THE

AMERICAN JURIST,

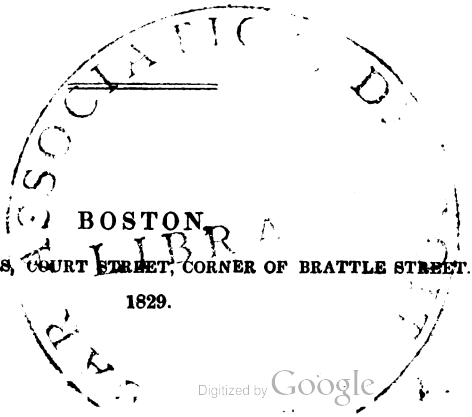
AND

LAW MAGAZINE.

VOL. I.

JANUARY AND APRIL, 1829.

"Hanc igitur video sapientissimorum fuisse sententiam, legem neque hominum ingeniis excogitatam, nec scitum aliquod esse populorum, sed æternum quiddam, quod universum mundum regeret, imperandi prohibendique sapientia."—CICERO.



BOSTON,
FREEMAN & BOLLES, COURT STREET, CORNER OF BRATTLE STREET.
1829.

TO SUBSCRIBERS AND THE PUBLIC.

THE editors of the American Jurist present their second number to the public, corresponding more nearly than the first to the plan on which it is proposed to conduct the work. It is intended, hereafter, to make the department of intelligence still more extensive than it is in the present number. The digest of recent decisions will be continued in the succeeding numbers. The object will be to give merely an index to those decisions which are of general interest throughout the country, omitting those which depend on local statutes and usages. Cases however depending on statutes of limitations or of frauds, or other statutes which are similar in many states, will be embraced in the digest. The analysis of legislation will be also continued and extended to all the states. The conductors of the work will by these means endeavor to make it exhibit a correct view of the course of cotemporary legislation and judicial decisions. It has been and will still continue to be their object to make the work national and general, introducing only those subjects which are likely to be interesting in every part of the United States. They will also endeavor to fill their volumes with subjects of lasting interest, and to make them of permanent utility, and with this view they will refrain from introducing to any considerable extent reports of cases which will appear in the volumes of reports, including only interesting and important cases that may come to their knowledge, which would not otherwise be published in a form convenient for reference. It is proposed particularly to make the work the vehicle of elaborate written opinions of eminent lawyers on important questions; and the conductors request a communication of such opinions.

CONTENTS

OF

No. II.

ART. PAGE.

I. JACKSON ON REAL ACTIONS 185
A Treatise on the Pleadings and Practice in Real Actions; with Precedents of Pleadings. By Charles Jackson.

II. PROSECUTIONS AGAINST ANIMALS 223

III. JUDGE STORY'S ARGUMENT 237
Outlines prepared for an Argument to be delivered before the Board of Overseers of Harvard College, upon the Discussion of the Memorial of the Professors and Tutors of the College, claiming a right that none but resident Instructers in the College should be deemed or chosen 'Fellows' of the Corporation; the substance of which was spoken before the Board at their Meeting in January, 1825. By Joseph Story, one of the Members of the Board.

IV. TRIAL BY JURY 274
A Treatise on the Law and Practice of Juries as amended by the Statute of 6 Geo. IV. c. 50, including the Coroner's Inquest, &c. By James Kennedy.

V. FUGITIVES FROM JUSTICE 297

VI. BROUGHAM'S SPEECH 310
Present State of the Law. The Speech of Henry Brougham, in the House of Commons, on Thursday, February 7, 1828, on his motion, 'that an humble Address be presented to his Majesty, praying that he will graciously be pleased to issue a Commission for inquiring into the Defects occasioned by time and otherwise in the Laws of this Realm, and into the Measures necessary for removing the same.'

VII. STORY'S EDITION OF ABBOTT ON SHIPPING . 321
A Treatise of the Law relative to Merchant Shipping and Seamen. By Charles Abbott. Edited by John Henry Abbott. Fourth American from the fifth

London edition. With Annotations, containing the principal American Authorities: By Joseph Story.

VIII. COXE'S DIGEST 330
A Digest of the Decisions in the Supreme Court, Circuit Courts, and District Courts of the United States. By Richard S. Coxe.

IX. WILLIAMS'S EDITION OF HOBART'S REPORTS 334
The Reports of that Reverend and Learned Judge, the Right Honorable Sir Henry Hobart, Knight and Baronet, Lord Chief Justice of his Majesty's Court of Common Pleas, and Chancellor to both their Highnesses Henry and Charles, Princes of Wales. First American, from the fifth English edition, with Notes and References to Prior and Subsequent Decisions: By John M. Williams.

X. QUESTION OF GENERAL AVERAGE . . 336
An Opinion of Charles Jackson.

DIGEST OF RECENT DECISIONS . . . 339

LEGISLATION
Great Britain 363
United States 366
Massachusetts 368
Mississippi 375

INTELLIGENCE 378

QUARTERLY LIST OF LAW PUBLICATIONS . 383

TO THE PUBLIC.

THE publication of this journal has not been undertaken without the strongest assurances of co-operation and assistance from many of the most learned and distinguished members of the profession in different parts of the country, provided the plan and principles on which it is to be conducted shall meet their approbation. That it is of great importance to have such a journal published, and that it may be of extensive usefulness, seems to be too obvious to be insisted upon, and is, indeed, universally admitted. It is matter of remark and surprise, that, while we have so many political, theological, literary, medical, and other journals, we should be without even one devoted to legal science, than which no other comes more immediately 'home to men's business and bosoms.' This deficiency has been but partially and very imperfectly supplied by the leading reviews, some portions of which have been occupied with legal subjects, which have been admitted, however, not without some hesitation on the part of the conductors of the reviews, and, in some instances, to the prejudice of their popularity; since it is, in some degree, a departure from their plan, and unacceptable to many of their readers. But it is apparent that the most free admission of such articles into those journals, without, in fact, entirely changing their character, would, by no means, answer the demands of the profession, or even of that numerous class of readers who have a sufficient knowledge of the law as a liberal study, to be interested in its current topics of discussion, although they take no active part in the practice. The consequence is, that, for want of some

common medium of communication, the different members of the profession scattered through the country are, as far as their professional pursuits are concerned, in a manner insulated from each other.

