.A., Cambridge; Edward Bray, Esq., B.A., Cambridge; Jonas Ashton, Esq., B.A., Cambridge, and M.A., London; William Moxon Browne, Esq., B.A., Cambridge; Harry Cleveland Vaughan, Esq., University of London; Thomas Charles Hindmarsh, Esq., B.A., Oxford; William James Smith, B.A., Cambridge; Frederick William Slingsby, Esq., B.A., Cambridge; Walter Wilson Leroux Cosser, Esq., B.A., Oxford; Henry Frederick Plunkett, Esq., University of Madras; Charles Dalton Clifford Lloyd, Esq., Pokala Venkatakrishnama Naidu, Esq., University of Madras; Edward Fraser Gladstone-Lingham, Esq.; Arthur Jepson, Esq.; Thomas Massey, Esq., University of London; Samuel Henry Woodhouse, Esq., B.A., Oxford; Charles Newman Watts, Esq.; William Harry Barber Lindsell, Esq., B.A., Oxford; Arthur Thomas Waring, Esq.; Emilius St. Clair O'Malley, Esq., B.A., Cambridge; Thomas Rolls Warrington, Esq., B.A., Cambridge; and William Mulholland, Esq., B.A., Queen's University in Ireland (Irish Bar, Easter Term, 1865).

Gray's Inn. John Foster Reed, Esq.

GRAY'S INN SCHOLARSHIPS.

The Gray's Inn scholarships for the present year were on the 9th inst. awarded as follows: The Bacon Scholarship, £45 per annum, tenable for two years, to E. C. Thomas, B.A., of Oxford; and the Holt Scholarship, £40 per annum, tenable for two years, to W. E. Ball, LL.B., London, student of the society. The subject for the Lee Prize, an exhibition of £25, founded by John Lee, Q.C., LL.D., late a bencher of the inn, for next year is "The Judicature Act, 1873, stating its objects and provisions generally, and its probable effect on the administration of the law in England.

APPOINTMENTS.

Mr. A. E. Hardy has been appointed Recorder of Kingston-on-Thames; Mr. F. A. Bosanquet, Junior Counsel to the Admiralty. The following gentlemen have been appointed Queen's Counsel: Messrs. Campbell Forster, Bayliss, and Gorst, of the Northern Circuit; Messrs. J. O. Griffits and Motteram, of the Oxford Circuit; Messrs. Cave and Mellor, of the Midland Circuit; and Mr. B. T. Williams, of the South Wales Circuit; and Messrs. C. Locock Webb, Hemming, Graham Hastings, Ince, W. F. Robinson, Montague Cookson, and Horace Davey, of the Equity Bar Mr. Alfred Young, barrister, has been appointed President of the Arbitration Board of the Wolverhampton Building Trades. Mr. Stephen Sanderson, solicitor, has been appointed Clerk of the Peace for Northumberland; Mr. Andrew Storey, Town Clerk of Leicester; Mr. Robert Greening, solicitor, Examiner in the Court of Admiralty; Mr. J. G. Hawkins, Clerk to the County Magistrates at Hitchin; Mr. Joseph Archer, solicitor, Clerk to the Magistrates at Alnwick; Mr. J. T. Ball, solicitor, Town Clerk and Clerk to the Borough Justices at Middlesborough; Mr. G. H. Page, Registrar to the Hay County Court. *South Australia.* Sir Richard D. Hanson has been appointed to administer the Government of the Colony in the absence of Mr. Anthony Musgrave, C.M.G. *Western Australia.* Mr. J. C. H. James, barrister, has been appointed Commissioner of Titles. *Fiji.*—Sir William Hackett, Chief Justice of the Colony, has been appointed Member of the Legislative Council. *India.*—Mr. Frederick Clarke, barrister, has been appointed Assistant Secretary to the Legislative Department of the Bengal Government.

THE

LAW MAGAZINE AND REVIEW.

No. VIII.—Vol. IV.—August, 1875.

I.—GRAND JURIES AND THE PLEAS OF CRIMINALS.

By John Lascelles, Barrister-at-Law.

THE cost of prosecuting and punishing those idle and dissolute members of the community who make up the criminal classes is a large item in our national expenditure; and the loss and inconvenience which they inflict upon individuals who are called upon to give evidence in prosecutions against them are considerable. Anything, therefore, which is capable of diminishing one or more of the evils in question is well worthy of attention. And, since we are satisfied that the administration of our criminal law at Assizes and Sessions can be made less expensive to the State, more convenient to witnesses and others engaged in prosecutions, and more effective for the conviction of criminals, by means of certain simple changes of procedure, we do not hesitate to submit our ideas on the subject for the consideration of our readers. Some of them are doubtless well acquainted with the administration of our criminal law in all its details; while others have only that general information on the subject which can be picked up by serving on juries, giving evidence in trials, or watching proceedings in

the courts. It is probable, however, that the attention of few of them has been directed to the various steps by which criminals are brought to justice, with special reference to their bearing upon the convenience of persons concerned as witnesses, and upon the amount of this branch of our national expenditure. We shall, therefore, describe such of them as directly affect the question before us; and, in doing so, we shall restrict ourselves to a description of what takes place generally, and shall not trouble our readers with an account of criminal law procedure in exceptional cases.

When a man is accused of a crime, he is taken before a magistrate, who hears the evidence against him, and then, according to circumstances, either dismisses the case, deals with it himself, or commits the prisoner for trial at some assizes or sessions which will shortly be held in the neighbourhood. When a prisoner is so committed, the evidence against him is taken down in writing; the written reports of their evidence are read over to the witnesses, and the papers are duly signed by them and by the committing magistrate, and are sent to the assizes or sessions at which the trial is to take place. These written reports of the evidence given on the committals of prisoners are called "depositions," and we shall have occasion to refer to them again. When the day has arrived on which the trials of prisoners at the Assizes or Sessions are to begin, the Grand Jury appear in Court and receive their charge, in which any cases likely to present difficulties are usually mentioned, and in which information and advice are given as to the proper method of dealing with them. At assizes, the charge is given by the judge who presides in the Crown Court; at county sessions, it is given by the chairman of the magistrates; and at city or borough sessions, by the Recorder. When the Grand Jury have been charged, they retire to the room set apart for their use, and begin to consider the Bills preferred against the prisoners who have been committed for trial at the assizes or sessions at which they are acting. It is their duty to examine the

Bill against each prisoner, and to determine whether there is a *primâ facie* case against him, which he should be called upon to answer. To enable them to do this, they have power to call and to examine the witnesses who are in readiness to give evidence in support of the charge.

The prisoners cannot be called upon to plead, until true Bills have been found against them; and the court is, therefore, obliged to wait until some Bills have been found before it can proceed with the trials. When a batch of true Bills has been brought into court by the Grand Jury, the prisoners against whom they have been found are arraigned; the charges against them are read over, and they are called upon to plead.

Those of them who plead guilty are, if they are old offenders, then called upon to plead to counts of the indictments which charge previous convictions. And if a prisoner, against whom this charge is made, deny that he has been previously convicted as alleged, the jury are sworn to try the question; the necessary documentary evidence of the conviction is produced, and a warder from the prison where he was confined pursuant to it, usually gives evidence of his identity, which is considered conclusive by them. When the pleas have been taken, those prisoners who have pleaded guilty are brought forward and sentenced; and the witnesses, who have held themselves in readiness to give evidence against them, are paid, and allowed to go to their homes.

The prisoners who have pleaded not guilty to the principal charges are then tried in their proper order; and those of them who are convicted, and against whom previous convictions are charged in the indictments, are then called upon to plead to the counts containing the charges in question. If any of them deny that they have been previously convicted, the question is tried, as in the case of those who took the same course after pleading guilty to the principal charges. As each prisoner is convicted, he is sentenced, and the witnesses against him are paid and allowed to go away.

We have now given a short account of the procedure in our Criminal Courts, which will be sufficient to enable our readers to understand the suggestions for its amendment which we wish to submit to them. It will be observed that the Grand Jury begin their deliberations on the first day of the Assizes or Sessions at which the prisoners, against whom they find true Bills, are to be tried; and that they have power to call and to examine witnesses.

It will also be observed, that when they have brought in a true Bill against any prisoner, he may be called upon to plead, and may be put upon his trial at once. As a general rule, Grand Juries only call some of the witnesses in support of each Bill before them; and, in cases in which true Bills are found, and the prisoners plead guilty to the charges against them, none of the witnesses are called; unless special circumstances make the presiding judge, recorder, or magistrate, desire to question them before passing sentence. Our present procedure, however, compels the persons in charge of prosecutions to bring all the witnesses, against each of the prisoners in the calendar, to the town at which the assizes or sessions are held, on the earliest day on which the Bills in support of which they may be called upon to appear can be taken up by the Grand Jury. It also obliges them to keep them there, and to have them in readiness to give evidence, from that time; till the cases in which they are concerned are finally disposed of. All these witnesses are paid so much a day during the time they are in attendance; and their travelling expenses, if any, are also repaid to them. The money thus disbursed is, in the first instance, paid by the county treasurers, in respect of witnesses appearing at assizes and county sessions; and by the city or borough treasurers, in respect of witnesses appearing at city and borough sessions. It is, however, ultimately repaid to these local treasurers by the Treasury, out of the Consolidated Fund.

It is clear that the procedure which we have described is both extravagantly wasteful of public money, and unneces-

sarily inconvenient to individuals who have the misfortune to be summoned as witnesses in criminal cases. Private citizens are brought away from their ordinary occupations, and are kept in forced idleness about our criminal courts, and, after being subjected to great inconvenience and loss, are frequently told that they are at liberty to go home, as their evidence will not be required, the prisoners against whom they were ready to appear having pleaded guilty. Warders of prisoners are often brought from distant parts of the country to be in readiness to give evidence as to previous convictions, which all persons, who are acquainted with proceedings in our criminal courts know perfectly well are generally admitted, almost as a matter of course, by the prisoners against whom they are charged. These public servants are brought to the towns where our assizes and sessions are held at great expense to the State. Its indirect loss occasioned by our present procedure is also considerable; for the warders in question are withdrawn from the discharge of their regular duties, and are sometimes kept loitering about our courts for two or three days. The mere fact that our present procedure compels persons in charge of prosecutions to bring witnesses against prisoners who plead *guilty*, as well as against those who plead *not guilty*, and are consequently tried, should be sufficient to cause us to review the administration of our Criminal Law, in order to see whether it may not be made more convenient to individuals, and less expensive to the State.

We shall now enter into the details of a proposed procedure under which the attendance of witnesses in the cases in which prisoners pleaded *guilty* would be, generally, unnecessary; while the efficiency of the administration of our Criminal Law would, at the same time, be increased. The power of Grand Juries to call and to examine witnesses in support of the Bills before them, and our practice of taking the pleas of criminals, *after* the commencement of the assizes or sessions at which they are to be tried, are the joint causes

of the expenditure of public money which we consider unnecessary and wasteful, and of the other evils which we desire to remedy. These, therefore, are the points to which we must direct our attention; and it is evident that if we would effect the saving contemplated, and remedy the evils in question, we must alter our practice with respect to Grand Juries and with respect to the time of taking pleas.

We must either abolish Grand Juries, or deprive them of the power of calling and examining witnesses.

And we must call upon our criminals to plead a day or two before the commencement of the assizes or sessions at which they are to be tried; and we must, then, summon those witnesses only whose attendance is absolutely necessary, namely, the witnesses against those prisoners who plead *not guilty*, and who consequently have to be tried. Can we make the changes indicated, without being unduly harsh to our criminals, and without weakening the efficiency of the administration of our Criminal Law? We think we can, and we think the necessary changes of procedure can be made easily.

We will first consider the change which should be made with respect to Grand Juries. The Grand Jury is a very ancient institution. Its primitive constitution is described in the laws of King Ethelred II.* (A.D. 978-1016); and, we believe, English gentlemen have periodically met together as Grand Jurymen from that time to the present. We will not hesitate to confess that we are in favour of the abolition of Grand Juries. We think it prudent, however, to make their abolition an alternative proposition; for we know that some people have great veneration for them, and consider them bulwarks of our liberties.

* "This is the ordinance which King Ethelred and his Witan ordained as 'frith-bot' for the whole nation, at Woodstock, in the land of the Mercians, according to the law of the English." III. cap. 8. . . . "And that a gemôt be held in every wapontake; and the xii. senior thegns go out, and the reeve with them, and swear on the relic which is given them in hand, that they will accuse no innocent man, nor conceal any guilty one."—*Thorpe's Ancient Laws and Institutes of the Anglo-Saxons.*

In days when our judges were creatures of the Crown, and jurymen were ignorant, and, in cases in which it was a party, were liable to be punished if they gave honest verdicts, Grand Juries were, no doubt, great safe-guards to the people. There was some chance that the collective wisdom and independence of the gentlemen who were summoned on them, would protect the liberty of the subject, and prevent the strong from oppressing the weak.

Grand Juries have, no doubt, done good service in the past, and we will not venture to say that they are absolutely useless now. We think, however, that they have ceased to be necessary; that they sometimes cause a failure of justice; and that they may be abolished without danger to the liberties of the people.

Our judges, recorders and chairmen of magistrates at Quarter Sessions, are no longer under the influence of the Crown; and though our judges still, nominally, sit as its representatives, in reality they sit as representatives of the Nation, to preside over the administration of justice on behalf of the people at large.

They carefully consider the evidence against each of the prisoners tried before them, and, if any case is not made out by the prosecution, they declare that there is no evidence to go to the jury, and direct an acquittal. If, therefore, Grand Juries were abolished, all the protection which is fairly due to prisoners who are innocent of the charges made against them, would be given by the judges, recorders, and chairmen of magistrates who preside at Assizes and Sessions. In such cases, they would direct acquittals and, since they would do this after all the evidence had been given in open court, we think justice would be less likely to fail than it is at present, when bills are thrown out by grand jurymen, who have not generally had any legal training, and who have not the same facilities for sifting the evidence adduced.

It is also worthy of consideration, that common jurymen are now better educated than grand jurymen were a few

centuries ago; and that our free and vigilant press, and our parliamentary government, make oppression, under cover of criminal proceedings, almost an impossibility. We think, therefore, that the services of Grand Juries might safely be dispensed with, and that their abolition would be advantageous to the State. If, however, the people will not submit to their abolition, we can retain them, and still effect the objects which we have in view.

We have seen that the only duty which they have to perform, with respect to prisoners, is to ascertain whether there are *primâ facie* cases against them, which they should be called upon to answer. It is clear, that all the information which is necessary to enable them to do this can generally be obtained by reading the depositions. Sometimes, however, additional evidence turns up after a prisoner has been committed for trial. In such cases, the additional evidence in question might be taken by a magistrate in the presence of the prisoner, and might be committed to writing, duly signed by the witness and by the magistrate who took it, and attached to the depositions. If this were done, Grand Juries would, in all cases, be able to obtain the information which they required, by reading the depositions and the additional evidence, if any, attached to them, together with any documents referred to. We are aware that depositions are not always taken as carefully as they ought to be. There is no reason, however, why they should not be carefully and accurately taken in all cases. We know that it is the duty of the officials concerned to do so, and we cannot admit the fact that a few of them discharge the duty in question in a careless and slovenly manner, as an argument of any weight against the change of procedure which we propose.

Moreover, short-hand writing has now been brought to such perfection, that any possible objection, based upon the inaccuracy of depositions, can easily be surmounted by providing that they shall contain verbatim reports of the evidence given on the committals of prisoners. This would

necessitate some simple changes of procedure before the committing magistrates, into the details of which we shall not enter here. It would also cause some extra expense. We do not, however, think this method of taking depositions would be at all necessary; but even if it were, we have no doubt that, after paying the extra expense in question, the State would still be a considerable gainer by the changes which we recommend.

We think, therefore, if Grand Juries are not abolished, they should be deprived of the power of calling and examining witnesses, and should be restricted to the consideration of the depositions and other documents, if any, which we have mentioned. In addition to the saving of public money which we contemplate, we think the change of procedure proposed would, in some cases, prevent a failure of justice. The depositions are taken when the facts sworn to by the witnesses are fresh in their memories, and before the friends of the prisoners have had time to tamper with them. Witnesses who have been tampered with sometimes try to twist their evidence in favour of prisoners, even when it is given in open Court, and is brought out by the questions of counsel whose intellects have been specially trained for the work. Such witnesses are much more likely to attempt to twist their evidence, and to succeed in giving false impressions, when they are examined in grand jury rooms, and have only the untrained intellects of grand jurymen to contend with.

Now, if we either abolish grand juries or restrict them to the consideration of the written evidence bearing upon the cases before them, we can easily avoid the necessity, which now exists, for summoning the witnesses against prisoners who plead *guilty*. In order to do this, we must appoint Commissioners, to receive the pleas of prisoners a day or two before the commencement of the Assizes or Sessions at which they are to be tried. If we abolish Grand Juries, the indictments must be made by virtue of the committals. And if the pleas of prisoners to be tried at Assizes be taken on the

Commission Day, there will be time enough to summon the witnesses whose attendance is required. If we retain them, they will have to be charged, and, we think, the Commissioners in question might either be allowed to give the charges themselves, or might read charges which had been written, after reviewing the depositions by the judges, recorders, or chairmen of magistrates, who would preside at the trials. These Commissioners should sit in open Court, and should cause the prisoners to be brought forward and called upon to plead to the principal charges. They should then sit with closed doors to take the pleas to the counts charging previous convictions. They should have power to advise prisoners to plead not guilty, and even to enter pleas of not guilty for them in cases seeming to be involved in doubt or difficulty; and in such cases they should record what they had done. All the pleas should be duly recorded, and the prisoners should be removed to await the day fixed for the trials. Prisoners appearing to be lunatic, or standing mute of malice when called upon to plead, should be remitted to be dealt with as they are at present. The witnesses against those prisoners who pleaded not guilty, or who did not plead before the Commissioners, for the reasons which we have mentioned, should receive notice to attend and give evidence at the trials of the prisoners, against whom they were required to appear. The witnesses against those prisoners who pleaded guilty should have no notice sent to them, unless the presiding judge, recorder, or magistrate desired to question them before passing sentence, when they should be summoned to appear at a particular time; and the fact of receiving no such notice or summons should discharge them from their obligation to be in readiness to give evidence.