For want of some mode of publication convenient for preservation, such as a law journal presents, many productions rich in learning and brilliant in thought, like the first article in our present number, if we may be allowed to speak of any part of our own journal in such case, are either consigned to oblivion, or, at most, reach only a limited circulation and short-lived publicity in a pamphlet form.* The loss to the profession and the community is still greater in those stifled efforts of genius which are now not put forth at all, but which are sure to be excited and called forth by an appropriate periodical work; which, by diffusing at large the knowledge that now remains in obscurity, and embodying the speculations and reflections that otherwise perish undivulged, would give to all the members of the profession the advantage of the learning and thinking of each one. Nor is such a work less called for on account of the productions which it may elicit, than by such as are already published. An increasing tide of reports and law treatises is setting in upon the profession, only a very small part of which most of its members have the means to purchase, or the leisure to read; and yet they all find, in the course of their experience and practice, the need of such general information respecting the subjects and character of these works, as can be supplied only by a periodical journal. And the authors and publishers of reports and elementary treatises have an evident and strong interest in promoting a publication, one object of which is to direct the public attention to all those productions of the press which may deserve to be patronised and diffused. It is a cheering excitement to an author, who is devoting months and years in laborious and painful application to his work, to know that the fruits of his toil will, immediately on

* The Suffolk Bar requested a copy of Judge Story's Address for the press at the time of its delivery, which he, at that time, declined giving.

their being presented to the public, be elaborately analyzed, and their character made known.

There is no country in which some medium of legal communication and intelligence between the different parts is more necessary than in the United States, since the frequent migrations and active commerce among the different states, and the consequent intermixture of the interests and affairs of the subjects of distinct jurisdictions, make it important, and indeed necessary, that the members of the profession in one state should have some knowledge of the legislation and legal administration in the others, and much of this knowledge can be most conveniently and economically obtained through a periodical journal.

Such a work may be no less useful and important as affording the means of information wanted by every practising lawyer and liberal student, respecting the legal proceedings and publications of foreign countries. Until very recently, a great part of our law, as well as our law books, were made in England; we followed the decisions of the English courts with a deference little short of servility, insomuch that our courts have, in some instances, felt themselves to be so strictly bound by their authority, as to reject very cogent and conclusive arguments against them, continuing to decide upon the old doctrine even after it had, in fact, been overruled and exploded by the English courts; until afterwards, by the subsequent publication of their reports, our judges felt themselves at liberty to decide in conformity to the demonstrated law of the case, without deeming it a violation of the respect due to those foreign tribunals, or apprehending the reproach of dangerous innovation. The maxim was, and indeed is, that the courts must administer the law as they find it; not make it; and as many doctrines of the law are the logical deductions from principles acknowledged both in England and this country, the practical application of the maxim was, that our courts were as much bound by the logic of the English judges, as by the principles of the common law. The means afforded us by a community of language to resort directly to the richly-stored re-

positories of English law, are, no doubt, of immense advantage, and will always continue to be so; but the time for implicitly adopting the English books, and servilely following the English administration of the law, is fast passing by; and the period of our pupilage is almost expired. 'I do not like,' says an eminent American jurist in a private letter now before us, 'this everlasting copying of British publications, this everlasting waiting for the word of the fugelman beyond sea;' and he expresses what we believe to be the universal sentiment of the profession. If the time is not already arrived, it is very near, when the British jurists, ceasing to be our masters and oracles, will only be our fellow-laborers in the common field of legal science; and the more we cease to adopt implicitly, and in the gross, their books and their law, the greater will be the necessity and utility of a work, one of the objects of which may be to direct the attention of the profession to such parts of the legal literature of Great Britain, as well as of the nations of the continent, as shall shed the most light upon our own system.

A liberally and industriously conducted law journal may have a salutary influence upon our legislation, which is often directed to subjects of discussion that require a preparation on the part of the hearers, as well as the speakers. Upon many questions, such, for example, as that of a bankrupt law, and especially upon constitutional questions, the debate is very materially assisted, and much is done towards arriving at satisfactory conclusions, by a previously-published investigation, having reference to the particular question and occasion. The discussion of many of these questions involves the use of much technical language, and is accordingly very ill suited to the character of the periodical works now published. The question, for instance, of incorporating more of equity jurisdiction into the laws of Massachusetts, which has been agitated in the state for eight or ten years past, has never been thoroughly discussed in any publication; it has hardly been touched upon, because there was no publication suitable for this purpose. The subject has, therefore, labored,

the progress has been slow, and the successive steps have been taken with great hesitation, because the lawyers were, in general, very little acquainted with the subject, and possessed few books to give them any knowledge of it. Many of them thought, at first, that a court of equity was one in which the judge decides according to his discretion, or upon the principles of common sense, that is, in effect, upon no principles at all; and as long as they entertained such a prejudice, they were, as might have been expected, very averse to the establishment of such a court. A journal devoted to subjects of this sort would have set them right at once upon this point, and upon many others, which have been subjects of much awkward embarrassed debate between speakers and hearers, who could get no common position from which to start.

The subject of codification is one that falls very naturally within the plan of our publication, and one that hardly seems to be in its place either in the newspapers or literary reviews; though it has occupied some share in both, since we first began to hear of Jeremy Bentham. The progress in this discussion towards satisfactory conclusions has been very slow. The question is even now discussed as a general one, that is, whether every community which has not digested its laws into the form of a code should not immediately set about doing it, without taking into consideration whether their laws, as they stand, are voluminous or few, intelligible or obscure, multifarious or simple, or well or ill framed, or whether they can command the skill and talents requisite to any material reformation. These are questions certainly very pertinent and essential to the subject, and yet in the mode of discussion which has been most frequently adopted, they have been entirely excluded, for the reason that the inquiry did not relate to the laws of any particular community. It cannot, we think, be doubted that a journal devoted to subjects of this description, would have assisted the profession and the public very materially in arriving to satisfactory positions in regard to codification.

From the Year Books downwards, the decisions of the courts,

though regarded as authorities, that is, considered *prima facie* to be law, have yet been subjects of discussion, and must continue to be so, as long as law is entitled to the rank of a science, for a congeries of arbitrary inconsistent dogmas cannot be a science; and, therefore, the decision of a court which is not in harmony with the system of which it is intended to be a part, is, in effect, overruled as soon as it is pronounced. The candid, respectful, and liberal examination, in a suitable place, of a principle or doctrine contemporaneously decided by a court, is as fully authorized, and as proper, as the examination of any principle adopted a hundred years ago. And by far the most suitable place for such an examination is in a work addressed more particularly to lawyers. In such a work, an exception to a decision is less liable to the objection that it is an appeal from the court to the popular voice, than if it appears in a newspaper or other popular journal.

We will not pretend to enumerate all the present deficiencies which a well-conducted law journal may supply, or all the modes in which its useful influence may be felt in the profession and in the community, but one other advantage of such a work ought not to be overlooked. It is due to the reputation of those distinguished judges and lawyers who, by their talents and labors, lay the foundation of the stability and permanent usefulness of our institutions,—and it is also due to their survivors,—that some memorial more peculiarly appropriate, as well as more lasting, than marble or brass, should be dedicated to their memory, and that some niche should be set apart to them in a temple consecrated to intellectual greatness;—and no work can be more suitable for this purpose than a journal devoted to the science which they have advanced and adorned.

In thus stating the present deficiencies of our legal literature, we have, at the same time, intimated the plan and principles on which the JURIST is intended to be conducted.

CONTENTS

OF

No. I.

ART.		PAGE.
I.	JUDGE STORY'S ADDRESS . . . . . An Address delivered before the Members of the Suffolk Bar, at their Anniversary, on the fourth of September, 1821, at Boston. By Joseph Story.	1
II.	ON A NATIONAL BANKRUPT LAW	35
III.	LAW OF REAL PROPERTY . . . . . Observations on the Actual State of the English Laws of Real Property; with Outlines for a Systematic Reform. By James Humphreys.	58
IV.	SEVERAL QUESTIONS OF INSURANCE . . .	99
V.	LIFE AND WRITINGS OF SIR WILLIAM BLACKSTONE	116
VI.	LIVERMORE'S DISSERTATIONS . . . . . Dissertations on the Questions which arise from the Contrariety of the Positive Laws of different States and Nations. By Samuel Livermore.	132
VII.	TESTIMONY OF QUAKERS	141
VIII.	MEMOIR OF JUDGE TRIMBLE	149
IX.	LITERARY PROPERTY	157
X.	PETERS'S REPORTS . . . . . Reports of Cases Argued and Adjudged in the Supreme Court of the United States, January Term, 1828. By Richard Peters, Jr.	177
	QUARTERLY LIST OF LAW PUBLICATIONS . .	181

THE AMERICAN JURIST.

No. I.

JANUARY, 1829.

ART. I.—*An Address delivered before the Members of the Suffolk Bar, at their anniversary, on the fourth of September, 1821, at Boston.* By JOSEPH STORY.

GENTLEMEN,—In comparing the present state of jurisprudence with that of former times, we have much reason for congratulation. In governments purely despotic the laws rarely undergo any considerable changes through a long series of ages. The fundamental institutions, (for such there must be in all civilized societies), whether modelled at first by accident or by design, by caprice or by wisdom, assume a settled course, which is broken in upon only by positive edicts of the sovereign, suited to some temporary exigency. These edicts rarely touch any general regulation of the state, and still more rarely attempt any general melioration of the laws. For the most part they affect only to express the arbitrary will of the monarch, stimulated by some pressing private interest, or gratifying some temporary passion, or some fleeting state policy. There is in such governments what may be called a desolating calm, an universal indisposition to changes, and a fearfulness of reform on all sides; on the part of the people, lest it should generate some new oppression, and on the part of the ruler, lest it should introduce some jealousy or check of his arbitrary power. In such countries the Law can scarcely be said to have existence as a science. It slumbers on in a heavy and drowsy sleep, diseased and palsied. It breathes only at the beck of the sovereign. It assumes no general rules, by which

rights or actions are to be governed. Causes are decided summarily, and more with reference to the condition and character of the parties, than with reference to principles; and judges are ministers of state to execute the policy of the cabinet, rather than jurists to interpret rational doctrines.

Under such circumstances the lapse of centuries scarcely disturbs the repose of the laws, and men find themselves standing in the same crippled posture, which was forced upon their ancestors, long after their sepulchres have mouldered into dust, and the names of the oppressor and the oppressed are sunk into doubtful traditions. The laws of the Medes and Persians were proverbially immutable. The institutions of China have undergone no sensible change since the discovery and doubling of the Cape of Good Hope; and the pyramids of Egypt, lost as their origin is in remote antiquity, are not perhaps of a higher age, than some of its customary laws and institutions. And it may be affirmed of some of the eastern nations, that through all the revolutions of their dynasties it is difficult to point out any fundamental changes in the powers of the government, the rights of the subject, or the laws, that regulate the succession to property, since the Christian era.

In free governments, and in those where the popular interests have obtained some representation or power, however limited, the case has been far otherwise. We can here trace a regular progress from age to age in their laws, a gradual adaptation of them to the increasing wants and employments of society, and a substantial improvement corresponding with their advancement in the refinements and elegancies of life. In the heroic and barbarous ages, the laws are few and simple, administered by the prince in person, assisted by his compeers and council. But as civilization advances, the judicial powers are gradually separated from the executive and legislative authorities, and transferred to men, whose sole duty it is to administer justice and correct abuses. The punishment of crimes, at first arbitrary, is gradually moulded in a system, and moderated in its severity; and property, which is at first held at the mere pleasure of the chief, acquires a permanency in its tenure, and soon becomes transmissible to the descendants of those, whose enterprise or good fortune has accumulated it. Whoever examines the history of Grecian, or Roman, or Gothic, or Feudal jurisprudence, will perceive in the strong lines, which may every where be traced, the truth of these remarks. And

it is matter of curious reflection, that while the laws and customs of the East seem in a great measure to have been stationary since the Christian era, those of Europe have undergone the most extraordinary revolutions; attaining at one period great refinement and equity, then sinking from that elevation into deep obscurity and barbarism under the northern invaders, and rising again from the ruins of ancient grandeur to assume a new perfection and beauty, which first softened the features, and then extinguished the spirit of the feudal system.