At the commencement of the Assizes or Sessions to which they had been committed for trial, those prisoners who had pleaded guilty should be sentenced. Those who had not pleaded before the Commissioners should also be dealt with; and

those of them found to have stood mute of malice should be punished for their contumacy. The trials of the prisoners who had pleaded not guilty should then be proceeded with in regular order.

We have now laid before our readers our plan for cheapening the administration of our Criminal Law. We cannot tell them the sum which the nation would be likely to save by adopting it. The kindness of the gentlemen in charge of the records at Bolton and at the Salford Hundred Prison has, however, enabled us to collect some information bearing upon the subject. During ten years, ending July 29th, 1870, the total number of prisoners called upon to plead at sessions for the borough of Bolton was 1183. Of these, 459 pleaded guilty to the charges made against them; 492 pleaded not guilty, and were tried and convicted; and 232 pleaded not guilty, and were tried and acquitted. Our information respecting the pleas of prisoners at county sessions and at assizes is limited. We are able to state, however, how the prisoners pleaded at twelve sessions for the Hundred of Salford, held in the years 1869 and 1870, and also at six Manchester assizes, held during the same years. We can also tell our readers the number of prisoners, who either pleaded guilty or were convicted at these assizes and sessions, after having been previously convicted. At the twelve sessions in question the total number of prisoners called upon to plead was 718. Of these, 245 pleaded guilty to the charges made against them; 362 pleaded not guilty, and were tried and convicted; and 111 pleaded not guilty, and were tried and acquitted. Of those who either pleaded guilty or were convicted, 253 had been previously convicted, and they all pleaded guilty to the counts charging the previous convictions. At the six Manchester assizes which we have mentioned, the total number of prisoners called upon to plead was 382. Of these 79 pleaded guilty to the charges made against them; 217 pleaded not guilty, and were tried and convicted, and 86 pleaded not guilty, and were tried and acquitted.

Of those who either pleaded guilty or were convicted, 82 were charged with having been previously convicted; 79 of these pleaded guilty to the counts charging the previous convictions, and 3 pleaded not guilty to them, but were found by the juries who tried them to have been previously convicted as alleged. If complete statistics were collected, respecting the pleas of criminals to counts charging previous convictions, it would be found that such charges are almost invariably admitted by them.

We believe our judges, recorders, and chairmen of magistrates, will agree with us, that the prisoners who plead not guilty to these counts do not reach one per cent of the total number of prisoners against whom previous convictions are charged.

The statistics which we are able to put before our readers are not very recent. We merely use them, however, to show the average number of prisoners who plead guilty to the charges made against them at assizes and sessions; and, since there is no reason to suppose that the average practice of prisoners as to their pleas is variable, they are as valuable for the purpose for which alone we use them as they would have been if they had included the pleas of the last batch of prisoners arraigned.

Our readers are now in a position to form some estimate of the loss to the public, and of the inconvenience and loss to private individuals, occasioned by our present method of administering this branch of our Criminal law. They see, that a large proportion of the prisoners called upon to plead at Assizes and Sessions plead guilty to the principal charges against them; and that almost all of them plead guilty to the counts charging previous convictions.

And since we have shown how the attendance of witnesses against prisoners who take this course can be easily rendered unnecessary, we think we have made out a case for the amendment of our criminal law procedure which we have proposed. If it were so amended, both the State and indi-

viduals concerned as witnesses in criminal cases would be largely benefited, without occasioning any public inconvenience, or any injury to persons accused of crimes; who would merely be required to make up their minds as to their pleas a day or two earlier than they are called upon to do under our present procedure.

II.—THE BISHOPS AND THE LAW OF ADVOWSONS.

By EDMUND ROBERTSON, M.A., Fellow of C.C.C., Oxford, Barrister-at-Law.

THE future of the Church of England is rapidly becoming one of the great questions of the day. Our columns, of course, are entirely closed to the religious aspect of the question, and in calling attention to it now we have no intention of trespassing beyond the proper domain of legal and political discussion. Whether we like it or not, the public will continue to dispute about the distribution of ecclesiastical revenues, and it is therefore important to find out what are the popular conceptions of the nature of what is called Church property. Probably those who support the Establishment, and those who assail it, would find themselves in surprising unison on this point. The assailants would say that it is national property, and the defenders that it is ecclesiastical property, but both would probably maintain that it is not private property. To the one it is the inalienable patrimony of the Church, to the other the misappropriated wealth of the people. Both of these views are so thoroughly erroneous, both leave out of sight so completely the rights of private owners, that it cannot be quite

useless to call attention to the law and to the facts of the question. We do not propose to anticipate, for one moment, either that the Church is to be destroyed, or that it is to be reformed. But we think it mischievous that people should go on for ever urging projects of reform or destruction without adverting to the rights of property which, in one case or the other, may be affected by their schemes. We think it right that all parties should be notified that there exists, with reference to Church property, an interest which is separate from all of them, and which must be reckoned with at every step they take. The Church patron as such is not concerned with the maintenance, the reform, or the destruction of the Church. He cannot call upon the State to keep the Establishment on foot in order that his rights may be perpetuated, nor can he object to disestablishment except in so far as he has a claim to compensation for injury done to his property. He is simply a private owner who has no *locus standi* whatever with reference to Church Legislation, except in so far as his hereditaments may be injuriously affected thereby.

There are, we think, indications of a tendency on the part of members of the legislature to neglect these purely legal considerations. Last year a measure (the Scotch Patronage Act) was passed abolishing the rights of patrons, and awarding as compensation one year's value of the living at its next voidance. It was avowed by the ministers in charge of the Bill, that only the peculiar circumstances of the country made it possible—that it was not to be drawn into a precedent—that Church property was valueless in Scotland—and so on. We have nothing to do with the policy of such a measure, and we may be quite certain that private patrons are strong enough in both houses to resist the application of the same principle to themselves. The bishops, however, have been moving in a small way on the subject. They do not propose to abolish patronage indeed, but they wish to cut it down in several directions. The House of Lords is not quite

prepared to follow the Episcopal Bench in this matter, and possibly in another Session the Bishops' Patronage Bill may not get so far as it has gone this year. But the proposals of the Bishops seem likely enough to gain ground among certain sections of the people; and they are, in our opinion, a very serious invasion of the legal rights of private patrons. The Bill of this Session, as modified by the House of Lords, is comparatively harmless. It seeks to impose some restriction on the choice of patrons with respect to the age and character of the presentee—enlarges, in fact, the bishop's powers of veto. It invites members of the congregation to send, under privilege, to the Bishop, communications affecting the moral character of the person proposed for the living. It would abolish donatives, or rather make them, like other advowsons, subject to the control of the bishop. The sting has been taken out of the Bill, however, by the clause prohibiting the sale of 'next presentations' being suppressed. None the less, however, are the Bishops eager to carry this point, and we can easily understand that among adherents of the Church, and even among outsiders, their views would command a very considerable amount of support. The temper likely to be excited by such discussions is not the most favourable for cool consideration, and we hope that, before the debate begins, people will have learned something about its legal conditions. We, of course, say nothing about the desirability of their proposals, considered as measures of Church Reform. What we do maintain is, that the people who bring them forward are apt to neglect the legal rights of patronage, and that measures of confiscation—in the proper sense of the term—are discussed as calmly as if they had no incidence on property at all.

It is no new thing in English political history for the State, in the course of effecting changes in its own organization, to come into collision with the interests of private citizens. It might be said, indeed, that every new statute affects somebody injuriously, and so far necessitates a sacrifice of private

interests. We are now speaking, however, of those cases in which things belonging to private persons are deliberately taken away for reasons of public policy. There can, of course, be no law to regulate the conduct of the State in such cases, but in England there is a well-established practice of awarding compensation in money to the persons injured. There are two instances in particular where nobody would dream of disputing the practice. The first is the case in which the property of private persons is taken either immediately or through the intervention of an authorized body, by the State. The second is where what are called vested interests are concerned. If it is thought necessary to abolish an office, the person holding it is not simply dismissed as a servant no longer required, but receives a pension or a sum of money, or, at all events, something which is supposed to be an equivalent of the emoluments he has lost. Compensation for private property and vested interests goes hand in hand with every interference by the State with one or the other. It might be possible, doubtless, to show that the second principle at least is not carried out with perfect consistency in all cases, and that, while it is generously applied when the office is valuable, it is generally disregarded when the office is of small profit. However that may be, both principles are sufficiently well established for our purpose.

If an advowson is injured or destroyed by the action of the State—if, for example, the benefice is abolished, or the patron's choice hampered by restrictions which practically reduce the money value of his property—has the patron, according to our English practice, any right to demand compensation? We do not suppose that there can seriously be much doubt that he has. His vested interests are not, perhaps, capable of being calculated on the same principle as the emoluments of an office, for it is the theory of the law that the office of patron, as such, has no emoluments. But he is a holder of property in every sense of the word; and, if

his property is injured, is he not to be compensated like any other owner? Supposing the legislative power should see fit to abolish private patronage, or to disestablish the Church, the advowson, which might have been sold for £6,000 yesterday, is worth nothing to-day. Is the patron to have no compensation for this injury to his realty? We can shew, in a few words, how completely an advowson has acquired the character of property. But, indeed, to most people it would be conclusive to know that the law at present permits people to buy and sell such things—that the State itself, through its highest officer, actually sells them to private persons. No just Government would abolish a traffic (however mischievous it might be) which it had encouraged and even itself engaged in, without compensating the persons who had been induced thus to invest their money. We do not see that it makes much difference that the thing so dealt with is a public office.

We need not occupy ourselves with the history of this very remarkable kind of property. Sir Robert Phillimore's authority may be accepted as sufficient on this subject, and he finds the earliest trace of it in the privilege granted by the Council of Orange, in 441, to Bishops building churches in the dioceses of other Bishops. A Bishop, who built a church in another's diocese, was allowed to nominate the clerk, but not to consecrate the church. In the same way, when a great lord built a church, he was allowed, in acknowledgment of his benefaction, to present a clerk to the Bishop for ordination. This right of presentation descended in the founder's line, and ultimately hardened into the valuable form of property we now know it to be. English ecclesiastical lawyers apparently look upon it as, in origin and reason, very much the same thing as the right of visitation in the case of eleemosynary corporations. The visitor represents the pious founder, either by office (as in the case of the episcopal visitors of colleges) or by family descent, or by some other connection, and his duty is to see that the statutes made by the founder, for the proper govern-

ment of his corporation, are duly obeyed by the corporators. In the same way the patron of to-day represents the benefactor of many hundred years ago, and his right of nomination is simply an acknowledgment of the munificence which called the church into existence. In point of fact, however, there are essential differences between rights of patronage and rights of visitation. The former may, the latter may not, be transferred. The former is property, the latter is not. The latter is an onerous duty, the former is a valuable privilege.

An advowson may be defined as the right to appoint a qualified person to a vacant benefice in the Church. Strictly speaking, it is merely a right of presentation to the Bishop, but the veto of that officer so far as it exists at all can only be exercised in the exclusion of unqualified or disqualified persons. But in point of fact the patron has the right to put his nominee into the vacant office. Considered as a bare right to nominate a priest—a power of appointment in short—it is surprising to find how completely it has gathered round itself the incidents of real property. Blackstone, it will be remembered, classifies advowsons among what he calls "incorporeal hereditaments," meaning thereby a kind of property which he supposes to exist in the eye of the law only, as opposed to corporeal hereditaments which are cognisable by the senses—*e.g.*, land. An advowson may be appendant to a manor, or it may be in gross, and there are many ways of dealing with property which will turn an advowson appendant into an advowson in gross. A person may be tenant in fee simple of an advowson as well as of a piece of land; in which case he and his heirs have a perpetual right of presentation. He may have such an estate in an advowson as he may in any other real possession, whether created by common law or by statute. He may sell or mortgage his patronage, as he may his estate. He may be legal or equitable owner of the advowson, according to the circumstances under which it came into his hands.

Any conveyance that will pass real incorporeal property will pass an advowson. An advowson may be sold either for the inheritance, or for the next turn, or a number of turns, or for as many turns as shall happen in a limited number of years. Almost the only restriction on complete freedom of sale is the rule that an advowson cannot be sold while the living is vacant. There can be no grant of a void turn, except by the king. The void turn is "a thing in action and effect, an execution of the advowson, and not the advowson itself." So say the books. The void turn, in fact, is a *chattel*, and if a patron dies before presenting, it goes to his *executors*, and not to his heir, except in the case of a donative. The case in which the patron is himself the incumbent gives rise to qualifications which exhibit very curiously the legal view of advowsons. When the incumbent dies, being owner in fee of the advowson, the heir shall present to the vacant turn and not the executor. So, also, if a patron, being incumbent, devise his advowson, or the next avoidance, by will, it will be a good devise, although, of course, the will only takes effect after death, and after death, of course, the living is vacant. The law, however, holds that the will had an inception in his lifetime. It is, perhaps, useless to go through the legal incidents of this species of property at greater length. By Act of Parliament it is included in the term *real estate*. It may be entailed. It may be the subject of a joint tenancy, a tenancy in common or a coparcenary. A husband might hold his wife's advowson as tenant by the *curtesy*. It may be given in dower and sold in bankruptcy. It is real assets in the hands of the heir for payment of debts. It is protected by the process of *quare impedit*. It is, in short, property, in the strictest legal sense of the word. A writer on ecclesiastical law has indeed said that advowsons are "merely a trust vested in the hands of the patron for the good of the Church and Religion," but, however elevated may be the sentiment, and whatever justification may be found for it in

historical facts, we cannot admit that it has any meaning in law. The law, indeed, refuses to consider that the presentation itself is in any case to be regarded as a benefit to the patron, or as a thing which might be a benefit to anybody else. In accordance with this principle, the mortgagor and not the mortgagee, the bankrupt aud not the trustee, fills up a living which falls vacant during mortgage or bankruptcy. But this applies only to the individual act of filling up the vacancy. The right to fill up future vacancies is still untouched. The law, perhaps, is not very consistent on this point. It may seem absurd to hold that the right to exercise a power *in futuro* may be worth buying and selling, but that the actual exercise of the power can be worth nothing—that human beings are willing and eager to pay large sums for property, the use of which can never be of any pecuniary value to themselves. These reflections, however, lead outside our province, which, as we have already said, is strictly legal and political.

We have seen how the powers of a patron may be bought, sold, granted, devised, mortgaged, entailed, in fact dealt with in every way known to the Law of Real Property. It is not necessary to discuss these powers in detail, and we might perhaps rest content with the definition we have already given, viz., that an advowson is the right of presenting a qualified clerk to a vacant benefice. Some benefices are *donative* (*i.e.*, the intervention of the Bishop is unnecessary) and these, we understand, have a higher market value than those which are presentative. A Papist is disabled from presenting to a vacant living, but we are not aware that this disability has any influence on the market. It is easy to show, however, that such privileges or restrictions might very well affect the price of ecclesiastical property. For example, if a patron might present any person, whether a qualified clerk or not, the advowson would in all probability acquire a higher market value. On the other hand, if the disabilities of Papists were extended to a much larger section of the

community, we may presume that with the withdrawal of many persons willing to purchase, the market would be likely to fall. It must be conceded, we think, that for many possible changes in the organisation of the Church leading to a depreciation in the value of patronage as a property, the patron could have no claim for compensation whatever. It might suit the policy of the State, for example, to make such conditions as to the belief, the education, or the duties of a clergyman as to render the office much less generally desired than it is now. Supposing, let us say, that Roman Catholicism, or any faith obnoxious to the nation at large, were decreed to be the established religion of the State, a fall in the market value of advowsons would very probably take place, but the patron could have no claim for compensation. His right is simply that of nominating, out of a limited number of qualified persons, one to fill in a certain district, an office created, defined, limited, and regulated by the State, and to receive the profits attached thereto. The right to nominate to a profitable office is in fact what he buys and sells, and the State or the body through which the State acts, alters the duties of the office as it pleases, from time to time.

However this may be, it seems obvious that any change which limits the number of the patron's rights, must diminish their value in the market, and must, therefore, be a fair subject for compensation. Take, even, such a trifle as the Bishop of Peterborough's proposed limit to the age of presentees. If I may not put in a man over seventy years of age, my living is worth so much the less, inasmuch as the next voidance is the more distant. If I may not take a bond of resignation from an incumbent, whom I place in the living until my son shall be of age, the living is worth considerably less to me, or any purchaser from me, than it is now. If I may not sell a next presentation, I lose one of the most valuable privileges of my possession, for there are many men who would freely purchase a next presentation, and

would yet decline to take the whole inheritance. Every one of these proposals is a slice out of the patron's property, for his only property, in this connection, is the group of rights which go under the name of patronage. Every one of them, moreover, is likely to affect prejudicially, and some of them seriously to depreciate, the value of his heritage. It is no use to say, with the Bishop of Peterborough, that compensation is given for the loss of property and not for the loss of privileges. It is a complete answer to that assertion (even if it were founded on ascertained practice) that patronage is property, and is, at the same time, merely a bundle of such privileges as we have mentioned. The privileges may be mischievous or otherwise; with that question we do not meddle. But there they are, and every day they are bought and sold and treated as property in every diocese in England. If you take one of them away you must pay for it just as you would if you had, for some public convenience, to diminish the privileges which an owner of land has with reference to his own estate.