It is not however upon topics of this sort, suggested by a broad and general survey of the past, however interesting to the philosophical inquirer, that I propose to dwell at this time. My purpose rather is, to offer some considerations touching the past and present state of the common law, and to suggest some hints as to its future prospects in our own country, and the sources from which any probable improvements must be derived. In doing this, I shall attempt nothing more than a few plain sketches, contenting myself with the hope of being useful, and leaving to others of higher talents and attainments, the more ambitious path of eloquence and learning.

The history of the common law may be divided into three great epochs; the first extending from the reign of William the Conqueror to the Reformation; the second from the reign of Elizabeth to the Revolution, which placed the house of Brunswick on the throne; and the third including the period, which has since elapsed, down to our own time.

The first of these epochs embraces the origin and complete establishment of the feudal system, with all its curious burthens and appendages; its primer seizins, its aids, its reliefs, its escheats, its wardships, its fines upon marriages and alienations, and its chivalrous and socage services. Connected with these were the distinct establishment of tribunals of justice, administered first by Judges in Eyre, and afterwards by Courts at Westminster; the introduction of assizes and writs of entry, and the perfecting of all those forms of remedies, by which rights are enforced and wrongs redressed. Some of the most venerable sages of the law belong to this period; the methodical and almost classical Bracton; the neat and perspicuous Glanville; the exact and unknown author of Fleta; the criminal treatise of Britton; the ponderous collections of Statham, Fitzherbert and Brooke; and above all the venerable Year Books themselves, the grand depositories of the ancient com-

mon law, whence the Littletons and the Cokes, the Hobarts and the Hales of later times drew their precious and almost inexhaustible learning. Of these blacklettered volumes few in our days can boast the mastery. Even in England they are suffered to repose on dusty and neglected shelves, rarely disturbed, except when some nice question upon an appeal of death, upon the nature of seizin, or upon proceedings in writs of right, calls them up, like the spirits of a departed age, to bear their testimony in the strife. This too was the age of scholastic refinements, and metaphysical subtleties and potent quibbles and mysterious conceits; when special pleading pored over its midnight lamp, and conjured up its phantoms to perplex, to bewilder, and sometimes to betray. This too was the age of strained and quaint argumentation, when the discussions of the bar were perilously acute and cunning. And yet, though much of the law of these times is grown obsolete, and the task of attempting a general revival is hopeless, it cannot be denied, that it abounds with treasures of knowledge. It affords the only sure foundations in many cases, on which to build a solid fabric of argument; and no one ever explored its depths, rough and difficult as they are, without bringing back instruction fully proportioned to his labor.

The commencement of the second period is rendered remarkable by the enactment of two statutes, which have probably conduced more than any others to change the condition of real property, and at the same time that they have facilitated its application to the business and the wants of real life, have in no small degree rendered its titles intricate. I allude to the great statutes of Wills and of Uses in the reign of Henry VIII. The former of them has crowded our books of reports with cases more numerous and more difficult in construction than any other single branch of the law. The latter, followed up by the statute of Elizabeth of Charitable Uses, laid the foundation of that broad and comprehensive judicature, in which equity administers through its searching interrogatories, addressed to the consciences of men, the most beneficent and wholesome principles of justice. The whole modern structure of Trusts, infinitely diversified as it is, by marriage settlements, terms to raise portions or to pay debts, contingent and springing appointments, resulting uses and implied trusts,—grew out of this statute, and the constructions put upon it. And it is scarcely figurative language to assert, that the scintilla juris of Chud-

leigh's case, is the spark, that kindled that flame, which has burned so brightly and benignantly in the Courts of Equity in modern times.

Two statutes equally remarkable adorned the close of this second period; the one the statute of Habeas Corpus, the great bulwark of personal liberty, the other the statute abolishing the burthensome tenures of the Feudal Law. These were the triumphs of sound reason and free inquiry over the dictates of oppression and ignorance. They were the harbinger of better days, and gave lustre to an age, which was scarcely redeemed from profligacy by the purity of Lord Hale, and was deeply disgraced by the harsh and vindictive judgments of Lord Jeffries. Yet through the whole of this period we may trace a steady improvement in the great departments of the law. Under the guidance of Lord Bacon the business of Chancery assumed a regular course, and at the distance of two centuries, his celebrated Ordinances continue to be the polestar, which directs the practice of that court. A more noble homage to his memory, or a more striking proof of the profoundness of his genius, and of the wisdom and comprehensiveness of his views, can scarcely be imagined. And it may be truly affirmed, that his Novum Organum scarcely introduced a more salutary change in the study of physics and experimental philosophy, than his Ordinances did in the practical administration of equity. The common law, too, partaking of the spirit and enterprise of the times, gradually shifted and widened its channels. Courts of justice were no longer engaged in settling ecclesiastical or feudal rights and services. The intricacies of real actions were laid aside for the more convenient and expeditious trial of titles by ejectment. Assizes and writs of entry fell into neglect, and the subtleties of logic were exchanged for the more useful inductions of common sense. Arguments were no longer buried under a mass of learning; and Reports, instead of overwhelming the profession, as in the pages of the venerable Plowden, with a flood of ancient authorities and curious analogies, began to be directed to the points in controversy with brevity and exactness. Philosophy, too, lent its aid to illustrate the science, and the criminal law, though occasionally disgraced by abuses, was softened by the humanity, illustrated by the genius, and methodised by the labors of the greatest luminaries of the law.

The third period may not inaptly be termed the Golden Age

of the Law; since it embraces the introduction of the principles of commercial law, and the application of them with wonderful success to the exposition of the then comparatively novel contracts of bills of exchange, promissory notes, bills of lading, charter parties, and, above all, policies of insurance. Lord Holt with great sagacity and boldness led the way to some of the most important improvements by his celebrated judgment in Coggs vs. Barnard, in which the law of bailments is expounded with philosophical precision and fulness. It is true, that the leading maxims are borrowed from the Roman Law, as the beautiful treatise of Sir William Jones sufficiently explains to the humblest student; but the merit of Lord Holt is scarcely lessened by this consideration, since he had the talent to discern their value, and the judgment to transfer them into the English code. The modest close of his opinion in this case shews, how little the law on this subject was at that time settled, and how much we owe to the achievements of a single mind. 'I have said thus much' (is his language) 'on this case, because it is of great consequence, that the law should be settled on this point. But I don't know whether I may have settled it, or may not rather have unsettled it. But however that may happen, I have stirred these points, which wiser heads in time may settle.' Wiser heads have not settled these points. This branch of the law stands now at the distance of more than a century on the immoveable foundation, where this great man placed it, the foundation of reason and justice. And if he had left no other judgment on record, this alone would justify the eulogy of an eminent modern judge, that 'he was as great a lawyer as ever sat in Westminster Hall.'

The doctrines of the Courts of Equity during this last period have attained a high degree of perfection, though the origin of them must in many cases be admitted to belong to the preceding age. Lord Nottingham brought to the subject a strong and cultivated mind, and pronounced his decrees after the most cautious and painstaking study. Lord Cowper and Lord Talbot pursued the same career with the genuine spirit of jurists. But it was reserved for Lord Hardwicke, by his deep learning, his extensive researches, and his powerful genius, to combine the scattered fragments into a scientific system; to define with a broader line the boundaries between the departments of the common law and chancery; and to give certainty

and vigor to the principles as well as the jurisdiction of the latter. Henceforth equity began to acquire the same exactness as the common law; and at this moment there is scarcely a branch of its jurisprudence, that is not reduced to method, and does not in the harmony of its parts rival the best examples of the common law. Our own age has witnessed in the labors of Lord Eldon, through a series of more than twenty-five volumes of reports, a diligence, sagacity, caution, and force of judgment, which have seldom been equalled, and can scarcely be surpassed; which have given dignity, as well as finish, to that curious moral machinery, which, dealing in an artificial system, yet contrives to administer the most perfect of human inventions, the doctrines of conscience ex æquo et bono.

There is another great name, which adorns this period, respecting whom it is difficult to speak in terms of moderated praise, and still more difficult to preserve silence. England and America and the civilized world lie under the deepest obligations to him. Wherever commerce shall extend its social influences; wherever justice shall be administered by enlightened and liberal rules; wherever contracts shall be expounded upon the eternal principles of right and wrong; wherever moral delicacy and juridical refinement shall be infused into the municipal code, at once to persuade men to be *honest*, and to keep them so; wherever the intercourse of mankind shall aim at something more elevated than that grovelling spirit of barter, in which meanness and avarice and fraud strive for the mastery over ignorance, credulity and folly,—the name of Lord Mansfield will be held in reverence by the good and the wise, by the honest merchant, the enlightened lawyer, the just statesman, and the conscientious judge. The maxims of maritime jurisprudence, which he engrafted into the stock of the common law, are not the exclusive property of a single age or nation, but the common property of all times and all countries. They are built upon the most comprehensive principles, and the most enlightened experience of mankind. He designed them to be of universal application, considering, as he himself has declared, the maritime law to be, not the law of a particular country, but the general law of nations. And such under his administration it became, as his prophetic spirit, in citing a passage from the most eloquent and polished orator of antiquity, seems gently

to insinuate. Non erit alia lex Romæ, alia Athenis; alia nunc, alia posthac; sed, et apud omnes gentes et omni tempore, una eademque lex obtinebit. He was ambitious of this noble fame, and studied deeply and diligently and honestly to acquire it. He surveyed the commercial law of the continent, drawing from thence what was most just, useful and rational; and left to the world as the fruit of his researches, a collection of general principles, unexampled in extent and unequalled in excellence. The law of Insurance was almost created by him; and it would be difficult to find a single leading principle in the beautiful system, that surrounds and protects the commerce of our times, which may not be traced back to the judgments of this surprising man. Of him it cannot be said, Stat magni nominis umbra. His character as a statesman and an orator, as the rival and the equal of Chatham and Camden, would immortalize him. But the proudest monument of his fame is in the volumes of Burrow and Cowper and Douglass, which we may fondly hope will endure as long as the language, in which they are written, shall continue to instruct mankind.

I have been drawn into these remarks on the character of Lord Mansfield, beyond the scope of my original intention, by my extreme solicitude to impress the younger members of the profession with a due sense of his learning and his labors. It appears to me, that his judgments should not be merely referred to, and read, on the spur of particular occasions, but should be studied as models of juridical reasoning and eloquence. I know not, where a student can learn so much or so well, as in the reports which I have named; and there is scarcely a sentence, which dropped from his lips, which may not prove of permanent utility to the profession. Our young men of the present day are apt to confine their reading too much to elementary treatises. The utility of these cannot be doubted; but the reports are the true repositories of the law; and of these none are so interesting and so convincing, as those which are graced by the persuasive judgments of Lord Mansfield.

The principal improvements in the law during the period, which has last past under review, may be summed up under the following heads. 1st. A more enlarged and liberal interpretation of contracts. 2d. The adoption of the great principles of commercial law, borrowed from the usages of merchants, the dissertations and commentaries of foreign jurists, and the inductions of philosophical inquiry. 3d. The enlargement of

the remedy by assumpsit, moulding it, as in the action for money had and received, to the most important purposes of a bill in equity. 4th. The reducing of many doctrines of the law to systematical accuracy by rejecting anomalies, and defining and limiting their application by the test of general reasoning.