Let it not be supposed that this is a merely theoretical question, or one not likely to be of much practical importance. The number of livings in private hands in England is prodigious. There are between seven and eight thousand benefices belonging to individuals alone, and to these must be added a thousand more belonging to lay corporations like the colleges of Oxford and Cambridge. The only livings which cannot be regarded as private are those held by Bishops and Ecclesiastical Corporations, or by State officers like the Lord Chancellor. They might all be dealt with in any way we please without the holder of the office having a claim for compensation. It might be thought at first sight that the patronage of the Universities and Colleges is of the same character, and the precedent of the Scotch Act would certainly justify that way of looking at them. We cannot, however, recognise any difference between academical and other lay patronage. It is held under no trust, is purchased

with corporation money, or sold just as any other real property might be. When a college sells a farm and buys a living, the living is as much the private property of the corporation as the farm would be. Including, therefore, the patronage of academical societies, we have probably not far off nine thousand private advowsons, all fully under the scope of the Bishop of Peterborough's Bill. We cannot wonder that there should be strenuous opposition even to changes admittedly beneficial, when they affect property of this enormous amount. We have no right to do good to the nation, or any section of it, at the private cost of individuals. Before the Bishops can purify the system of Patronage in any marked degree, they must look about for some means of compensating the persons who have a legal and vendible interest in what they regard as abuses.

III.—GREEK AND ROMAN JURISPRUDENCE IN RELATION TO SLAVERY.

By S. T. Taylor-Taswell, M.A., Christ Church, Oxford.

NOT one of the least interesting aspects of the study of Jurisprudence is its relation to the Institution of Slavery, an institution which, in the old days of Greece and Rome, held so prominent a position among the elements of society, which, to within a few years, disfigured modern civilization in one of the most enlightened of Republics, and which in contemporary events brings to our shores a representative of the Arabian race to ratify its final suppression on the East Coast of Africa.

Slavery in ancient times formed the basis of society, and, as a learned member of the French Institute has remarked, without it it is impossible to imagine that the Republics of

antiquity could have had any existence. In the pages of Homer it appears as an ancient fact, consecrated by tradition and supported by custom; and that which was an heritage to the Greeks and Romans by the way of tradition and custom, was perpetuated by them to the latest periods of their national history. At the dates of the Invasion of the Barbarians, and of the Latin Conquest of Constantinople in the thirteenth century, slavery still existed. An Institution of such long duration, and which, whatever may have been its beginning, became ultimately of the greatest importance, could not fail, in the course of its development, to attract or demand the attention of both legislator and jurist. And accordingly we find in the pages of the Digest, the Institutes, the Constitutions of the Roman emperors, and in the Greek Legislation, both under Solon and in the Athenian Code, the position of the slave defined, as well in his relation to the individual free citizen as to society.

As a preliminary remark, we may observe, that in both the Greek and Roman legal systems the slave always appears at a disadvantage. Wide distinctions are made between him and the freeman, and when rights are conceded the concession is made with reluctance, and corresponds to the hesitation with which new ideas were allowed to modify or uproot original prejudices. The reason of this is that law, to a large extent, is the reflexion of the opinion of society, and of that opinion modified by philosophy. Now, both society and philosophy looked upon the slave with contempt. At the same time, however, that philosophy and law were regarding the slave as an animated working tool or possession,* and as a thing and property *(res, mancipium)*, nature was asserting her rights on behalf of a depressed, despoiled, and contemned humanity, and demanding a recognition of her claims. This conflict between the conventional opinion of society on the one hand, and of nature on the other, may be

* Arist. Eth. viii., 13. Pol i., 1.

held as an explanation of the contradictory position which the slave holds in the ancient systems of law. The famous *Law of Nature* also, as formulated by the later Stoics, exercised a marked influence on the jurists of the Antonine period, and through them on the civil law of Rome. The ancient severity of the law became relaxed, and the liberal tendency which set in was further developed by the more enlightened principles of Christianity.

I.—Early Legal Position of the Slave.

To the civilization of our nineteenth century the position which the slave held in the laws of Greece and Rome appears as one of great if not unexampled severity and harshness. Compared with the freeman and citizen he was debarred from all rights both personal and civil. Theoretically he was outside of the consideration of law, except so far as his master's interest called for its interference, when he was invested with a *quasi*-legal existence. In only one instance do we find his own individuality acknowledged, and that was to his disadvantage, when, having offended against society by the commission of a crime, he passed from the jurisdiction of the family to answer for murder before the public tribunals. The principle on which the organization of the primitive family was based, of the subordination of all its members to the chief, placed the slave entirely at the mercy of his master, who exercised over him, as over the sons of the family, the right of life and death *(jus vitæ necisque)*. Within the sacred precincts of the family the law did not intrude, except when society and the interests of society were outraged by an infraction of the laws which were the basis of its security, its coherence, and its order. This was the principle which obtained at Rome. In Greece there was not this absolute exclusiveness, and the power of the master was not so supreme and unlimited that he could arbitrarily put his slave to death. The intervention of the law was necessary. "But among you," says Hecuba, in her

impassioned reply to Ulysses, "law lies openly impartially both to the free and slaves, concerning blood."* This is but the poetic expression of an accepted principle and rule of law which we encounter again in an extant oration of Antiphon (B.C. 480—cir. B.C. 411.), the most ancient of the ten orators in the Alexandrine Canon.† If this appeal to the judicial powers were ignored, the master was liable to exile or to the pains of religious expiation. In other respects the kurial and dominical power for the maintenance of domestic discipline were identical. Each possessed the right of inflicting corporal punishment, of loading the slave with irons, of placing him in confinement, or imprinting his forehead with marks *(stigmata)* in the case of flight, and thus rendering his identification easy in the event of a repetition of the offence.‡

In the estimation of the law the slave was a thing, a property, and subject to all the conditions of property. He could be sold, exchanged, given gratuitously in full proprietorship or in usufruct, let out to hire, lent, transferred, acquired by prescription, devised or bequeathed, given in pledge, seized for debt, or abandoned. The word *mancipium*, applied to him in Roman law, seems to refer to his forming the highest form of Quiritary property. Over property of this description the master's power was supreme and absolute. In respect to the property which custom and humanity at times allowed the slave to accumulate, the master's power was both sacred and entire.

From the point of view in which the slave was regarded other consequences followed, corresponding to the two

* Eurip. Hecub. 290, 291.

† Antiphon, de cæde Herod. §. 48. Apud Telfy, Corpus Juris Attici, 1133. p. 285.

‡ Pignorius, in his Treatise "De Servis," gives the forms of stigmata and notæ in use among the Greeks and Romans. They consisted of three circles one above the other varying in size, the smallest being at the bottom. Within these ran the inscription, e.g., *Tene me quia fugi, et revoca me domino meo Bonifatio Lunario.*

divisions which obtained in the Greek and Roman systems, viz. public and private law. He had neither personal nor civil rights. Marriage, with its civil sanctions and moral obligations, was reserved for the freeman. We find that the word γάμος was never employed by the Greek writers to express the union of slaves, and Reitemeier remarks that Xenophon of Ephesus does not once use the term when speaking of the union of Leukon and Rhoda. But though the slave was cut off from a legal marriage, the cohabitation of slaves had been permitted from the earliest times. In the heroic age Homer informs us that masters rewarded the fidelity of slaves by giving them a companion.* This was what Eumaios and Melanthios looked for at the hands of Ulysses. In the Digest,† the word *uxor* is applied only by way of explanation to the slave's companion, but the more general terms in use were *contubernalis*, as one who lived with him, or *concubina*, the sharer of his bed. The name for the union of slaves among the Romans was *contubernium*. It was permitted by a law of Solon, approved of by Xenophon,‡ and recorded by Plautus, who, in the language of satire, states that upon these matrimonial ceremonies more care was expended than on the marriages of free persons.§ But in every case the master's consent was necessary, as we may learn from an Athenian law, which forbade house-slaves to beget children without it.‖ The union was dissolvable at will, at the caprice of the slave, or at the interest of the master, and the infraction of the tie did not constitute adultery.** It created no relationship between parent and children.††

* Odyss: xiv., 62—68. *Ibid*, xxi., 214—217.

† "*Contubernales servorum id est uxores.*" D. xxxiii., 7—19.

‡ "Xen. Œcon," ix. c. 5. § "Plautus, Cas. prol. 68—79.

‖ See "Telfy. Corp. Jur. Att." 1468, p. 378.

** In the emendation of the *Lex Aquilia*, Diocletian says, "*Servi ob violatum contubernium (suum) adulterii nomine accusari non possunt.*" C. J. *q. q. ad leg. Juliam de adulter.*

†† "*Sed ad leges serviles cognationes non pertinent.*" D. xxxviii. *de grad. et affin.*

The same principle operated with regard to property. The slave, in strict law, possessed no proprietary right, and all he acquired he acquired for his master. Custom caused some relaxation of this law, as has been mentioned previously, probably based on economical reasons, and the slave was sometimes allowed to share in the profits of agriculture, or in those which arose from other sources. This at Rome was called the *peculium*, but the Greeks had no corresponding word to express this kind of *quasi* property. As we learn from Papinian, its existence depended on the sole will of the master. The slave was only allowed the usufruct, and was at liberty to employ it on the purchase of a slave for himself or on anything else which his fancy might suggest. Another point indicative of the master's control over it was that it was not attached to the slave's person, and that when the slave passed from the possession of one master to another it did not go with him.

Such was the slave's incapacity with respect to personal rights. The same principle regulated his position as to civil rights. He was cut off from all civil rights and privileges which the citizen enjoyed, guarded with such jealousy, and so tenaciously retained. As Dion Chrysostom relates, the slave had no share in the administration of the State.* Equally at Rome he had no civil existence, as is evidenced by the dictum of the jurists, "*Servile caput nullum habet jus.*"† He could not be subject to an obligation.‡ At first sight there appears little distinction in the position which the slave and the *filius familias* occupied in the family organization, but the slave, unlike the son, could not undergo any diminution of status, for the simple and obvious reason that he had none. Beside this there was a tendency in the Roman law to assimilate him to cattle and to inanimate

* See Telfy, Corp. Jur. Att. p. 18.

† L. 53 Paul.

‡ *In personam servilem nulla cadit obligatio.* D. L. 17, *de divers. regul. juris.*

things, and, if a person, he was looked upon as a dead person. When he appears before the tribunals we find little amelioration of his condition. He was deemed incapable of taking an oath. If his evidence were required it was always extracted by torture, from which it was considered to derive a fictitious value. Torture was more common among the Greeks than the Romans, and the eulogies of their orators and jurists invested it with a species of sanction. Among the Romans its use became more frequent towards the close of the Republic. The slave thus appeared before the tribunals without any of those guarantees which were afforded to the freeman. In Greece the judicial investigation into his crimes was carried on by the magistrates, and at Rome by the *triumviri capitales*, from whose decision there was no appeal. The distinction between slave and freeman was carried out even in the mode of punishment, for while the latter was thrown from a precipice or beheaded, the former was crucified. In ordinary cases the delicts of the slave were visited on his body, while the freeman was safe from the rods. Witness the case of St Paul.

This tendency to look upon the slave as cattle or inanimate property, and so to deprive him of all personal and civil rights, was counteracted by the theory of the law of nature, a Stoic doctrine which found general acceptance among the Roman jurists.

In the Institutes the slave is treated of under the title *de Personis*. He was sometimes classified with things, sometimes with persons. Slavery was the one point in which the Roman jurists found the *jus gentium* irreconcileable with the *jus naturale*, and hence the confusion and contradiction apparent in their classification of the slave. "The Roman Law," says Sir Henry Maine, "was arrested in its tendency to look upon him more and more as an article of property by the theory of the Law of Nature, and wherever servitude has been sanctioned by institutions which have been deeply

affected by Roman jurisprudence, the servile condition has never been intolerably wretched."* The influence of the Stoic theory on the Roman jurists is also observable in the definition which they give of slavery as an institution of the law of nations, but *contra naturam*.† The fundamental doctrine of this school was that all men are equal by nature, *omnes homines naturâ æquales sunt*. It further inculcated complete resistance to passion. It is to the prevalence of these views that we must attribute the movement for recognizing in the slave, however degraded, the germ of humanity, his capacity to acquire a *persona* of his own, wherever the State saw fit to allow it, and the few guarantees with which he was subsequently invested.

Still, without his master the slave was nothing. His *persona* he acquired in virtue of a capacity derived from his master; his master's power was like a latent force that seized upon all his acquisitions, and while the slave took part in all the strife, the contests, the movement, and the affairs of legal life in the *agora* and the *forum*, the master, as it has been well expressed, took all the profits, just as the general all the glory and triumph of the victory won by his lieutenants.

The interest of the master was almost the sole thing which the law kept in view. The master, to exculpate himself, had the option of submitting his slave to the torture. The *persona* with which the slave was invested enlarged the master's capacity and area of action, wherever his word was requisite for the completion of a stipulation, or he supplied some physical defect. The master, to preserve his own good name, could impose on him a duty which would be repudiated by every free man, and could institute him heir of his debts, under the title of *hæres necessarius*, and could also make him tutor of his children. The slave acquired freedom in

* Ancient Law, p. 166.

† "Servitus est constitutio juris gentium, quâ quis dominio alieno *contra naturam* subjicitur." D. 1. 5. 4; Inst: 1. 3. 2.

this manner, but the freedom he acquired does not invalidate the general proposition of the slave's incapacity, it only shows that he was not degraded to the level of inanimate property, and that there was some improvement in his condition. The master could also through him acquire the benefits of *usucapio* and *possessio longi-temporis*, and indeed, proprietorship and possession. To render the master secure in his interest a general rule was laid down as to the obligations which the slave could enter into on his account. It was as follows. The slave could enter into an obligation for his master's profit, but he could not do so for his master's loss without express authorisation to that effect. The same principle of the master's interest being kept in view was also observed with regard to noxal actions. The master was liable for any culpable act of his slave, only if done with his knowledge, acquiescence, or collusion, but a right of action was given to the master wherever he had suffered damage in the person of his slave.

It is now necessary to speak of the guarantees which were accorded to the slave for protection against the ill-treatment or violence of strangers. They show also that a certain personality was recognized in the slave, but the remark previously made still holds good that it is the master's interest which is in reality being observed. The slave's individuality was absorbed in that of the master; he was, in the language of Aristotle, a part of his master. The master's power may be likened to a larger circle drawn round the slave, within which the smaller circle of the slave's individuality was included. The law for the slave was severe in Greece and Rome, but doubtless, the legal relations of master and slave were modified by local circumstances, and by the spirit of humanity. In one point we observe a distinction between their respective systems indicative of their main characteristics. While, as before observed, at Rome, the law abstained from intruding, except under peculiar circumstances, into the domain of the family, and

left the slave to the unrestrained cruelty of his master, in Greece an asylum was afforded him in the sacred precincts of the temple of the Eumenides, or of Theseus, to which he might fly and claim to be sold to another master on proving the charge of cruelty. A similar protection, based on the Grecian practice, was at a later period offered to the slave in the Roman Empire, when he appealed to the supreme dispensing power by flight to the statues of the Emperors. But this is stated by way of anticipation, and not as supporting the contrast which is attempted to be drawn between what at all times prevailed in Greece, and a custom which only at a comparatively late period found acceptance in Rome. He was also provided with other guarantees. A law of Solon protected the Greeks lave against outrage, insult, ravishment, rape, and the like.* Any Athenian then who liked could bring the matter before the *Thesmothetæ*, i.e. the six junior *archons*, who adjudicated on causes assigned to no special court. The Roman master's power was supreme and absolute, and was of the same kind as that which he exercised over all other property, the *jus utendi abutendi*. If a comparison were instituted between the two systems as to their comparative severity, the judgment would have to be given in favour of that of Greece. The exit from slavery in both was by manumission, but of the majority of those who became slaves in Greece the same words might be uttered which Dante records as written over the vestibule of Hell, *Lasciate ogni speranza, voi ch' entrate.*

II.—Antonine Jurisprudence.

From this review of the principal legal features of the early Greek and Roman systems of jurisprudence in relation to slavery, we pass to a consideration of those ameliorations of the servile condition, which were introduced during the period of the Antonines, and which we shall delineate with

* See Telfy, Corp. Jur. Attic: 1158.

greater fulness. These were due to the progress which the Stoic philosophy made among the Roman jurists after the subjugation of Greece. "Some of the earliest names," says Sir Henry Maine, "in the series of renowned juris-consults, are associated with Stoicism." "The juris-consults of the Antonine period laid down the axiom, *omnes homines naturâ æquales sunt*. They intended to affirm that under the hypothetical Law of Nature, and in so far as positive law approximates to it, the arbitrary distinctions which the Roman Civil Law maintained between classes of persons cease to have a legal existence." *

The importance of this axiom consists in this, that wherever Roman jurisprudence conformed itself to the law of nature, there was no difference in the eye of the Roman tribunals between freeman and slave. The opinions of Lecky and Troplong coincide in acknowledging the influence which the Stoic doctrines had upon Roman legislation on the subject of slavery.† Another influence, that of Christianity, was also beginning to work on society and on legal opinion,‡ and under these two forces of philosophy and religion, the principles of the ancient law were sifted, and its asperities softened. The work of modification consisted principally in placing a restraint on the sources of slavery, in giving greater extention to those personal rights, the beginnings of which had been conceded, in allowing the slave to possess a *peculium*, and to contract a sort of matrimonial alliance, and lastly in facilitating and simplifying the modes of manumission.

* "Ancient Law," pp. 55, 92.

† Lecky, "Hist. of European Morals," vol. i. p. 65. Troplong, "De l'influence du Christianisme sur le Droit Civil des Romains," pt. i. c. 4, pp. 54, 55, et seqq.

‡ Troplong asks, in the same work, whether the *Lex Petronia*, which forbade masters to give their slaves to combat with the beasts, was not due to the combined influence of Stoic and Christian ideas. The *Lex Petronia* was passed in the reign of Nero, though Hugo ("Hist. du droit Romain," sec. 296) and Haubold, refer it to Augustus.

With respect to the sources of slavery, we are informed by the Jurists that slaves were either born or became so. "*Servi autem aut nascuntur aut fiunt.*" * The principle of law regulating birth both in Greece and Rome was that the offspring followed the condition of the mother. Among the Roman jurists, in order to decide the child's freedom or servitude, the whole period of gestation was taken in view, and if at any period between conception and parturition, the mother had been for an instant free, the infant was declared free-born.† On the authority of Pliny, we are informed that a law of Trajan declared all infants free, with full rights, who had been exposed.‡ Diocletian forbade children to be given in pledge, and protected the insolvent debtor. Addiction, however, as Grote observes, continued throughout the Pagan period of the Empire in the West, and even down to the time of Justinian in the Eastern Empire.‖ Solon had passed a similar measure with respect to females.** The rights of war were, however, always maintained.

The rigour of the ancient law had excluded slaves from personal rights. Some extension was now made as to the *peculium*. The initiative was taken by the State, which allowed public slaves to dispose of half their goods.†† The *peculium* belonged to the master, but when the slave was the property of several masters, he was allowed to take the purchase money of his liberty from it. The value of this concession consists in the recognition of the slave's capacity to deal with his *peculium* in a more extended way than had previously been the case. A new spirit also was observable in the laws regulating family relations. The affection of

* Inst. I. 3.4.

† Cf. Gibbon, Vol. v. c. 44, p. 290.

‡ Plin. Ep. 10, 72.

‖ Grote, Hist. of Greece, vol. iii., p. 211.

** *Ibid.* iii. 185.

†† Ulpian's Fragm., 20-16. "Servus publicus populi Romani partis dimidiæ testamenti faciendi habet jus."

slaves was taken into account, and a family was not allowed to be separated.*

A restraint was also put upon the dominical power. The pages of the history of slavery are stained with the record of the heartless cruelty of the masters, of an Aurelian, of a Macrinus, who obtained the soubriquet of Macellinus, because the floors of the Imperial palace were stained with the blood of his *vernulæ;* † of a Pollio, who caused his slaves to be thrown to the enormous eels he kept in his fish-pond; of a Flamininus,‡ who put one of his slaves to death to show a boon companion how he could kill a man; of a Roman matron, who evoked the indignant reproaches of Juvenal for having crucified a slave from mere caprice.§

Limits were placed on this unbounded and tyrannical power. The power of life and death was abolished by Hadrian, who forbade masters to put their slaves to death, and required a more responsible agency for their condemnation.** "The licence," says Lecky,†† "which the decision of the great Roman jurist might give to the punishment of slaves, in stating that homicide implies an intention to kill, and that the master was not guilty of the death of his slave, unless it could be proved he had the intention, was restrained by strict laws, which forbade excessive punishment, abolished private prisons *(ergastula)*, and appointed special officers to receive their complaints." ‡‡

* L. 35. (Ulp.) † Seneca de Ira, iii. 40, de Clementia I., 18.

‡ Plutarch, Life of T. Flamininus, xxxv.

§ "Pone crucem servo!" Meruit quo crimine servus
Supplicium? Quis testis adest? Quis detulit? Audi;
Nulla unquam de morte hominis cunctatio longa est.—
"O demens! ità servus homo! Nil fecerit esto.
Sic volo, sic jubeo, sit pro ratione voluntas."—Juvenal, vi. 219.

** "Servos a dominis occidi vetuit; eosque jussit damnari, si digni essent," Spart. Adv. 18.

†† "Hist. of European Morals," vol. i. 65.

‡‡ Seneca states that, in the time of Nero, the præfectus urbi at Rome, and the governor in the provinces, were commissioned to hear the complaints of slaves against their masters. Senec. De Benefic. iii. 22.

In the spirit of Athenian legislation, the right of sanctuary was granted by Antoninus, who ordered the sale of any slave who fled to the statues of the Emperors for protection, if the cruelty of the masters were proved, after investigation, to be excessive. Hadrian forbade the sale of slaves for the gladiatorial combats without recourse to the magistrates, and Marcus Aurelius passed a similar measure respecting their sale for the contests with the beasts.*

The only modifications we find when the slave appeared before the tribunals, are that he did not, when once made *servus pœnæ*, fall again into his former master's power. The pardon of the Emperor was considered to have enfranchised him. Some limitations were also placed upon the use of torture. Augustus had not considered it as a means to be relied upon in arriving at the truth, and Hadrian forbade it except in extreme cases. But while the area of torture was limited in one way it was extended in another, and in political offences, as in treason, no exception was made as to age or sex.

But the altered spirit of legislation was most conspicuous in the laws affecting manumission. "Ancient forms of manumission," says Wallon, in his History of Slavery, "received greater facilities, new forms were invented, obstacles were smoothed down, doubts dissipated, difficulties resolved in a sense more favourable to the liberation of the slave." We may remark, in passing, that manumission was more frequent at Rome than in Greece. In both countries it was effected either by purchase or gratuitously. The other exit from slavery was by death, and Bossier has shewn how the preoccupation of death entered into the slave's thoughts. The modes of manumission at Athens and Rome were in some respects similar. The slave became free at Athens by his name being inscribed on the register, and at Rome by

* 'Servo, sine judicio ad bestias dato, pœna verum et qui comparavit, tenebitur.' D. 18. 1. de contrah. emptione.

his name appearing in the census list. Both at Athens and Rome freedom could be given by testament. The declaration of the slave's liberation had to be made publicly and proclaimed. As appears from epigraphic discoveries in Thessaly inscription on a monument conferred freedom. A Roman master could also make his slave free by writing to that effect to him *(per epistolam)*, or by making the declaration before his friends *(inter amicos)*. But there was one form peculiar to Greece, that of sale or donation to a deity. The master advanced with the slave whom he wished to enfranchise to the entrance of the temple, and there, in presence of witnesses chosen from among the citizens, in front of the sanctuary, at the further end of which were the statues of the Three Fates, and the entrance of the mysterious oracle, he solemnly sold him to the priest of Apollo.* This recalls at a later period a law of Constantine which allowed the faithful to manumit their slaves on solemn festivals, in the presence of the people and of the priests.† In the Christian form, however, no money passed hands, nor was it attended by severe restrictions, or onerous obligations. Christianity, in imitating the example of the ancient religion, transformed it.

One instance will be sufficient to illustrate the facilities which the Imperial legislation afforded as to testamentary bequests of liberty. Conformably to the practice of the old law, if the instituted heir did not enter upon the inheritance, the testament became inoperative, and as a consequence, all bequests of liberty fell through. To remedy this defect the Jurists allowed another to take the heir's place, and in this way give effect to the slave's enfranchisement. If this failed the *Fiscus* came to the relief, and Marcus Aurelius further permitted an adjudication of the goods, when all enfranchised directly, or by *fideicommissa*, became free. At

* M. Foucart, "Mémoire sur l'affranchissement des esclaves d'après les inscriptions de Delphes."

† Cod. Theod. iv. 7, 1.

the same time we must not lose sight of the restraints which were placed upon the unlimited exercise of the right of testamentary bequests of liberty. The *Lex Ælia Sentia*, passed A.D. 4, forbade the enfranchisement of slaves under thirty years of age. When they were under this age the manumission was void unless the old form of the *vindicta* had been employed. The *Lex Fusia Caninia* passed four years later (A.D. 8.) put a limit on manumission by testament, made by wealthy Romans for the empty vanity of swelling their funeral train with freedmen wearing the cap of liberty.* It is necessary also to observe that enfranchisement, made either by the State or by private individuals, did not entirely and completely free the slave. Its effect was to bring him into a set of entirely new relations to his former master. In Greece, the full rights of citizenship would not ordinarily be acquired till the second generation, but if a wealthy freedman wished to obtain them, he had to submit to severe and onerous public duties. Enfranchisements made by the State, however, had some advantages over those made by private individuals, and on important occasions, the people, in virtue of their sovereign power, sometimes added political rights to the gift of freedom. This was the case with those who had fought at Arginusæ and Cheronea, and those who acquired political and personal freedom in this way were distinguished by the name of Platæans. At Rome the way to civil freedom was more open. The *legitima manumissio* by *vindicta* and *testamentum* conferred full citizenship, but sometimes, when the forms were less complete, freedmen *(liberti)* were admitted to a mean position between freemen and slaves, and became, under the *Lex Julia Norbana, Latini Juniani*, or under the *Lex Ælia Sentia, Dediticii.*† The former might marry and trade with the Romans on the footing of Roman citizens, but could not vote at elections, nor fill public offices.

* Instit. i. 7.

† Instit. i. 5, 3.

The latter only enjoyed personal liberty. In Greece, the freedman could remove the marks of servitude by allowing his hair to grow; he could adopt a noble name, and was, after a custom which obtained at Athens and in the Ægina, even admitted to succeed to the rights of husbands and other privileges. But, notwithstanding these privileges, which his changed condition conferred upon him, he was still subject to duties to his former master, some of which were fixed, and others regulated by express stipulations made at the date of enfranchisement. The *metic* was subject to the regular annual impost of twelve drachmas, and other charges on being allowed to settle at Athens.* But the freedman of a private individual was bound to do all the *metic* was liable to, in addition to what he had stipulated himself. The difference between the *metic* and the freedman was, that the former could choose a patron for himself from among the citizens, while the latter had one chosen for him. The form of sale to a deity, being a species of religious consecration (ἀνάθεσις), rendered the *hierodoulos* free from any obligation or promise he had made at the time of enfranchisement, if he felt indisposed to carry it out. A guarantee was furnished to the ordinary freedman against the unjust demands of his patron, as he could add a kind of surrogated tutor to watch over his interest, in addition to his legal tutor. At Rome, also, certain privileges were accorded to the freedman. He was protected from all the consequences of his former servile condition; thus, he could not be prosecuted for a debt contracted while he was a slave. But, like the Greek freedman, he was under obligations to his patron. In the way in which the law dealt with the excessive demands of patrons, we see the new influences which were at work in the direction of liberty. The law forbade what were termed, "leonine" institutions as tending to place the freedman at the mercy of the patron, by keeping him in

* The *Metic* was a permanent resident alien at Athens, and in other Greek States.

a state of chronic insolvency. The prætor defined promises of days of labour with the utmost precision, he laid down the limits within which they could be exacted, and when these obligations were allowed, a restraint was placed upon them, corresponding to their nature; *operæ fabriles* were transferable, while *operæ officiales*, being of a personal nature, could only be exacted by the patron and his sons. The nature of the works, again, was to be in conformity with the age, dignity, health, wants, and intentions of the parties concerned. In respect of the general obligations imposed by law, there was a reciprocal right of support between patron and freedman. The patron could not demand it unjustly, but if he refused it to his freedman he lost the right of patronage.

Still the laws of Greece and Rome kept a watchful eye over the interests of the patron, the effect of which was to keep the freedman in a state of subordination and control. The crime of ingratitude was punished severely. In Greece the freedman was liable to the action for desertion *αποστασίου δίκη*.* If convicted, he was relegated to slavery, could be sold, or loaded with irons. If he were acquitted by the *polemarch*, the patron lost all the rights of which he had made a bad use.† At Rome, ingratitude to a patron was looked on as a species of high treason. The punishment for it varied between the reigns of Hadrian and Justinian. The gradations in punishment which had been allowed by Commodus, were removed by Constantine, who decreed loss of liberty without any intermediate steps.

The amelioration in the legal position of the slave, which had been effected during the Antonine period under the combined influence of Stoic and Christian ideas, was further extended by the establishment of Christianity in the reign of Constantine. Its influence had been operating since the days of Tiberius, but what we have to observe is, that Con-

* Telfy, Corp. Jur., Attic., 1172. Demosth, 790, 2; 940,15.
† Petit, Lois Attiques, ii. vi. 9, 10.

stantine distinctly places his *point d'appui* in Christianity, and that the measures afterwards passed are referred to as the outcome of a religious sentiment. To Constantine, manumission appears as the result of this feeling. In connection with it he uses the words *religiosa mente*. He suppressed the usage of marking the foreheads of convict slaves, "so as not to mar the visage made in the likeness of Divine beauty." Alexis Comnenus, in 1095, in reviewing the measures which conceded to freemen and slaves alike the nuptial benediction, invoked the grand principle of the Church, *Unus Deus, una Fides, unum Baptisma.*

Stoic philosophy had to some extent prepared the way for the influence of Christianity. Stoicism recalled the Roman mind from indifference, it enlisted in its service, in an age of general profligacy both among the wealthier and poorer classes, whatever remnants were yet to be found of that noble, dignified, and simple character, which had founded and strengthened the Republic, and formed the basis of the extension and consolidation of the Empire. Christianity, with greater effect, continued the work which Stoicism had begun. Marcus Aurelius had recognized the reciprocal duties of man to man, and had adorned his palace with the golden rule of the Founder of Christianity. Seneca saw in all men a common parentage which came near the universal fraternity preached by the disciples of Christ. He vindicated with an ardent philanthropy the rights of humanity in the slave, sprung from the same origin as his master, subject in the body, but free in the spirit. In perusing these doctrines to which he gives utterance, we are insensibly reminded of the sentiments of St. Paul. But while Christianity took up the work of Stoicism, it strengthened it with higher sanctions by associating morality with religion. We are guarded against the error of supposing that Christianity wrought an instantaneous and complete reform in legislation, by the intervals which elapsed between the different measures affecting slavery, by the opposition

they encountered, by their retrograde character in some instances, and further by the existence of slavery down to the last days of the Lower Empire. Lecky remarks that no great advance was made in legislation on slavery for two hundred years from the conversion of Constantine.* Some even of that Emperor's measures have a retrograde character, and the same remark applies to the legislation of Leo the Philosopher. Lastly, some points were left untouched by Justinian. Still the influence of Christianity was considerable. It achieved a great success by opening a wider gate to enfranchisement, and by providing fresh guarantees for the slave.

III.—Byzantine Legislation.

During the period from the foundation of Constantinople to the close of the Byzantine Empire there are three reigns, those of Constantine, Justinian, and Leo the Philosopher, the legislation of which may be considered as typical of the rest, and as illustrating the alternations to which legislation on slavery was subject either from prejudice or from political causes. To illustrate these alternations it may be sufficient for our purpose if we confine ourselves to two points, Marriage and Enfranchisement.

It has been remarked that one of the most revolting features of slavery, as it passed from the Pagan to the Christian Emperors, was the utter want of legal recognition of the marriage tie. The union of slaves was tolerated, but it received no legal sanction, and the marriage of free persons with slaves was punished. By the terms of the S. C. *Claudianum*, the free woman who gave way to her passion, for a slave (*servili amore bacchata*)† lost her freedom, and with it her estate. Constantine increased the penalty to death for the woman, and the slave was burnt alive. These mixed unions were, however, permitted with a curious dis-

* See Lecky, "Hist. of Europ. Morals," Vol. i. p. 66.

† Instit. iii. 12. 1.

tinction. The freewoman, while forbidden to marry her own slave, could marry the slave of the *Fiscus*, in which case a half liberty was reserved to her, and her sons became *Latini*;* the freeman could marry his own slave, but was not allowed to marry the female slave of another man. The infringement of this distinction involved heavy penalties for the parties transgressing, which took the form of either exile, the mines, or confiscation. The relaxation of the original prohibition was, no doubt, due to the influence of Christianity, but the working of its spirit comes out more strongly with respect to the effects of marriage. "Who," says Constantine, "could suffer infants to be separated from their parents, brothers from their sisters, wives from their husbands?"† Under Justinian, a sensible advance was made. The freeman was allowed the power of enfranchising the slave, and of then following this up by a solemn act of marriage. The issue of this marriage became the legal heirs of their father. But it was not till the reign of Leo the Philosopher (886 A.D.), that the inviolability of the marriage-tie, in the case of slaves, was recognised. He conceded the right of intermarriage between slaves.

But the influence of Christianity was most conspicuously shown in regard to enfranchisement. The Church taught the equality of man, and it followed, as a necessary consequence, that when the Emperors became Christian, this principle should operate in their legislation. The number of manumissions in the reign of Constantine was enormous. It was by him that the machinery of enfranchisement was changed. He extended the power to the Church. The assembly of the faithful took the place of the assembly of the prætor with precisely similar effects. To give greater point and significance to the ceremony, the great church festivals were selected, and, in particular, that

* Cod. Theod. iv. 8. ad. S.C. Claudianum.

† Cod. Theod. L. i., 2., 24., de comm. dividundo.

of Easter, which was especially associated with deliverance, both in the Jewish and Gentile mind.. By a law of A.D. 321, the ordinary forms in use were, in effect, abrogated, inasmuch as from that date the Church had the power conceded to her of making enfranchisement by any form of words she chose. St. Augustine gives us the ordinary form which was in use. The policy of Constantine contrasts remarkably with that followed by Augustus. The latter put restraints on liberty by fixing the age of the manumittor, and by limiting the number who could be manumitted. The liberty conferred was only of an inferior kind; *pessima libertas* as it is styled by Gaius, and *inferior libertas* by Justinian. The conservative spirit of Augustus aimed at preserving the pure blood of the city. But under Constantine ideas had taken a different direction; the title of citizen had lost its *éclat* and old value; there was a decrease in the population; and besides this, Christianity had appealed to the conscience, and so had tended to remove those barriers to a full participation of privileges which were so strong under Augustus. The object of Constantine, as Godefroy remarks, was to afford greater facilities for obtaining full and complete liberty, and the rights of the city.* In other respects, we observe in his reign a retrogressive movement on the question of liberty. Influenced by political reasons, Constantine allowed those who found exposed infants to sell them as slaves. To save children who were menaced with starvation or abandonment, he allowed parents to sell them, reserving to the parents, however, the right of redemption, on the basis of the law of Moses.

For two hundred years, that is, between the reigns of Constantine (307-337) and Justinian (527-565), there is almost an absolute pause, but in the meantime that spirit which had dictated the measures of the former had been operating, and had served to prepare for the larger and more

* Godefroy, "Le Code Théod." vol. i., 397,398. De Manumiss. in Eccles.

effective legislation of the latter. It had experienced a shock under Julian the Apostate (361-363), the polytheistic reactionist as he is termed, but still Christianity was the moving force in all the great social ameliorations. The measures of the intermediate twenty-six joint or separate reigns were few and unimportant.