Without doubt many of these changes were brought about by the enterprise of commerce and the philosophizing spirit of the times. The former rendered indispensable the introduction of many general principles to regulate the complicated business of trade, and to protect and encourage navigation. The latter, by accustoming the profession to more comprehensive argumentation and more perfect generalizations, gradually wore away that exclusive devotion to technical rules and ancient practices, and the narrow policy of the old law, which had been for ages the reproach of the Benchers of Westminster Hall. The common law had its origin in ignorant and barbarous ages; it abounded with artificial distinctions and crafty subtleties, partly from the scholastic habits of its early clerical professors, and partly from its subserviency to the narrow purposes of feudal polity. When this polity began to decline, the mass of its principles was so interwoven into the texture of the law, and so consecrated by authority, that it became dangerous, if not impracticable, to disentangle it. There was therefore a natural jealousy of changes, lest they should work mischiefs in the venerable fabric. It was not until the current of society had taken a new direction, and commerce had worn its channels wide and deep through the whole country, that the necessities of trade compelled the profession to look abroad for doctrines of more general application. Yet it cannot be denied, that the progress of improvement was slow, and that the genius of Lord Mansfield, by outstripping that of the age at least a half century, accomplished with brilliant success what a few may have ventured to hope for, but no one before him was bold enough to execute. The remarks of Mr. Justice Buller, a proud name in the English law, in the case of Lickbarrow vs. Mason, fully confirm the views, that I have attempted to unfold. 'Before that period,' (says he) 'we find that in courts of law all the evidence in mercantile cases was thrown together; they were left generally to the jury, and they produced no established principle. From that time we all know the great study has been to find some certain

general principles, which shall be known to all mankind, not only to rule the particular case, but to serve as a guide for the future. Most of us have heard these principles stated, reasoned upon, enlarged, and explained, till we have been lost in admiration of the strength and stretch of the human understanding.'

Although the causes, to which I have alluded, contributed in a high degree to the advancement of the law, yet there is another, which in my judgment had a decided, though silent operation in its favor. I refer to the change in the tenure of office, by which the judges, instead of being dependent on the pleasure of the Crown, enjoyed their offices during good behavior. This measure of consummate wisdom forms a part of the solemn act of settlement, which fixed the succession of the throne of England in the house of Hanover, and was adopted not merely to secure the personal independence of the judges, but the purity and independence of the law. The first effect was to check the undue influence of the Crown through its judicial patronage; the next and not least important was to restrain the tumultuary excitements of the people. Men for the most part are willing to submit to the laws, when faithfully and impartially administered. If they are satisfied, that the judges are incorruptible, they acquiesce in their decisions, even when they may suspect them to be erroneous, as the necessary homage, by which their own rights and liberties are permanently secured. But if the fountain of justice is impure, and sends forth bitter waters, stained by influences, which are not avowed, and yet are scarcely covered; if judges are removed at pleasure and appointed at pleasure, to gratify a favorite or a faction, an arrogant minister or a violent House of Commons; it is easy to foresee, that jealousy will lead to distrust, and distrust to hatred, and hatred to disobedience, and disobedience to resistance, which, if it stops short of treason, will yet utter itself in deep complaints, until public confidence is universally shaken, and armies become necessary to support the execution of the laws. Considerations of this sort have always impressed me with the belief, from the first moment, that I ventured into the deeper studies of the law, that the independence of the judges is the great bulwark of public liberty, and the great security of property; and that the revolution of 1688 would have been but a vain and passing pageant, a noble but ineffectual struggle against prerogative, if the triumph of

its principles had not been secured by this practical means of enforcing them. Throughout the reigns of both the Charleses and both the Jameses, it is melancholy to remark the perpetual changes on the bench, induced by favoritism, or discontent, or an attempt to overawe the courts. The noble answer of Lord Coke to the inquiry of the king in the dispute about commendams, what he would do, if the Crown in any case before him required the judges to stay proceedings, 'that he would do that, which would befit a judge to do,' is worthy of everlasting remembrance. But it was his solitary answer. To the disgrace of the age, all the other judges, intimidated by the king and his haughty chancellor, 'the wisest, greatest, meanest of mankind,' promised implicit submission to the commands of the Crown. And even Lord Coke for his conduct on other occasions drew from the king the bitter, though perhaps unjust rebuke, 'that he was the fittest instrument for a tyrant, that ever was in England.' In the reign of Charles II. the conduct of the crown was more openly profligate, and its influence exerted to affect the judgments of the courts, even in private suits. It is matter of history, that Sir Edmund Saunders, after having advised the proceedings in the Quo Warranto against the city of London, was promoted to the Chief Justiceship of the King's Bench, not on account of his talents, his learning, or his virtues, but on account of his known devotion to the interests of the Crown. Such are some of the more offensive forms, under which the tenure of offices during pleasure will sometimes exhibit men, from whose elevation of character better things might be expected. But the more silent and unobtrusive influence of *popular* dependence, though less striking to the vulgar eye, is not less subversive of the great purposes of justice. It is indeed more dangerous to the liberty and property of the people, since it assumes the attractive appearance of obedience to the will of the majority, and thus without exciting jealousy or alarm tramples under foot all those, who refuse to obey the idol of the day. How can it be reasonably expected, that the law should flourish as a science, when the judges are doomed to resist the humors of the prince, or the clamors of the populace, at the peril of those stations, which may constitute their only refuge from pecuniary distress?

If the old tenure of office had remained, we might still have possessed many valuable judgments of the later common law judges. But we should have searched in vain for those bright

displays of independence and virtue, for those beautiful arguments in defence of private rights, for those finished illustrations of pure and exalted equity, and for those comprehensive commentaries upon commercial law, which have immortalized their memories. If their places were of any value, they must have resigned them, or remained the timid followers of the old law, without the ambition to improve its doctrines, or the hardihood to encounter the alarm of innovation. Lord Mansfield would scarcely have sustained himself on the bench, in the midst of so many political and professional foes, to utter the thrilling declaration, 'I wish for popularity; but it is that popularity, which follows, not that which is run after. It is that popularity, which sooner or later never fails to do justice to the pursuit of noble ends by noble means. I will not do that, which my conscience tells me is wrong upon this occasion, to gain the huzzas of thousands, or the daily praise of all the papers, which come from the press. I will not avoid doing that, which I think is right, though it should draw on me the whole artillery of libels, all that falsehood and malice can invent, or the credulity of a deluded populace can swallow. I can say with another great magistrate upon an occasion and under circumstances not unlike, Ego hoc animo semper fui, ut invidiam virtute partam, gloriam, non invidiam, putarem.'