The reign of Justinian was an era of great and striking reforms. His object was to associate with the military glories of Narses and Belisarius, the glory of the legislator. He was a resolute legal reformer. The motto of his reign was liberation, and is comprised in that passage of his Novels, "*Nobis autem omne extat studium subsistere libertas atque valere.*"* Justinian's legislation covered almost the whole area of slavery, and extended beyond it into the region of liberty by the obliteration of all the marks of a previous condition of servitude. He abolished the *S. C. Claudianum.* "It is not right," he said, "that a free woman, reduced by a fatal amour, or by any other cause, should, contrary to the integrity of her birth, end her days in slavery."† He permitted no one free-born to become a slave *ex supplicio—i.e.* by punishment. The inhuman system of personal-mutilation, derived from the East, was regarded as a ground for immediate liberation. Military service was made another ground for liberty, its privileges extending even to a removal of the rights and obligations of patronage, where such service had been undertaken with the master's consent. The abuses which arose from the monastic life, into which the slave frequently entered from no other motives than to escape from his master's service, also came under his reformation. The law of the Church was brought into harmony with the Civil Law respecting the ordination of slaves. A period of three years was prescribed for the novitiate, and if subsequently they renounced the monastic order and clerical life, they were rele-

* Novellæ, 78.4.

† C. J. 24., de Senatus-consulto Claudiano tollendo.

gated to their former condition. But the reforming work of Justinian did not stop here. He did away with all that scaffolding of restrictive measures which stood in the way of enfranchisement by testamentary disposition. Under the old law, the institution of the heir was the essential part of the will, and all bequests inserted before it were declared null and void. A contrary interpretation was allowed by Justinian, especially where liberty was in question. In elective bequests of liberty which were not executed by the heir, the hesitation of the old law and of the Jurists was interpreted by Justinian in a manner equally characteristic. He ruled that all were free, on the ground that the testator had all in view—not any one in particular. Partial enfranchisements were also regulated, while the old forms were confirmed.* Justinian revived the old law of Claudius, which had become inoperative, as to the abandonment of sick or old slaves, who were declared *ipso facto* free. But further, the measures of Justinian followed the freedman into the domain of liberty, where he had held an intermediate place between the citizen and the slave. He did away with the distinctions of *Latini Juniani* and *Deditícii*, and restored all to the full rights of citizenship. The only thing remaining was the restoration to the freedman of all the marks of ingenuous birth, and this he effected by conceding the right of wearing the gold ring, and by *natalibus restitutio*. To preserve the freedman and freeman in liberty, he placed obstacles in the way of their degenerating into servitude as *coloni*, who in some respects were assimilated to slaves, being attached to the land, and occupying an analogous position to the serfs of the middle ages.

Under Leo the Philosopher, we observe a retrograde movement in respect of liberty, though his reign is marked by two reforms of an important nature as to marriage and the *peculium*. He closed the avenues open to liberty by the monastic and clerical professions. These measures were

* Inst. ii. 7.4.

dictated by prudence, and were intended as much to protect the master's interest, (since the three years' novitiate had proved ineffective for tracing the fugitive) as to secure the Church against the corruption with which it was threatened.

These measures of Constantine, Justinian, and Leo, illustrate the alternations to which the progress of legislation was subject, and they serve at the same time to show the influence which the New Faith was exercising in the Imperial counsels.

During the Lower Empire, various measures were passed under the alliance of Church and State, all in the direction to which legislation on slavery was tending, all tending to ameliorate the hard condition in which we have observed the slave to have been placed by the old law, and to re-invest him with those rights of humanity of which he had been defrauded.

Legislation had been influenced by Stoicism, but a stronger light, acting more directly than that which flickered from the feeble lamp of Philosophy, had shone upon the sombre domain of slavery, revealing in dark masses of shadow the height of its hardships, the profound depths of its miseries, and heralding a day of deliverance for the captives, and a setting free to them that were bound. Slavery received relief from Christianity. The condition of slavery, says Montreuil, among the Greeks of the Lower Empire was never what it had been among the Romans, and if the monuments of the law had not existed, we should have had the right to believe in its entire disappearance.* The tendency was towards liberation, but the final and decisive word for the abolition of slavery was never uttered, and when the Crusaders in the thirteenth century appeared beneath the walls of Constantinople, slavery was still in existence. We may enquire briefly what was the cause of this, and why the abolition of slavery in the Empire was left to the Middle Ages.

* Montreuil, Histoire du Droit Byzantin. iii. 56.

The solution of this query may be found possibly in this reflection, that while equality was the recognized law of nature, while the universal fraternity of the Gospel was admitted as axiomatic, still the principle of proprietary right held a tenacious grasp on the Roman mind, and the ancient traditions of the race, though weakened, were not destroyed. The Romans contented themselves with modifying the abuses of slavery, without going to the length of putting an end to its existence.

No one in antiquity entertained the idea of the abolition of slavery. At the date of the subjugation of Greece slavery was in full vigour in that country, and during the most brilliant period of Roman history, when philosophy was beginning the regeneration of society which afterwards became the province of Christianity, we meet with no expression of a hope, or conviction, nor even a hint, in the writings of the most enlightened philosophers, that slavery would ever be abolished. Those even who saw and complained of its dangers, who said, like Seneca, "How many famished animals whose voracity we have to gratify! how much expense to clothe them! how much care to watch over those rapacious bands! what charm can any one feel in being served by a race which complains, and hates us," never for a moment imagined a future when slavery was to disappear.

Slavery was an institution surrounded with prejudices; it formed one of the elements on which society was based; it entered into life and manners, it was sanctioned by the voice of philosophy, and while Christianity was propounding doctrines inimical to its continued existence, it yet preached to the slave resignation.

IV.—THE LATE LORD MACKENZIE, OF THE COURT OF SESSION IN SCOTLAND.

LORD MACKENZIE, one of the judges of the Court of Session, in Scotland, died at Upper Norwood, on the 19th of May last, after an illness of six months' duration, but which, until a few days before his death, was not supposed to be of an alarming nature. Lord Mackenzie, who was born in 1818, was son and namesake of Donald Mackenzie (Captain in the 21st Regiment, the Royal North British Fusiliers) who served with distinction, and lost a leg, in the French wars, at the end of the last century. His mother, Robina Jamieson, was a daughter of John Jamieson, the learned author of the well-known dictionary of the Scottish language, and sister of Robert Jamieson, one of the leading counsel at the Scotch bar of his day. Lord Mackenzie originally studied for the medical profession, and, in 1839, became a licentiate of the Royal College of Physicians, and also Fellow of the Royal College of Surgeons, having completed the requisite course of study with great distinction. He did not, however, practice as a physician, but, yielding to the wishes of his mother, turned his attention to the study of law, and, in 1842, he was called to the Scotch bar. His career at the bar was one of steady and increasing success. He soon rose into a good practice, and, in 1855, succeeded Mr. A. S. Logan, then created Sheriff of Forfar, as Advocate Depute. In 1861, upon the death of Mr. Earle Monteith, he was appointed to the Sheriffdom of Fife, and, in 1870, in the earlier years of Mr. Gladstone's administration, he was raised to the Bench.

Donald Mackenzie is a name which will not readily pass from the memory of those among whom he lived, not so

much on account of his talents as a counsel and a judge—although these were above the average—as on account of his sterling qualities as a man. The tall athletic highlander, with his handsome, joyous, yet firm face, with his manly bearing, with his charm of manner which was the reflex of a genial, sympathetic heart, with his unswerving truthfulness and honour, with his spotless life, won for himself a universal love such as few gain, and such as few so well deserve. One of his great characteristics was his earnestness in everything he did. "Whatsoever thy hand findeth to do, do it with all thy might," seemed to be his motto, and whether in the discharge of his professional duties, or in the pursuit of sport upon his native hills, he was the same strong, earnest man, untiring in mind as in body, doing what he had to do with all his might. Another distinguishing feature of his character was his unselfishness, and this perhaps more than anything else endeared him to all with whom he came in contact. He never thought of himself where others were concerned, and he never allowed his own pleasure or his own ease to interfere with his duty. And, indeed, it is impossible to shut one's eyes to the fact that this devotion to duty, to the exclusion of every consideration of self, materially contributed to cut short his career while still in the full vigour of life. For, long after most men would have succumbed, he continued his judicial labours, and albeit that he was enduring the most agonising pain, he never fell short of his wonted courtesy, or abated his untiring industry, and he only consented at last to take the much needed rest when his strong frame was utterly shattered by the combined effects of work and disease. However impossible it may be not to regret that he did not sooner take the ease which he so well merited, it is equally impossible to deny that in doing as he did he was but true to himself, and that his death was worthy of his life.

As a lawyer Lord Mackenzie was not in the first rank,

and indeed those who knew him best used to say that he had not chosen the line of life for which his undoubted abilities best fitted him. But his knowledge of law was not of that desultory sort, picked up as occasion requires, which may carry a man through a fair practice creditably enough, but can never make a sound jurist or a competent judge. His store of legal knowledge, on the contrary, being gained by conscientious application, was systematically arranged and well digested, and both as a counsel and as a judge his constant endeavour was to avoid mere technicalities and to find the broad principle of law upon which the true solution of the question depended. He may not always have succeeded in this endeavour, for he did not in any pre-eminent degree possess that almost intuitive perception of principle, and that comprehensiveness of mental vision essential to a truly great lawyer, but his success was that of a man of clear practical intellect and sound common sense who gave his best work of body and mind to the task. Apart from his legal acquirements, Lord Mackenzie possessed many qualifications for success at the bar. Of commanding presence, and endowed with the gift of clear and ready expression, he possessed a fund of information upon all subjects rarely equalled, for during the course of a busy life he found time for an immense amount of general reading, and what he read he remembered. Perhaps the portion of his career during which he was most before the public, was when Advocate Depute, for during his tenure of that office an unusually large proportion of memorable cases fell to his share—among them the famous trial of Madeline Smith for murder, and of Dr. Wielobycki for forgery.

When raised to the Bench of the Court of Session, Lord Mackenzie probably showed greater judicial ability than was generally anticipated, for here his earnestness, perseverance, and concientiousness, raised him above many naturally possessed of greater legal acumen, and his judgments, in many important and difficult cases which were tried before

him, have stood well the test of review by the higher tribunals. In one respect Lord Mackenzie's judicial career showed, in a very marked manner, how thorough conscientiousness can counteract natural characteristics which would otherwise prove dangerous. Like all men of impulsive and ardent temperament, he was apt to take up at once a strong and decided view of any question. But he was not one of those who, if they have once expressed an opinion, will not afterwards admit that they have been in the wrong—he was far too generous and honest for that. And so he was always ready to weigh the arguments submitted to him, however contrary to his first impression of the case, and to give effect to such arguments, if, after carefully weighing them, he was convinced of their soundness. With all his scrupulous care, however, he was not a timid judge, but when his mind was made up he did not hesitate to express his opinion. Nor was he wasteful of time in the conduct of cases before him.

And now that he is gone, cut off while yet in the prime of life, his mind vigorous, his usefulness unimpaired, he has left a blank which will not easily be filled. But though he is dead his influence still lives, and will long be felt. Many a judge there has been of greater mental grasp, of higher legal acquirements, of more persuasive eloquence, but never one whose integrity was more unbending, or whose honour was more untarnished, who was a more perfect gentleman, or a better man.

V.—THE INTERPRETATION OF STATUTES.*

IT is hardly to be hoped that much benefit will arise from the recent Report of the Select Committee of the House of Commons on Acts of Parliament, in so far as the improvement of the manner and language of current legislation is concerned. But even if a scheme which really grappled with the evils of the present system, and suggested a suitable remedy, were carried into effect, the Interpretation of Statutes would still remain one of the hardest tasks which the legal intellect has to undertake. Statutes might be formed on a uniform principle, the mode of legislating by reference to previous Acts might be abandoned or confined within reasonable limits, and the language used might in all cases be the clearest and most appropriate which human ingenuity could supply; yet, although in this way some obvious evils would be got rid of, many perplexing problems would still arise, when enactments framed even with the nicest care came to be applied to "the infinite variety of human concerns." The utmost skill, learning, and attention on the part of the draftsman, will not always prevent omissions, for sometimes *bonus dormitat Homerus.* Of this a remarkable instance is found in the Fines and Recoveries Act, drawn, it is well-known, by a late eminent conveyancer, and justly considered the best framed enactment of modern times. The 33d section provided that if the protector of the settlement should be a lunatic, or convicted of felony, or an infant, the Court of Chancery should be the protector in lieu of the lunatic or the infant, but omitted the case of the convict of

* The Interpretation of Statutes, by Sir Peter Benson Maxwell, late Chief Justice of the Straits Settlements. London: William Maxwell & Son. 1875.

felony. It was held, however, by Lord Lyndhurst, that the omission might be supplied in order to give effect to the manifest intention. The well-known omission after the word "upon" in the 6th section of 9 Geo. 4., c. 14, (Lord Tenterden's Act), is probably a printer's mistake, and there the intention is quite as manifest as in the other case we have mentioned.

Such casualties, however, whether in drafting or printing, are of small consequence. The obscurity of statutes has deeper grounds than even haste or negligence. The difficulty with the ablest draftsman is to express his meaning in such a way as to prevent all cavil, doubt, or misapprehension. If the language is too general, it may not hit a particular thing which it ought to do; if it is too specific, it may miss something which was intended to be included. So with regard to the expression of intention as to questions to which a statute may give rise. If the intention is mentioned in certain cases, it may exclude others without any substantial reason; if a general intention is expressed, it may be found inoperative in particular cases which it was designed should be included. Again, it is impossible to anticipate the new circumstances, or combinations of circumstances, which may arise, and impossible therefore to provide for them in a manner consistent with the general intention of the Act. All these are difficulties which the present mode of preparing Bills and carrying them through Parliament may, in some degree, have aggravated, but which will be found to arise under any system which can be devised.

Whatever, therefore, the future may have in store for us in the way of an improved mode of legislation, the utility of such a book as that of Sir Benson Maxwell is not likely to be materially impaired. The only English work on the same subject must almost be considered as obsolete, and the merits of the present treatise are such as to ensure its success as a practical guide to the interpretation of the statutes. In preparing a work with such an object, the

author has followed the only mode which it was open to him to adopt. It was entirely out of the question for him to lay down rules which might seem just and wise to himself. There was no other course for him to follow than to collect the decisions which illustrate the principles on which the Courts interpret statutes, and to arrange them in a suitable order.

The subject of the interpretation of statutes is considered by Sir B. Maxwell as falling under two general heads:— "What are the principles which govern the construction of an Act of Parliament?" and next: "What are those which guide the interpreter in gathering the intention of those incidental points on which the legislature is presumed to have entertained one, but on which it has remained silent?" The former is by far the more important question, and of course occupies the larger portion of the book. The great rule is that of literal construction—a rule which must be rigidly applied unless there is what the law regards as a sufficient reason against its application. Where the language admits of no doubt, mere hardship is no such reason, nor is there any ground for the statement of Lord Coke, in *Bonham's* case, "that the Common Law doth control Acts of Parliament, and adjudges them void when against common right and reason." It is only when the language is open to doubt and is capable of receiving more than one construction, that the task of interpretation begins, and the true meaning is to be sought only, as Sir B. Maxwell justly states, "from such arguments and inferences as may be based within the four corners of the law, of which the passage under interpretation forms a part, viewed by such light as its history may properly throw upon it, and construed with the help of certain general principles, which, though neither infallible nor inflexible, are, nevertheless, indispensable to a right understanding of the language of enactments." (p. 49.)

The mode of interpreting statutes adopted by the Courts is founded entirely on legal principles, and differs materially

from what might be the popular notion on such a subject. It might seem a natural view that the intention of the legislature, from whatever source a knowledge of it might be obtained, should prevail in all cases where the language admitted of any doubt, but the Courts will only gather such intention from the language used, viewed with reference to the subject-matter to which it applies. The rules which the Courts follow are in no respect artificial or factitious; they naturally arise in a system in which justice is administered on fixed principles. We shall not say that they have always been wisely applied and never unduly strained, but such a work as Sir B. Maxwell's shows that certain rules have generally been acted on by the Courts in a uniform manner in interpreting statutes of every variety of language, and embracing every kind of subject. The immense mass of legislation which has been accumulating during the last forty-five years has, of course, given rise to many difficult questions. In the Table of Statutes referred to in the cases cited, prefixed to Sir B. Maxwell's work, it will be found that nearly the half of such statutes belong to this period. It cannot be said, however, that in modern times any new principle has been introduced, although the ingenuity of the judges has been taxed to the uttermost to educe anything like a meaning from many crude pieces of legislation. The ancient strictness has only been modified where it was necessary to do so for the ends of justice.

To illustrate the mode in which the Courts proceed in interpreting statutes, we may take the case of the retrospective force given to certain enactments where there is no express provision to that effect. The general rule is that all statutes are to be construed to operate in the future, unless, from the language, a retrospective effect be clearly intended. When the law is altered pending an action, the rights of the parties are decided according to the law as it existed when the action was commenced, unless the new statute shows a clear intention to vary such rights. But the presumption

against a retrospective construction has no application to enactments which affect only the procedure and practice of the Courts, even when the alteration which the statute makes has been disadvantageous to one of the parties. "Although," says Sir B. Maxwell, "to make a law for punishing that which, at the time when it was done was not punishable, is contrary to sound principle; a law which merely alters the procedure may, with perfect propriety, be made applicable to past as well as future transactions; and no secondary meaning is to be sought for an enactment of such a kind. It does not follow that because a suitor has a cause of action, he has also a vested right to enforce it by the course of procedure and practice which was in force when he began his suit. He has only the right of prosecuting it in the manner prescribed for the time being, by or for the Court in which he sues; and if an Act of Parliament alters that mode of procedure, he has no other right than to proceed according to the altered mode. The remedy does not alter the contract or the tort; it takes away no vested right in a state of the law which left the injured party without, or with a defective, remedy. If the time for pleading were shortened, or new powers of amendment were given, it would not be open to the parties to gainsay such a change; the only right thus interfered with being that of delaying or defeating justice; a right little worthy of respect." (pp. 199-200.)

The justice of the principle thus stated is obvious, and the distinction between the retrospective effects of statutes on rights and on procedure is entirely analogous to the distinction contained in the rule that the *lex loci* regulates the rights of parties under contracts made in a foreign country, but the *lex fori* the enforcement of such rights. The retrospective effect of enactments relating merely to procedure and practice is illustrated by a variety of decisions, and may be considered as fully settled. Questions relating to this matter are likely to arise after the coming into operation of the Judicature Act, but we have no doubt the Courts will adhere to

the principle above stated. Sir B. Maxwell, however, has pointed out an important qualification which it is necessary to bear in mind. "The new procedure would be presumedly inapplicable, where its application would involve a breach of faith between the parties. For this reason, those provisions of the Common Law Procedure Act of 1854, which permit error to be brought on a judgment upon a special case, and give an appeal upon a point reserved at the trial, were held not to apply where the special case was agreed to, and the point was reserved, before the Act came into operation. Where a special demurrer stood for argument before the passing of the first Common Law Procedure Act, it was held that the judgment was not to be affected by that Act, which abolished special demurrers, but must be governed by the earlier law. The judgment was in strictness due before the Act, and the delay of the Court ought not to affect it." (p. 202.)

As another illustration of the mode in which the Courts interpret statutes, we may take the strict construction of penal laws. The principle which is applied in such cases rests on this, that where the legislature intended to inflict punishment of any kind, it is not to be supposed to have had in view more than it has expressed, and that if it had designed anything else to be included, it would have done so explicitly. This presumption is analogous to the presumption that no person shall, in the absence of proof, be supposed to have done any act which amounts to a violation of the criminal law, or which would subject him to any species of punishment; and the two presumptions, no doubt, rest on the same general grounds. The degree of strictness, however, applied to the construction of a penal statute, depends in great measure on the severity of the statute. When it merely implies a pecuniary penalty, it would seem to be construed less strictly than when the rule is invoked *in favorem vitæ*. But, as observed by Sir B. Maxwell, "The tendency of modern decisions, upon the whole, is to narrow materially

the difference between what is called a strict and a beneficial construction. Remedial statutes are now construed with a more strict regard to the language, and penal with a more rational regard to the manifest aim and intention of the legislature than formerly. It is unquestionably right that the distinction should not be altogether erased from the judicial mind, for it is required by the spirit of our free institutions that the interpretation of all statutes should be highly favourable to personal liberty; and it is preserved in a certain reluctance to supply the defects of language, or to eke out the meaning of an obscure passage by strained or doubtful inferences. The effect of the rule of strict construction might almost be summed up in the remark, that where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning, which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject, and against the legislature which has failed to explain itself. But it yields to the paramount rule that every statute is to be expounded according to the intent of them that made it, and that all cases within the mischiefs aimed at are to be held to fall within its remedial influence." (pp. 256-7.)

Of the general merits of Sir B. Maxwell's work, we expressed our opinion in a brief notice in our last number. We have been still more impressed, on a closer perusal, with the great industry which it displays, and with the sound and lawyer-like manner in which the author has enunciated the principles which apply to the interpretation of statutes, and marshalled the varied materials which he has collected from the books in illustration of his subject. We can have no doubt that this treatise will be the standard work on the Interpretation of Statutes; but there are a few things we may mention which, if remedied in a future edition, will render it more useful. We have occasionally had to complain of a slight obscurity in the author's statements, and in the mode in which he connects the cases mentioned

with the principle they are intended to illustrate. For example, the last sentence in page 191 does not agree with what precedes and what follows it, and no explanation is given of this. There are other instances of a similar nature where a little comment would be beneficial; but these the author will no doubt observe on a careful revision. We may mention also that the index is not quite what might be desired. The primary object of such an index ought to be to give all the points relating to the interpretation of statutes which are to be found in the work; and the subjects of the different statutes or cases mentioned ought either to be in a separate index, or printed in a different type. Our complaint is that the index, with respect to the former object, is not sufficiently copious, and that the mixing together of the two sets of references in the way here done is somewhat bewildering. The removal of these slight blemishes will render the work more valuable for practical purposes, and at the same time improve its qualities as a learned treatise.

VI.—THE LOUISIANA CASE.

WHILE as yet the roar of cannon and the speeches of fervid patriots have scarcely ceased their loud record of the deeds which a century ago separated the American colonies from their mother country, we in England have only one feeling of admiration for the progress made in civilization, arts, and science by the sons of those whom we counted among our nearest relations. In this country we look with pride upon the firm legal basis on which the Americans have founded their constitution; the more so, because we can trace to England not only the laws themselves, but also in a great measure that respect for law

which is ever gaining a stronger hold on the American people. We purpose, therefore, laying before our readers some cases and decisions, which are deserving of notice, as they may form precedents useful to students of jurisprudence. "The Louisiana case" involves the law of election, and the power held by the President of the United States in the matter of contested elections, a power which will be seen to be greater than that possessed by the Sovereign under our Constitutional Monarchy.

In the year 1868 the State of Louisiana was empowered by an Act of Congress to return members as representatives to that body; thus Louisiana was incorporated among the States of the Union, and held to be bound by all laws which had been passed recognizing the "black" citizens of America, and granting them the right of suffrage. On the 13th July of the same year the military forces were withdrawn. The chief officers of the State were then elected, and the various appointments ratified. The new State of the Union, though still feeling sorely its altered position, recognized the full importance of obeying directions emanating from Washington; and it was not till 1872 that symptoms of dissatisfaction were once more apparent. There is, perhaps, nothing more striking to an Englishman travelling in America, than the waste of time, thought, and energy, spent upon the continually recurring elections. "Democracy" and "Republicanism," after the closest scrutiny, appear to him not so much political sentiments as names of candidates; while their train of eager followers, greedy of place, act as the red flag waved in the face of a bull. The platforms adopted on these occasions are in some cases very extreme, and the best excuse for their being proposed is the certainty of their never being adopted. The Democrats, with all their boasted aristocracy, are ever willing to throw out the largest baits, such as the green flag of Ireland proudly waving over the Union Jack of England, and fastened on the Castle at Dublin by the hands of

avenging American citizens. The "Paddy" of the Democrat is the "nigger" of the Republican, who educates his coloured brother to believe that the Republicans only are his true friends, and that the election of the Democrats will be fatal to his freedom.

A telegram, sent by the Attorney-General, from the Department of Justice at Washington, first called attention to the fact that the coming elections of 1872 in Louisiana were not expected to go off as quietly as those which had preceded. Mr. S. B. Packard, United States Marshal, was instructed to be prepared to enforce the decrees of the United States Courts, "no matter by whom resisted," and to call upon the military for aid and protection when necessary. Messrs. John McEnery and W. P. Kellogg had been nominated as candidates for the Governorship, by their respective parties; the former being the Democratic, the latter the Republican candidate. The friends of both claimed the victory, and two boards were elected to declare the result. Governor Warmoth, then in power, supported Mr. McEnery, the Board of which he was head adopting his name; that of Mr. Kellogg being known under the ominous title of the "Lynch Board."

With an impetuosity deserving of its name, the latter filed a bill against the Warmoth board in the United States Circuit Court, charging the Governor of the State with attempting to deprive the coloured voters of their rights as citizens, and in fact with cancelling their vote in its entirety. Judge Durell, the United States District Judge, found in their favour, and McEnery was enjoined to refrain from "in any manner acting, or pretending to act, as Governor of the State of Louisiana, and from making any pretensions or asserting any claim to the office of Governor of said State by virtue of any certificate, count, canvass, or adjudication now or hereafter made" by the Warmoth board. Thus the acts of the *de facto* Governor were annulled.

The next proceedings of interest in this case are to be

found in the steps taken by the United States Government, which at the present time is in the hands of the Republican party. We find the same Judge making an order, which is maintained to be illegal on the following grounds: "it was made out of Court, at his house, late at night, without application by any party." By this order it is directed that the "Marshal of the United States for the district of Louisiana shall forthwith take possession of the building of the State house for the assembling of the Legislature therein, in the city of New Orleans, and hold the same subject to the further order of this Court, and meanwhile prevent all unlawful assemblage therein under the guise or pretext of authority claimed by virtue of pretended canvass and returns made by the said pretended returning-officers in contempt and violation of the said restraining order;" but the Marshal is directed to "allow the ingress and egress to and from the public offices in the said building of persons entitled to the same." Here, we may point out, there appears to us to be a violation of electoral privileges, as well as a danger to be guarded against arising from the election of partizan Judges for a term of years. The most fatal error in the whole system of legal administration of the United States seems to us to be the power given to electors over judges, who are called upon to fulfil their office with strict impartiality. And it is, perhaps, only wonderful that men should be found willing to bow their necks to such an overwhelming yoke. We do not as yet know to what extent Judge Durell had the support of his higher legal confrères at Washington, but the following note is worthy of attention.

After the order mentioned above, Mr. McEnery appealed to the President, claiming audience for himself and a committee of citizens, to be heard in defence of their position and of the charges made against them. To this the following answer is returned by the Attorney-General:—

"Department of Justice, Dec. 13, 1872.

"Hon. John McEnery, New Orleans, Louisiana:— Your visit with a hundred citizens will be unavailing, so far as the President is concerned. His decision is made and will not be changed, and the sooner it is acquiesced in, the sooner good order and peace will be restored.

"GEO. H. WILLIAMS, Attorney-General."

Governor Kellogg was then installed, and order was maintained by military aid throughout the city of New Orleans. Our space will not allow us to follow up the course adopted by both parties to ensure victory for the minor offices, and to maintain in their places men supposed by both to have been illegally elected. According to the accounts rendered by the so-called conservative party, and which we do not remember to have seen denied by the republican party, votes appear to have been manipulated with a freedom which cannot be admitted as legal, by Governor Kellogg in his official capacity, or by others supposed to have been authorized by him. The following, however, was the result of an election which took place in the parish of Rapides. The parish of Rapides chose three members for the legislature. The returns gave all three conservatives. When the proofs closed, the only paper filed with the board was the affidavit of the United States supervisor, that the election was in all respects, full, fair and free.

It was not known in the parish that any opposition existed against those members. They left their homes and proceeded to New Orleans to be present at the opening of the legislature, no intimation of contesting their seats, or objection to their election, having been given by their opponents. At one of its last Sessions, the returning board declared all the Republican members elected from that parish. When the papers of the returning board were produced before the committee, there was found among them an affidavit by Mr. Wells, the president of the board, declaring

that intimidation had existed at certain polls in that parish, and that the returns from it should be rejected. The counsel for the (Conservative) committee testified that they had no opportunity to contradict the statements of this paper; that they had never seen or heard of it before; and that upon an examination of the papers before the board when the proofs closed, it was not among them. Mr. Wells was, moreover, proved to have sworn falsely, as to personal knowledge, he not being in the parish on the day of election. This important statement was made as evidence, and reported by the committee. The representatives in the house amounted to 111 members, being divided, according to Governor Kellogg's classification, into fifty-three Republicans, fifty-three Conservatives, and five cases held to be doubtful, but claimed by the Conservatives to be duly members and partizans of their cause. On the 4th January, 1875, a majority of the Conservatives met and proceeded to elect officers, Mr. Wiltz being chosen as temporary chairman, and the house being sworn according to usual custom. For Mr. Wiltz's election fifty-eight votes were given, fifty-five being recorded in his favour. It is a curious fact, mentioned in the evidence of the day, that "all this time, outside the bar, were a large number of police, supported by Federal troops." At three o'clock p.m., General de Trobriand, United States army, entered the hall in uniform, accompanied by two of his staff, and exhibited orders received from Governor Kellogg, calling upon him "to clear the hall and State house of all persons not returned as legal members of the house of representatives by the returning board of the State." Mr. Vigers, the former clerk of the house, then pointed out the members mentioned, as illegally returned, by Governor Kellogg, and they were then escorted out of the hall by soldiers, fully armed, and with fixed bayonets. Governor Kellogg's party then entered upon possession, and have, we believe, enjoyed, up to the present, undisturbed, the victory which they thus gained.

The above case will show that in some respects the even tenor of constitutional government, in the United States, may be open to the invasion of arbitrary tendencies. According to the laws, well defined by Curtis and others, no power could call in the aid of the military to repress a proceeding undertaken by members of the representative body in the hall allotted for their meetings. We have no account of any opinion issued by the legal advisers of the President, and this case is important as showing to what extent a partizan feeling may carry away the better judgments of those to whom the highest offices are entrusted. Even if guilty of tampering and intimidation, the Democrats had a right to demand a thorough investigation into a question too important to be decided by the will of a general officer, himself a naturalized citizen of the United States. In monarchial governments such an insult to the "sovereign people" would scarcely be tolerated. In our own country Cromwell alone dared to remove the "bauble," the insignia of the national sovereignty. The imperious Bonapartes hesitated to assume a power which French republicanism openly displayed. It is true that in connection with the Louisiana case, we have to recollect certain facts peculiar to it, and the insubordination to law evinced by the so-called Confederate Government. But the great point to which we would call attention, is the obedience exhibited to the authority of the government of the United States by those who, a few years before, were in open rebellion, and who are now refused that legal enquiry which is their due. Such a *coup d'état* is only possible under the prevalence of partizan government, and when the press, divided in sympathies, does not sufficiently protect the immediate interests of all its fellow-citizens. The United States have before them a glorious future, and may look back to their past history with no little pride; but we sincerely hope that the liberty which they now possess will never at any time degenerate into licence, and that their government will ever be ready to support those laws which

form their best protection. The case we have noticed ought to be the last of its kind, and we can only regret its occurrence in a country which has shewn such enthusiastic devotion to Liberty.

VII.—THE BERLIN JURIDICAL SOCIETY.

WE are glad to be able to give our readers some particulars of this learned and valuable body of Jurists, from its sixteenth yearly report, now lying before us.* The object of the Society is the promotion of Juridical Science, and the affording a ready means for the discussion of all points of interest connected therewith. As among ourselves, the mode of operation is chiefly the holding of meetings, at which papers are read and discussed. During the past winter session an interesting series of gatherings appears to have been held, in the course of which men of practical acquaintance with their subjects have discussed questions relating to the better administration of Justice, and the prevention of Crime, embracing some points still before the German Parliament, as, *e.g.* the revision of the Penal Code for the Geman Empire, which was promulgated in 1871, on which Stadtrichter Dr. Rubo read a paper. On this important question we hope soon to be in possession of valuable information, through some of our esteemed contributors on the Continent.

The fourth Congress of officials connected with German Penal Establishments, held in 1874, also formed the subject of an evening's discussion, and it may be said generally that

* Sechszehnter Jahresbericht über die Wirksamkeit der Juristischen Gesellschaft zu Berlin, in dem Vereinsjahre, 1874-5. Berlin, Druck von E. S. Mittler und Sohn, Kochstrasse, 69-70.

all topics of interest, whether questions belonging to the science of jurisprudence, or matters pertaining to daily life and legal practice, receive the attention of the Society. It also provides its members with a reading-room, and a library, which last, we are pleased to observe, is recruited by presents from various foreign sources, such as the University of Christiania, the Berne Juristen-Verein, and the International Statistical Congress (St. Petersburg session), as well as by gifts from authors of legal works in Austria and Italy. In this list neither England nor France has any representatives, a deficiency which we cannot but consider very regrettable, and which we shall be glad to see supplied in future reports. There can be no excuse for it on the part of England, and no good excuse on the part of France. Each is a country which has produced great jurists, and we are quite sure that the countrymen of Savigny, Mackeldey, and Warnkœnig, would welcome contributions from the countrymen of Cujas and Pothier, no less than from those of Blackstone, Austin, and Maine. We only notice one periodical in the French language in the list of the reading-room (Lesezirkel) of the Berlin Juridical Society, and that is the Belgian "Revue de Droit International;" and likewise one in the English language, the Transactions of our "National Association for the promotion of Social Science."

Prize Essays appear to be in vogue among our German friends as well as among ourselves, and the Berlin Society has promoted the discussion of the Law of Succession, a very valuable subject for the study of Jurists in all countries. But it might be objected that Prize Essays are only likely to be of practical effect in giving a stimulus to the student, or at most to the younger generation of practitioners, while their elders may very often need the substantial help afforded by a prize, for the prosecution of unremunerative Juridical labours. As though to meet any such objection, we find on another page of the Report that the Society is the trustee of a fund called the "Savigny Stiftung," in memory of the great

historian of Roman Law, which it administers precisely in the way above suggested.

Before we had read the report of the Berlin Juridical Society, the utility of a fund such as we now find exists in Germany had been pointed out to us, with a view to the assistance of members of our bar. Why, indeed, should we not have our own "Stiftung," in memory of one or more of our eminent jurists? The Eldon and Vinerian Scholarships and the Stowell Fellowship, are not sufficient to meet this want. Perhaps the nearest approach to it is to be found in the prizes established by the former Chichele Professor of International Law at Oxford; but they can only aim at a portion of the work which the Berlin Society does, not at that of its most valuable auxiliary, the "Savigny Stiftung." We trust that from the ranks of Dr. Bernard's prizemen and the Whewell scholars at Cambridge will come many of our best Jurists in this field; but we hope that the Inns of Court will take up the work at a more advanced stage, and encourage by pecuniary aid the publication of important works on Law, and Constitutional and Legal History, which may equal the contributions to Juridical Science produced by our German brethren.

The income of the invested capital of this fund has, we may mention, been employed in aid of publications of unquestionable merit, amongst which it would amply suffice to name the History of the Sources and Literature of Canon Law in the West to the close of the Middle Ages, by Professor Maassen of Vienna. But we will also mention, to show the variety of purposes which such a fund may serve, that Dr. Paul Krüger, Privat-Docent of the University of Munich, was assisted by it in journeys undertaken for collation of MSS., &c., as well as in the publication of his new edition of the "Codex Justinianeus," and that sums have in like manner been devoted to the illustration and exposition, from the best MS. sources, of the ancient South German Law-text known as the "Schwabenspiegel," by Professor

Rockinger of Munich. It is very satisfactory to note this brotherly help rendered to Austrian and South German Jurists by their brethren on the banks of the Spree, and we cannot but hail it as of good augury for an even closer unity of the German Fatherland in Jurisprudence than that which has been created by political events.