The review, which has been hitherto sketched of the history of the common law, however imperfectly, is confined altogether to British jurisprudence. Before the American Revolution, from a variety of causes which it is not difficult to enumerate, our progress in the law was slow, though not slower perhaps than in the other departments of science. The resources of the country were small, the population was scattered, the business of the courts was limited, the compensation for professional services was moderate, and the judges were not generally selected from those, who were learned in the law. The colonial system restrained our foreign commerce, and as the principal trade was to or through the mother country, our most important contracts began or ended there. That there were learned men in the profession in those times it is not necessary to deny. But the number was small, and from the nature of the business, which occupied the courts, the knowledge required for common use was neither very ample nor very difficult. The very moderate law libraries then to be found in the country would completely establish this fact, if it could be seriously

controverted. Our land titles were simple. Our contracts principally sprung up from the ordinary relations of debtor and creditor. Our torts were cast in the common mould of trespasses to lands or goods, or personal injuries; and the most important discussions grew out of our provincial statutes. Great lawyers do not usually flourish under such auspices, and great judges still more rarely. Why should one accomplish himself in that learning, which is more of curiosity than use? which neither adds to fame nor wealth? which is not publicly sought for or admired? which devotes life to pursuits and refinements not belonging to our own age or country? The few manuscripts of adjudged cases, which now remain, confirm these remarks. If here and there a learned argument appears, it strikes us with surprise rather from its rarity than its extraordinary authority. In the whole series of our Reports there are very few cases, in which the ante-revolutionary law has either illustrated or settled an adjudication.

The progress of jurisprudence since the termination of the War of Independence, and especially within the last twenty years, has been remarkable throughout all America. More than one hundred and fifty volumes of reports are already published, containing a mass of decisions, which evinces uncommon devotion to the study of the law, and uncommon ambition to acquire the highest professional character. The best of our reports scarcely shrink from a comparison with those of England in the corresponding period; and even those of a more provincial cast exhibit researches of no mean extent, and presage future excellence. The danger indeed seems to be, not that we shall hereafter want able Reports, but that we shall be overwhelmed with their number and variety.

In this respect our country presents a subject of very serious contemplation and interest to the profession. There are now twenty-four states in the Union, in all of which, except Louisiana, the common law is the acknowledged basis of their jurisprudence. Yet this jurisprudence, partly by statute, partly by judicial interpretations, and partly by local usages and peculiarities, is perpetually receding farther and farther from the common standard. While the states retain their independent sovereignties, as they must continue to do under our federative system, it is hopeless to expect, that any greater uniformity will exist in the future than in the past. Nor do I know, that so far as domestic happiness and political convenience are con-

cerned, a greater uniformity would in most respects be desirable. The task, however, of administering justice in the state as well as national courts, from the new and peculiar relations of our system, must be very laborious and perplexing; and the conflict of opinion upon general questions of law in the rival jurisdictions of the different states will not be less distressing to the philosophical jurist, than to the practical lawyer.

It may not be without utility to glance for a few moments at some of those circumstances, in which the coincidences and differences are most striking and instructive.

1. And first, as to the regulation of the tranfers of property. These are either by the descent and distribution of estates, by conveyances inter vivos, or by testamentary dispositions. As to the first, so far as my knowledge extends, the canons of descent in the direct line are the same in all the states. In all the states the children and lineal descendants inherit in coparcency, without any distinction as to primogeniture or sex. In descents in the collateral line, there are some peculiar modifications in almost all the states. In some states there is a difference between the half and the whole blood; in others, a difference between inheritances ex parte paternâ and ex parte maternâ; in others, a difference in the order of succession and representation. From the genius of our political institutions, as well as the habits of the people, there is every probability, that inheritances will continue to descend substantially in the same manner, as long as our free governments endure. An attempt to establish the English canons of descent could hardly succeed, but upon the ruins of all those institutions, which are considered the best protection of a republican government. Then, as to conveyances inter vivos. Lands are universally conveyed by a deed, acknowledged by the parties before some competent magistrate, and recorded in some public records kept for the registry of conveyances of this nature. The ceremony of livery of seizin is obsolete, if indeed it have any where a legal entity. The common law forms of conveyance are in general use, and the statute of Uses being recognised as a part of the common or statute law of the states, the English doctrines on these subjects are generally adopted. As to testamentary dispositions. Lands are universally disposable by will. The ceremonies, by which solemn testaments are evidenced in most of the states, do not materially differ from the English statute on this subject. In Virginia and Kentucky, however, a will wholly

written and signed by the testator is good, although there is no subscribing witness. In Louisiana the like provision exists; and it is to be observed, that the preceding remarks are in general inapplicable to this state, whose jurisprudence being founded on the civil law, the forms of conveyances, whether they be donations inter vivos, or donations causâ mortis, are regulated in general conformity to the rule of that law.

2. As to commercial law. From mutual comity, from the natural tendency of maritime usages to assimilation, and from mutual convenience, if not necessity, it may reasonably be expected, that the maritime law will gradually approximate to a high degree of uniformity throughout the commercial world. This is indeed in every view exceedingly desirable. Europe is already by a silent but steady course fast approaching to that state, in which the same commercial principles will constitute a part of the public law of all its sovereignties. The unwritten commercial law of England at this moment differs in no very important particulars from the positive codes of France and Holland. Spain, Portugal, and the Italian States, the Hanseatic Confederacy, and the powers of the North, have adopted a considerable part of the same system; and the general disposition in the maritime states to acknowledge the superiority of the courts and code of England leaves little doubt, that their own local usages will soon yield to her more enlightened doctrines. What a magnificent spectacle will it be to witness the establishment of such a beautiful system of juridical ethics; to realize, not the oppressive schemes of holy alliances in a general conspiracy against the rights of mankind, but the universal empire of juridical reason, mingling with the concerns of commerce throughout the world, and imparting its beneficent light to the dark regions of the poles, and the soft and luxurious climates of the tropics. Then, indeed, would be realized the splendid visions of Cicero, dreaming over the majestic fragments of his perfect republic, and Hooker's sublime personification of the law would 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.'

The commercial law of the Atlantic states has indeed already attained to a very striking similarity in its elements. Upon the subject of insurance there is no known difference founded on local usages or statutes. If the law be differently adminis-

tered, it is not, because there is any intention to deviate from the general doctrines of that law, but because the nature and extent of those doctrines have been differently understood. In all the states the same law prevails as to contracts of shipping and affreightment. In most of the states bills of exchange and promissory notes are negotiable, and rest upon the principles, which since the statute of Anne have won their way into the common law. Virginia affords the most striking exception to this remark; for, there, a limited negotiability only is recognised by law, and parties, who are remote endorsers, have no remedy against remote endorsers except by a suit in equity. Massachusetts, as far as I know, stands alone in her local usage of denying days of grace to promissory notes, unless expressed on the face of the contract. And it is seriously wished, that by a legislative act we might fairly get rid of this anomaly, which has not a single ground either of convenience or policy, or antiquity to recommend it.* There are some few other dissonances from the general commercial law, which have existence in some of the states, but it would serve no important purpose to explain them at this time.