Yet another interesting feature in connection with the Savigny Memorial Fund remains to be mentioned. In 1869, we learn, the College of Advocates at Barcelona established a Savigny Committee, and subscribed capital for a Spanish branch, to which the local Colleges of Advocates and Notaries, and the Law Faculty of the Academy, contributed. It was proposed by this means to promote the progress of Juridical Science in Spain, and to aid in the publication of Legal works, as done by the parent Society. Unfortunately, the political state of Spain, since the summer of 1869, has been so disturbed that the Barcelona Committee has hitherto made no sign. We can only hope that better times are at hand for it, and that the King who, on landing, told the inhabitants of that ancient town that he esteemed Count of Barcelona to be one of his proudest titles, will give the land peace, and enable its Jurists to co-operate actively with their brethren in other countries in the promotion of Juridical Science.

VIII.—THOUGHTS ON LAW REFORM.

By a Layman.

THE question of the fusion of Law and Equity has excited so much general attention that perhaps it may be permitted to a layman to offer some remarks upon it, not touching upon matters of detail, or upon scientific or technical problems of Jurisprudence, but referring to the more popular aspects of the subject and to some mischievous

and irrational misapprehensions which are very prevalent as to the nature of the reforms which are to be desired.

It is much to be regretted that the study of the general principles of Jurisprudence so rarely forms part of a liberal education. It thus too frequently happens, that between lawyers, who know very imperfectly the subject matter in dispute, and clients, who have only the vaguest conception of the rules of evidence, or the nature and scope of the considerations which will have weight in a court of justice, causes are brought forward in a most confused and unintelligible manner. This is one great source of the undue frequency of appeals; the question at issue has to be disentangled in court from the specious irrelevancies in which it has been involved, and only at last, after infinite waste of time and ingenuity, the most simple thread of most rare "common sense" is drawn out, and the decision is just what any clear-headed man, conversant with or concerned in the case, would have foretold from the first. The unbiassed opinion of such a man, speaking within the limits of his own experience, will often prove right in the long run, but it is common experience even with men quite able to understand thoroughly their own affairs, not to be able to tell where on earth their cases get to, especially in the earlier stage of proceedings. Neither the state of the law nor the legal profession, nor yet the ignorance of the general public, is solely to blame; but without large reformation in all three, it is vain to hope for a satisfactory administration of justice.

A code of law, such as that now administered in India, is in this way a great advantage to a layman concerned in legal proceedings, as affording some common ground on which lawyers and laymen can meet. Not that such codes supersede the expediency of employing professional services. Quite the reverse. It is the dangerous "little knowledge" which comes from "hand-books" and "guides," which leads to folly of that kind. But as soon as a man's mind takes in something of the measure of the object, he realises the fact

that almost every case which comes under litigation involves relations which he has never before duly considered. Take, for instance, the common relation of debtor and creditor, than which nothing seems simpler. Yet, in the event of bankruptcy, (a contingency which it is the object of every creditor to guard against) the collateral interests of all other creditors come into the field. A man may think he has "a right" to certain security; and so he may have as against his debtor, but it avails nothing against the other creditors, whose conflicting "rights" may be just as valid as his own. The danger is that the legal advisers, looking to literal precedents, the application of which is not presently obvious, and the client, looking only to the custom of the hour, each lacking the guidance of a common principle, may find, in the time of trial, that they have failed in understanding each other, and the true bearings of the transaction. Now, in a very large number of such cases, a clear comprehension of the difference in the nature of *jus in rem*, and *jus in personam*, would greatly help to enable a client to understand his lawyer's advice, and intelligently second his recommendations. The principle involved is neither complex nor obscure, still less does it call for an irksome study of technical detail, foreign to the current experience of laymen. Any man of ordinary intelligence will readily master the theory, and if he will only apply it till it becomes familiar to his mind he will find it afford a ready solution to very many cases which otherwise appear to be determined arbitrarily and harshly. He will at once see his "right" as against his debtor personally, and his right as against his debtor's goods, involve very different considerations. So, in many other instances, a wider knowledge will bring home the conviction that it is not so easy a question for any man to decide for himself what his rights really are, or ought to be. It would be a gain if only this word "rights" were commonly understood in its more exact and restricted sense. It is said that "rights are the creation of the law," which

may be very true within the four walls of a Court, but there are reasons against so sweeping an assumption which lie beyond the region and jurisdiction of a court of law, itself the creation of law. A plain man may fairly allege that "rights" are no more created by law, than language is created by grammar. Or, again, it may be urged that a law which is not supported by the moral sense of the people on whom it is imposed, is either openly resisted or covertly evaded. In either case the sovereign power by which the law is imposed is weakened *pro tanto*. An adequate and definite reason lies far nearer at hand why the use of the specific word "right" (or "rights") should be limited to its exact legal signification. For it is of the very essence of all civilization that men should forego the habit of judging every man in his own quarrel. Without submission to a common law, no organisation is possible. A free and strong Government may well allow any man to argue that he ought to have a "right," and need not impose any restriction on the use of the word in any general sense. Moreover, a man may freely express his opinion as to the rectitude of a given act without putting himself in opposition to any necessary law of society. But if he go a step beyond that, and maintain that he has a specific right, the reply comes at once: "Who gives it you? You are not the judge for yourself and your neighbour too." Any man seriously maintaining such an assumption argues himself out of the pale of civilization by the extravagance of his own pretensions. So far the argument carries us, and no farther. Of course, circumstances may arise such as to justify men in endeavouring to change the existing organization of a community, with a view to promoting not anarchy but a better order.

The necessity of obedience to law, although it may never reach an ideal perfection, is not the less imperative; and common-place as this truism may be, there is yet good reason for bringing it forward. For it is comparatively useless to

have a truth of this kind merely acknowledged. It should be so comprehended and realized as to become a part of the working conditions of every man's thoughts in the daily business of his life. It should engender as a habit of mind a just and reasonable *altruism* instead of the short-sighted egotism which is constantly bringing the common affairs of life into collision.

It is a very ordinary cause of regret that "law is so common." Some persons even object that if law were made cheaper and more expeditious, quarrels and strife would be aggravated. In a certain sense, these sentiments are true enough. The undue prevalence of a spirit of litigation no doubt is as great a curse as can afflict society, but surely "law" and "litigation" are two very different ideas. As long as human nature remains as it is these ideas will no doubt be indissolubly associated in a very large number of cases, but the object of jurists and philanthropists should be to raise law as far as possible above the spirit of mere litigation, which is indeed the most inveterate foe against which the spirit of justice has to contend. It may be said more truly that there is too little law than that there is too much. By far the larger and most mischievous part of litigation arises from a reluctance which many men have to take legal advice in proper time. Few are wise enough to go to a sound lawyer when entering first upon affairs which may lie beyond the limits of their immediate experience, with the two-fold object of taking care of their own interests and respecting those of others. Too often this is put off: the visit to the "lawyer" is made by those who want to get out of some difficulty; to save themselves from the effects of their own folly, or to throw upon others the consequences of their own neglect. There is little truth in either the "optimist" or the "pessimist" view about human nature. Most men start with the intention of doing what is right and fair, but the temptation to throw not only the loss but the discredit of a blunder off their own shoulders—or even to

hide the demerits of a doubtful policy in a cloud of litigation —is too severe a trial for the virtue of many.

All uncertainty as to the law, and want of confidence in the ordinary courts for its administration, greatly aggravate evils of this kind. It may be very true that in most cases a man who from the first arranges his affairs under competent advice, will find the restrictions of the law are not onerous, and in the long run that it is simpler and better to adopt many formalities and precautions, the utility of which is not at first sight obvious. Still, in spite of all precautions, any man may be forced into a dispute, and all the defects of the law, when brought to light in such cases, have a specially bad moral effect in encouraging the reckless neglect which is so much to be deprecated. Men are taught to trust rather to clever quirks, and "artful dodges," than to good management. The true simplification of the law on reasonable and intelligible principles will tend to encourage men to make good use of it, but mere litigation will not thereby necessarily be increased. On the contrary, the more certain the law, the more effectually will it act *potentially*, though the necessity of resorting to the courts may be greatly lessened. But the notion that the simplification of the law will do away with the want of men specially trained to it, is altogether contrary to reason and analogy. The experience of those engaged in the active business of life, in commerce or manufactures, amply proves the utility of the division of labour. Take, for instance, the case of a merchant regarded as the *entrepreneur*—the man at whose cost and risk, from beginning to end, a commercial transaction is undertaken. He never dreams of assuming the whole work himself. He has the aid of his banker for the more generalised part of his business, and of his various brokers for the more special details. This division is not the result of artificial arrangement: it grows up spontaneously, as a necessary condition of efficient and economical management, as soon as trade is developed on any large scale. The functions of banker,

broker, or merchant are far more closely allied to each other than that of any one of them, even, to the ideal lawyer—an ideal happily not unfrequently realised.

The ordinary operations of industry are, no doubt, of limited duration, and comparatively simple. The path is perfectly well-known, and within that beaten track there is no need for the intervention of a legal expert, whose natural field, however, though somewhat beyond, lies close at hand. All long-extended arrangements are within his province. It is his speciality to be familiar with remote and exceptional contingencies. It is easy to see why, if only for the sake of the more exact method used, the legal expert is here required. A. and B., engaged in the current business of life, understand each other perfectly well. It would be a waste of time and patience elaborately to define their mutual understanding. They may disagree, of course, but if pride or temper, or clashing interests bring them into collision, a cause of quarrel will never be wanting. Apart from any such rupture the "understanding" is safe enough to last for three or six months, or even for a year or two, less probable that it should last for 5 years, and very improbable that it should last, and be transmitted to their heirs and successors 40 or 50 years hence. A similar line of reasoning holds good where diverse interests, or interests not usually associated, have to be brought to work together. There is a distinct field here for the exercise of specially trained faculties which no conceivable simplification of the law will throw open to all alike, but which is far less fully occupied than it would be, if the system of law in the country could be brought more within the comprehension of the ordinary layman. Law is too much of a puzzle and a mystery to him, and (especially among the less intelligent classes) he has not that confidence in it, derived either from his own experience, or that of his friends and neighbours, which should make it natural to him to regard his lawyer rather as a guide and adviser than as a mere agent of litigation.

But the reduction of the law to more simple and general principles on the one hand, or the better study of elementary Jurisprudence on the other, are not the means of relief which are required in popular estimation to remedy its acknowledged defects. This relief is to be obtained *per saltum* without any such arduous exertion, by "the fusion of Law and Equity." Upon the real merits of this deep question I have not a word to say. That a High Court of Law should not be influenced by considerations of Equity, or that a Court of Equity should discredit the principles of Law, is not to be thought of. Into purely technical questions of procedure, or the profound distinctions of jurisdiction, it would ill-become "a layman" to enter. I speak only of popular notions upon the subject, and venture to suggest modifications which seem calculated to promote the efficient administration of justice as regarded from the point of view of an outsider.

Now, in popular apprehension, or misapprehension, what does this fusion of Law and Equity mean? It is apt to resolve itself very much into a vague notion that somehow or other people are to get substantial justice by a miraculously infallible and simple process. People are not to be troubled with any rules in particular, but the judge is to give a decision on the real merits of the case, whether those merits are brought before him or not.

Well, we all want to get at the real merits of a case, but there are two sides at least to every case, and the greater the latitude in the law the greater the uncontrolled discretion left to the judge. One humiliating fact is too often ignored. A vast number of people enter into affairs more or less complicated without ever having any clear idea from first to last as to what they are about. I will not assert, in contradiction to science, that any one can act without a motive, but the vaguest possible influences often lead men to actions, the evident consequences of which they ignore with the blindest fatalism. The ingenuity of special pleading may make confusion worse confounded under a most attrac-

tive mask of exactness; for the ingenuity of the pleader will draw inferences from casual incidents or admissions consistent, indeed, with each other, but entirely illusive as affording any indication of the intentions of the parties concerned. A rough and ready decision on such grounds "as would, or ought, to satisfy a jury," is the only possible solution of such cases. The popular desire for miscalled Equity probably arises, in great part, from such cases as these, where the successful litigant wins his cause entirely through the superior acumen of his lawyer. Neighbours, knowing the facts which never are brought before the Court, are indignant at the wrong done, and cry out for a remedy which would but aggravate the disease.

It may have a very reassuring sound to unthinking ears, that in equity the judge is not bound by the letter, but can look behind it to the reason, of the law. Still no laws can be supposed to be made without reason, and to determine as to the reason or the applicability of a law, is no light responsibility, hardly one to be entrusted too indiscriminately to "barristers of seven years' standing." Doubtless there are many able men presiding over the County Courts, still they have neither the leisure nor the support of a learned Bar, both of which, in the Higher Courts, are a safeguard against this latitude being abused or decisions being granted without reference to any principle, on the mere will of a judge. The infusion of too much "equity" in any such sense as this into our lower courts is fraught with very great danger. Of all evils, uncertain law is the worst and most demoralising. The ill effects of even a bad law can often be mitigated: if they can be foreseen they can often be guarded against; at worst the legislature can supply a remedy. But anything approaching to caprice, or even a colourable pretext for alleging or suspecting it, is a far more serious matter. The loser will hardly believe in the purity of capriciously administered justice. The High Court of Chancery, no doubt, administers Equity on principles as stable and as

clearly defined as those which govern the Courts of Law; but what will be the result of giving large discretionary powers to numerous small courts spread throughout the country? In the very nature of things any Court must be bound by the precedents made by its own decisions—unless of course they are over-ruled or modified by higher authority. Apart from any defect of judgment in those administering justice in these courts, the natural and inevitable course of development would be so diverse as to lead to utter confusion. The practice in each county would tend to diverge from that of every other, unless all alike were placed in definite subordination to a central authority. Nothing is to be gained by granting undue latitude to the local Courts of First Instance. Their true function is not to settle complicated and intricate cases, or to determine nicely balanced questions of conflicting rights, but rather to afford a prompt remedy for civil wrongs. It is not meant that merely technical limitations should be imposed upon their operations. If A. has a claim against B. and B. has a claim against A. on both of which the Court is competent to decide, it is no extension of its power to permit it to do the sum in subtraction necessary to bring out the final result. A mere multiplicity of cross claims does not necessarily involve any further difficulty than can be settled by the simple process of collating them at the end of the proceedings. Further there are many trade customs suited more or less beneficially to the exigencies of different industries. We have different conditions of society to deal with, all of which have a claim to consideration. It is not a superficial and inelastic uniformity that is desired, but the control of a high central authority, to ensure due unity of principle.

So far, therefore, from granting an ill-defined latitude to the inferior courts, they should be subject to strict rules and systematic and close supervision, though it is equally true that these rules in matters of detail, should be framed to meet the necessities and reasonable convenience of those who

are to be subject to them. The common relations of men in matters of contracts, of hiring and service, buying and selling, partnership and joint ownership, are more or less modified by very different local customs which obtain in different parts of the country. I am quite aware that the courts do take cognisance of such differences, and I do not for a moment suppose that such matters as these are subjects for new legislation. I would urge rather that the remedy for most of the inefficient working of the courts, is to be sought for, not in sweeping statutes, but in carefully and patiently watching and recording the results of experience, and carrying out unostentatiously such simple administrative adaptations as will render the practice of the courts more intelligible and efficient. I admit most fully that, as the administration of justice is the exclusive function of the sovereign power of the State, and must be regarded as enforced by the power and authority of the whole body politic, no man can claim a right to occupy the time of its courts by questions arising on foolish or frivolous contracts or customs, still less upon contracts or customs which are contrary to good morals and the public weal. It is no denial of justice for the law to refuse to entertain cases of this kind, and this is all that the law does when it refuses to permit any individual or interest "to contract itself out of the law." Fully admitting this, it is not the less certain that sound policy requires that the administrators of the law should be prompt, effectually to recognise the claims of right arising under any new forms or organisations of industry, by adapting the machinery of the court to the work it has to perform. The court should be adapted to the work, not the work to the court. Those who are able to realise to how great an extent the well being of a community depends on innumerable delicate adjustments and adaptations of industry, will best know how injurious are any restrictions, direct or indirect, upon its various methods of organisation. Order is essential to all, but the forms of order in a healthy and

vigorous social life, are as various as those in the visible creation.

Cannot this order, with the requisite mobility, be best secured by a closer organization, and due graduation of the Courts? Let the ordinary Courts of First Instance, and especially the local tribunals, be confined to the administration of strict law. I do not use the phrase in any technical or artificial sense, but to signify that these courts should be governed by laws and rules which can be definitely expressed, and let their power of acting on vague notions of "equity" be closely restrained. The moral effect of the prompt and even somewhat sharp administration of intelligible law is not to be overlooked. Even if the law is imperfect or partial, the remedy is not to be sought in an evasion of its provisions, under the name of equity, but in amended legislation. Let the remedies that must be required, in certain cases, against the blind operation of any laws which human skill can devise, be provided by the higher Courts. Referring specially to Local Courts, their chief use is to administer prompt justice in the ordinary concerns of life. A most important function it is, so important that the even current of its course should be carefully guarded against interruption. To this end let a discretionary power be vested in the Judges of such Courts of referring the causes brought before them to the Superior Courts, at any stage of the proceedings. There can be little risk in giving such free discretionary powers, as they will necessarily be exercised under competent supervision. With adequate machinery there is, surely, no reason why a reference or an appeal should be unduly tardy or costly. Difference of practice adapted to local requirements may well be admitted by a central authority, and yet kept in due subordination to unity of principle; while divergencies (however well devised to meet special cases) made without reference to such common authority, would tend, inevitably, to create confusion. The decisions on referred cases should result in a body of soundly developed rules, not

of unbending uniformity, but in due harmony throughout every district of the country.

Upon this view of the case the mere amount of the claims should not determine the power of reference. Causes for small sums may involve not only large interests but important principles. The nature of the case rather than the accidental amount, should determine the expediency of a reference. Indeed if a right of appeal is granted, there seems no adequate reason why the amounts coming under the jurisdiction of county courts should be closely restricted. The natural penalty on the losing party of paying the costs on both sides, would be some check to vexatious appeals.

Another effectual means of promoting the speedy administration of justice, requiring merely an extension of existing practice, would probably be found in the more frequent reference of ill-digested and complicated cases to a special office. Cases sometimes are sent to court in a complete muddle. They fail naturally. The usual reply is, "A man is bound to prove his own case," which is very true as far as it goes, but does not cover the whole question. A Court, no doubt, may order a man, who is responsible to others, to render an account, but that is just what no Court can enforce effectually. He swears he has done his best, and it is impossible to prove the negative. An order to deliver up accounts, letters, and other documents, or even a warrant to search for them, can be far more certainly enforced. What is really required in the class of cases referred to is thoroughly skilled investigation. Facts have to be "puzzled out" and pieced together by every and all methods. Now, though no doubt many lawyers are to be found who are good men of business, the practice of law does not afford good training for special work of this kind. The experience even of those most conversant with such affairs is necessarily one-sided, for it is the understandings misunderstood, the cases which have gone wrong once out of a thousand times which come into court. Lawyers see too much of the *pathology* and

little or nothing of the *hygiene* of the subject. They see so exclusively the folly of trusting too much that they are apt to fall into the opposite error of not trusting at all. Still, this work, though fitted rather for the specialist than the lawyer, should certainly be done under strict legal supervision. Surely there is often a failure of justice from the want of such a power of investigation as might be afforded by a trained body of accountants, as they might be called, though their duties would extend beyond the mere adjustment of figures.

With such machinery at hand, the obstruction to general business, often raised by very inadequate causes, would be avoided. It would afford also a check to many abuses from which all are liable to suffer. The work of solicitors is sometimes culpably bad, and the client finds it very difficult to get redress. Often, however, solicitors are more sinned against than sinning, and could tell many a story of the infinite perversity and wrongheadedness of clients, to the great detriment of other interests besides their own. Even when there is no worse fault than comparatively venial neglect and ignorance, it is but just that a man should pay for his own shortcomings, and though costs should not be made *artificially* penal, no part of the burden should be directly or indirectly thrown upn the public.

It is especially among the more ignorant classes that injustice is apt to arise from the very different degrees of intelligence which they bring to bear upon their affairs. It is not every village that has its Hampden to withstand the petty tyrant of its fields. Admirable as the self-reliant principle may be that, the courts being open to all, without fear or favor, each man is bound to look solely to his own interests; yet the power might well be more frequently used of ordering a searching investigation by trained experts, under legal control, where the Judge had reason to believe the true merits of a case were not fairly brought before him.

IX.—CONTEMPT OF COURT IN AMERICA.

A PAMPHLET has lately been issued in America bearing the following quaint title, "Judicial Conduct and Deportment; Judge Davis and Six Gentlemen of the New York Bar: By a Member of the Profession."

The extraordinary language used by a late Q.C., and present Member of Parliament, has induced many to think that the law of contempt requires perhaps some alteration. In New York we find, according to the above-named pamphlet, that Judge Davis does not permit even "Silent Contempt" to pass unnoticed, and so far as we can understand the case, our sympathies are in his favour. The question is necessarily a difficult one, but we think it well that our readers should have the facts before them so as to be in a position to decide whether contempt was intended or not. After the disgraceful disclosures which led to the breaking up of that circle known as the "Ring," one of its principal members, W. M. Tweed, accused of peculations on a gigantic scale, was twice put on his trial; Judge Davis being on the bench on both occasions. The jury disagreed on the first trial, and the learned judge made some remarks considered by W. Tweed's lawyers as exhibiting a bias against the defendant, and as being unfavourable towards the system of defence adopted by themselves. With all respect for Mr. Tweed's lawyers, we can only wonder that any defence was attempted. The case came to a second trial, and we find that the prisoner's counsel handed up to the judge a letter signed by them all, in which they state that their client fears, from the circumstances of the former trial, that the judge has conceived a prejudice against him; and that his mind is not in the unbiassed condition necessary to give an impartial trial; and requesting time to consider whether he should not relinquish the duty of presiding at the trial to

some other judge, at the same time declaring that no personal disrespect is intended. Such a letter, however carefully worded, could assuredly not be passed over, even by an "elected" judge anxious to secure for himself the goodwill of those in whose hands lay the power of re-election. Judge Davis is evidently not a person to submit to dictation; he accepted the paper and reserved his decision. The trial went on. At its close he sentenced three of the writers of the remonstrance to a fine of 250 dollars each, and severely reprimanded the juniors, giving it as his opinion that "if they had done such a thing in England, they would have been expelled from the bar within an hour." The counsel protested in defence that they intended no contempt of court; that they felt and meant to express no disrespect for the judge, but that their action was taken in furtherance of what they considered to be the interests of their client. The judge refused to recognize such a defence and distinction as possible or probable. It has been argued that the manner of making the remonstrance, shows that no contempt was committed, the letter being a private communication. To this, however, it may be answered that such a communication in a public law court, to a public officer, and concerning a matter of such public importance, cannot be considered "private." The subsequent declarations of the counsel that no disrespect was intended can hardly be sustained, from either point of view. It would seem manifestly impossible to ensure the administration of justice if the appointment of a judge to hear a case was left in the hands of counsel. Yet we gather from the following passage in a well-known American legal journal, that the question is differently viewed by many persons in the United States:—

"If Judge Davis concluded, after consultation with his brethren, that he did not like the paper, and that his feelings had been hurt, he should have followed the example of delicacy set by the officers of the court who presented the communication to him, and handed them a paper setting

forth his views, or invited them to dinner at Delmonico's during the intermission, and had a friendly explanation under circumstances provocative of good humour. The judge did just right in going on with the trial; he did just wrong in becoming angry with the paper."

Legal points, or differences between counsel and judge, are for the future, according to this argument, to be decided in a public restaurant, after the manner of the late "lamented Chief Justice Nicholson." Perhaps the excessive dread which is apt to prevail in the great Republic, as in Switzerland, lest any office should acquire an importance savouring of monarchy, may account for this singular theory. The journal from which we have quoted goes on to make the following statement:—"We do not know any law that compels counsel to pretend to believe that the judge is unbiassed in any particular case. With great deference for Judge Davis, we do not believe that one of the English judges on the Tichborne trial would have taken offence had Dr. Kenealy sent up such a letter. On the contrary, we find, from the record of that trial, that they endured conduct from the defendant's counsel, compared with which that of the counsel for Tweed should be considered the deepest reverence and the most servile prostration, not only without kicking the offender out of the profession within 'a single hour,' but without fining him the English equivalent of 250 dollars."

Our American friends do not seem to have remembered that the power of expelling from the bar is not in the hands of the English judges, and they may rest assured that "a single hour" would not be considered sufficient space of time for the Benchers of any Inn to express so marked an opinion of the action of counsel if brought to their notice. The case of Lord Ellenborough, in the Hone trial, is mentioned, and the exclamation of the prisoner in answer to much browbeating and bullying, "My Lord, you are not my judge; these," turning to the jury, "are my judges;" is quoted against

Judge Davis's action, though we do not see that an identity has been proved between the cases. We do not know whether the *Albany Law Journal* in its view of this question represented the feelings of the American bar generally, but the following extracts will probably cause our readers to draw conclusions adverse to the existence in the United States of that respect for the Bench which we should have looked for among the countrymen of Story and Kent:—

"We pay our judges their wages to try the rights of parties, and not to run a tilt against emotional contempts." . . . "It is much more important to our institutions that the bar should be free and untrammelled within reasonable bounds, than that sensitive hysterical judges should have their feelings guarded against offence." The remark made by Pliny in his "Letters:" "The very first duty which a judge owes to his position, is to have that patience which constitutes an important part of justice," is pregnant with thought, and worthy of adaptation. But a judge has also to guard the interests of justice against even the possible attempts of counsel who may be inclined to strain a point to protect their client. We regret to see an able law journal thus writing about an office of such importance, and can only hope that the harmony which should reign between the Bench and the Bar, may not soon be disturbed by any similar expressions of want of confidence.

LEGAL TOPICS.

FOREIGN JURIDICAL CONGRESSES.—As we have no doubt that some of our readers will spend part of their Long Vacation abroad, we think they may be glad to know what gatherings of jurists are to be held on the Continent during August and September.

The quaint old town of Nüremberg is this year to be the seat of the fifteenth session of the German Juristentag, whose first meeting was held in Berlin in the summer of 1860. During the intervening years the Presidential chair has been filled by some of the most distinguished jurists in Germany, among whom it is sufficient to name Bluntschli

and Gneist. The foundation of this Congress is due to the energy of the Berlin Juridical Society, of which we have spoken in another part of our present issue. The date of this year's meeting is fixed for 26th-28th August.

Holland is also to be the scene of conferences for the discussion of points connected with International Law, and, under the patronage of the King of the Netherlands, both the Institute of International Law (founded at Ghent, 1873), and the Association for the Reform and Codification of the Law of Nations (founded at Brussels, 1873), will hold their annual meetings, early in September, at The Hague. We shall make special arrangements to secure the best information for our readers as to the results of these Congresses, and their bearing on the advancement of the science of Jurisprudence.

We have received from Messrs. T. and J. W. Johnson and Co., law publishers, Philadelphia, a copy of an Address delivered before the Law Academy of that city, on the 13th May, 1875, entitled "Separate Use in Pennsylvania, considered with respect to the Restraint on Alienation," by E. Coppée Mitchell.

We have also to acknowledge the receipt of "The Supreme Court of Appeal," by Frederick Calvert, Esq., Q.C., (London, W. Ridgway, 1875); "Case of Williams v. Evans, appeal before Vice-Chancellor Malins;" "Some of the Ancient Jurisdictions of South Britain," by Joseph Boult, F.R.I.B.A., (a Paper read before the Literary and Philosophical Society of Liverpool); "Reformatory Industrial Schools for India," by Mary Carpenter (reprinted from the Journal of the National Indian Association, June 1875); "Intempérance et Misère," Paris, 1875, by M. Lefort, Advocate at the Court of Appeal, Paris, &c.

The Court of Queen's Bench.—The *Times* reporter, at the conclusion of his report of cases decided in the Queen's Bench, in the sitting in Banco, on the 5th July writes:—"The Court then rose, having sat for the last time. The judges, indeed, proceed to Guildhall to continue the Nisi Prius sittings there, but they are not sittings of the Court itself, and are only sittings of single judges for trial of cases under the authority of the Court. The Court of Queen's Bench, properly so called, unless some fresh change is made in the law, will never sit again, and has closed its long existence—of at least 1,000 years, for it is curious that just that period has elapsed since the time when the King, in the person of Alfred, first exercised its high jurisdiction over all

magistrates and superior judges. The special jurisdiction, indeed, constitutes the exclusive jurisdiction of the King's Bench, which preserves the memory of its origin in its peculiar title, 'the Court of the King before the King himself.' Its jurisdiction is, indeed, under the Judicature Act, transferred to the High Court, but it ceases to exist as a separate Court, and whenever its judges sit again it will not be as judges of this Court, but as members of a division of the High Court. And so this High Court, with all its memories and traditions, has passed away into history, and become a thing of the past."

OBITUARY.

MORGAN JOHN O'CONNELL, ESQ.

Morgan John O'Connell, Esq., barrister-at-law, of Greenagh, near Killarney, in the county of Kerry, who died on the 4th inst., in the sixty-fourth year of his age, was the elder of the two sons of the late John O'Connell, Esq., of Greenagh, by Elizabeth, daughter of William Coppinger, Esq., of Ballyvolane, in the south of Ireland. He was the nephew of the illustrious Daniel O'Connell, of Derrynane Abbey, the Irish Liberator. He was born in the year 1811, and was educated at Trinity College, Dublin. Called to the English bar at Gray's Inn in Trinity Term, 1852, he joined the Home Circuit, and practised at the Central Criminal Court. Up to the period of his death he held an official position as counsel in connexion with the General Post Office at St. Martin's Le Grand. Mr. O'Connell was a magistrate for the county of Clare, and was scarcely more than of age when he was selected as member of Parliament for his native county of Kerry, which he represented as a "Repealer" from 1835 down to 1852, when he retired. Mr. O'Connell inherited much of his uncle's genius, was an eloquent speaker, and a man of the most graceful and polished manners, but during the closing years of his life he took no part in politics. He derived considerable property in Clare from his uncle, the late Mr. Coppinger. In private life he was distinguished for many amiable traits of character. A contemporary, referring to his death, says, "His temperament was too easy, his manners were too genial to fit him for the severe labours, and for the harsh and often repulsive environments which every man who wishes to rise at the bar must sternly make up his mind to undergo. Morgan John O'Connell took life gaily, bore its rebuffs unconcernedly, and was in fine a laughing philosopher after Mr. Thackeray's own heart; and it was curiously noted that among all the friends and admirers of the great novelist, there was but one who presumed to recite the scathing satire of the 'Battle of Limerick' in his presence, and that one was

Morgan John O'Connell, an approved patriot, an Irishman of the Irish, who could, nevertheless, appreciate and give double zest to the rare humour, and the ringing rhymes of 'The Shannon shore.'" The O'Connells, from whom the deceased gentleman descended, have long taken a prominent part in Irish political affairs, and also in various other capacities. John O'Connell, Esq., of Derrynane, raised a company of foot for the service of James II., and signalised himself at the siege of Derry in 1689, as well as at the battles of the Boyne and Aughrim, and, returning to Limerick, was included in the capitulation of that city. The great-uncle of the deceased, Daniel, Count O'Connell, became highly distinguished. He was present at the capture of Port Mahon, and also at the grand attack on Gibraltar. On the downfall of Louis XVI. he emigrated to England, and was appointed colonel of the 6th Irish Brigade, which command he retained until that corps was disbanded. He held the rank of a general in the French army, and, at his decease, he was the oldest colonel in the English service. Besides the gentleman now deceased and his celebrated uncle, several other members of this family have held seats in Parliament. On some occasions four or five different Irish constituencies have been represented by the O'Connells at one and the same time, Mr. Morgan John O'Connell married in 1865 Mary, daughter of Charles Bianconi, Esq., D.L., of Longfield, in the county of Tipperary, the eminent introducer into Ireland of the travelling cars which bear his name. —*Irish Law Times.*

R. B. B. COBBETT, ESQ.

The late Richard Baverstock Brown Cobbett, Esq., head of the eminent firm of Cobbett, Wheeler, and Cobbett, solicitors, of Manchester, who died on the 3rd inst, at his residence near Wilmslow, Cheshire, in the sixty-first year of his age, was the youngest son of the late Mr. William Cobbett, the distinguished politician, formerly M.P. for Oldham, and brother of Mr. John Morgan Cobbett, the present senior member for that borough. He was born at Botley in Hampshire, in the year 1814, and, having received a great part of his education at home, was articled to a Mr Faithfull, then practising as a solicitor in London. On being admitted a solicitor, which took place in Hilary Term, 1838, he established himself in Manchester, where, by his unassisted exertions he created the business which he and his partners have ever since carried on. Mr. Cobbett was most generally known to the public in the capacity of an advocate. "The deceased," says the *Manchester Courier*, "inherited his father's Conservatism as well as his Chartist opinions, and became a member of the Chartist body during the agitation from 1837 to 1841. Subsequently, becoming dissatisfied with the leadership of Feargus O'Connor, he separated himself from the ultra-Chartists, and when the movements, after the riots, subsided, his political

life came to an end In the interval, however, he had rendered great service as an advocate to Chartists and Socialists who had been prosecuted in Manchester and the neighbouring towns for riotous behaviour, and his talents then shone forth brilliantly, amply evidencing that he would have made a splendid advocate at the bar; indeed, all who have any connection with the law, and who have had an acquaintance with him, hold a strong opinion that in the event of his having gone to the bar he would speedily have risen to the bench, on which his calm and judicial mind would have made him one of the chief ornaments." Mr. Cobbett was engaged in defending the prisoners who took part in the great Chartist riots in Manchester in 1839, and he was very frequently employed by the Government in enforcing the provisions of the old Factory Act, as against the masters, receiving his instructions direct from London. In these cases he was very frequently opposed by the first counsel of the day who were specially retained on behalf of the masters. Perhaps the most important of these cases was the one at Glossop in 1854, when Messrs. J. and W. Sidebottom and Co., and Mr. John Wood, spinners and manufacturers, were summoned for allowing their hands to work during meal hours. The overlookers in each case were convicted and fined, but the Bench expressed their opinion the employers were the culpable parties. Mr. Cobbett held a high place among the local solicitors, and was a member of the Manchester Literary Association and of the Manchester Law Association, of which he had been president. "His great and essential characteristic," says the journal above quoted, "was his power of condensation—he never wasted the time of the magistrates with stating the facts of his cases, but put them with judicial clearness and conciseness before the court. He conducted his examinations and cross-examinations of witnesses on the same principle, and came directly to the point he wanted to elicit. By reason of these great and valuable talents he became a noted pleader, nor was there one who carried so much influence with him, or who impressed the Bench to such an extent." Mr. Cobbett married in 1841, Jane, daughter of Mr. William Palmer, of Bollitree, near Ross, Herefordshire, who survives him, and by whom he has left four children, two of whom, the sons, are in the Profession. The remains of the deceased gentleman were interred at the parish church at Wilmslow.—*Law Times.*

We have also to record the death, in his sixty-first year, of MR. WILLIAM ADAM MUNDELL, Q.C., a Bencher of the Middle Temple. Mr. Mundell, who died at his residence, in the Buckingham Palace Road, on the 15th July, was called to the bar at the Middle Temple on the 7th May, 1847, and took silk in 1866. For some years before his death he had been a leading member of the Parliamentary Bar.

Law Magazine and Review.

NOTICE TO SUBSCRIBERS AND THE PUBLIC.

THIS old-established Legal Periodical, having passed into the hands of new proprietors, and under new editorship, will in future be published in its old form, as a Quarterly, in November, February, May, and August, at 5s. With the present number, which concludes the Third Series, is issued a Title Page and a Table of Contents. The first number of the Fourth Series will be published on the 1st November next, by Messrs. Stevens & Haynes, Bell Yard, Temple Bar.

Special arrangements have been made by the Proprietors for giving to this, the only English Quarterly Review of Jurisprudence, unique information on Legal Bibliography and the progress of Juridical Science on the Continent, which will be confided to their Foreign Editor, with the assistance of eminent Continental Jurists. Particular attention will also be paid to American and Colonial Jurisprudence, and the Magazine will, as ever, afford its best support to all measures calculated to advance the true interests of Legal Science and of the Profession.

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