3. As to remedies, it would be endless to point out the coincidences and differences between the various states. Remedies are necessarily modified by the wants and manners of the community, and processes, which from habit are thought useful and convenient in one state of society, are rejected as burthensome and injurious in another. In several of the New England states the attachment of real and personal property is allowed upon mesne process, not merely to coerce the appearance of the defendant, but to secure a final satisfaction of the judgment, if the plaintiff recovers in the suit. This process, except so far as it belongs to foreign attachments (analogous to our trustee process), is utterly unknown elsewhere, and the existence of it among ourselves is contemplated with surprise and regret, by those, who are accustomed to the general processes of the common law. It is thought a hardship, that any person should be liable to be stripped of his property, before it is ascertained judicially, that a good cause of action exists against him, and the danger of abuse has been dwelt

* Since this address was delivered, a statute has been passed in Massachusetts, providing that grace shall be allowed on all promissory notes, orders, and drafts, payable at a future day certain, in which there is not an express stipulation to the contrary. St. Mass. 1824, c. 130.

upon with much emphasis and force. And yet perhaps the annals of no country present fewer instances of abuse, than those of the New England states, which allow this mode of proceeding. Personal arrests are rare here, even when property is not to be found; and it is not perhaps hazarding too much to assert, that the writ of capias has subjected more persons to wrongful imprisonment, than the unjust attachment of property has to serious loss and inconvenience. Yet it cannot be denied, that the latter process is liable to great abuses, and that our exemption from them has resulted principally from the sound discretion and integrity of the Bar. And it is most desirable, that some summary practice, analogous to that of discharging on common bail, should be authorized by the legislature, so that fraud and circumvention and oppression may find it more difficult to obtain undue advantages, and compel undue compromises under the influence of this dreaded process.

The remedy for trying land titles in all the states in the Union, except Louisiana and some of the New England states, is the English action of ejectment. It is scarcely modified even in its slightest forms, and John Doe and Richard Roe are the familiar guests, hospites antiqui et constantes, of the courts on the picturesque banks of the Hudson, the broad expanse of the Delaware and Chesapeake, the sunny regions of the South, and the fertile vales and majestic rivers of the West. In Louisiana, the civil law governs all judicial proceedings, and administers all remedies in personam and in rem. And I cannot help paying my humble homage to the excellence of this code, which, adapting its remedies to the exigency of the case, gives complete relief without trammelling itself with prescribed forms, which often perplex and sometimes defeat the ends of justice. In one or two of the adjoining states, the old anomalous proceeding, known as a plea in ejectment, still prevails. The use of writs of entry for the trial of land titles is, I believe unknown, except in Massachusetts, Maine, and New Hampshire. Whether we have derived any important benefit from the revival of the old forms of proceeding in real actions is a question, upon which wise men and sound lawyers may probably disagree. If we have disembarrassed them of some troublesome appendages and some artificial niceties, and rendered them more attractive by the simplicity of their structure; still it must be confessed, that they are not easily moulded to

all the uses, which modern conveyances and devises render convenient and necessary. The abandonment of these forms in England from a general sense of their inadequacy to the purposes of justice, and the adoption there, as well as in most of the American states, of the action of ejectment, which has been ascertained by experience to be a perfect and convenient remedy, do certainly carry a weight of authority against our own practice, which, if it be not difficult to resist, it would at least be safe to follow.

4. As to the structure of land titles, there is a considerable diversity in the states, and in several of them a great departure from the simplicity and certainty of those derived under the common law. I am not aware, that in any part of New England any serious difficulties are to be found on this subject, all titles having had their origin in separate grants derived directly from the government or confirmed by it, and having the usual formalities and certainty of grants of the Crown at common law, or of grants by private legislative acts. The only questions, which have been much litigated, are those of boundary, which may and do ordinarily arise under grants between private persons, and of these there have been few of any considerable magnitude. Far different has been the course of proceeding in some other parts of the Union. Titles there have originated in general laws, under which any person might appropriate the property of the state by following the regulations pointed out by certain statutable provisions. These provisions are very complex, and embrace a variety of stages of title, in each of which the purchaser is obliged to observe great precision, or his rights may be postponed to a puisne holder or claimant. As, therefore, the titles stand upon general laws, and by taking steps to acquire them inchoate rights are obtained, or priorities secured, before the titles are consummated by grants from the government, many very difficult questions have grown up as to the nature, extent, validity, and priority of conflicting titles. A regular grant or patent from the government is no security against other claimants, although it should happen to be prior in point of date to all others. It is liable to be overreached and defeated, sometimes at law and sometimes in equity, according to the local jurisprudence, by prior inchoate rights or equitable claims, whether arising under pre-emptions, or settlements, or entries, or other matters, which have been held to confer upon an adverse claimant a

legal preference. These remarks apply with considerable force to the land laws of Pennsylvania, Maryland, North Carolina, and Tennessee. But it is in Virginia, and more especially in Kentucky, which derives its titles under the Virginia land laws, that they are realized in their fullest extent. The system of land titles in Kentucky is indeed one of the most abstruse branches of local jurisprudence, built up on artificial principles, singularly acute and metaphysical, and quite as curious and intricate, as some of the higher doctrines of contingent remainders and executory devises. It affords an illustrious example of human infirmity and human ingenuity: of human infirmity in the legislative supposition, that the great statute, on which it rests, was so certain as in a great measure to preclude future litigation; of human ingenuity in overcoming obstacles apparently insurmountable, by devising approximations to certainty in descriptions strangely vague and inaccurate, thus preserving the legislative intention, and yet promoting the great purposes of justice. The vice of the original system consisted in enabling any persons to appropriate the lands of the state by entries and descriptions of their own, without any previous survey under public authority, and without any such boundaries as were precise, permanent, and unquestionable; and the issuing of grants upon such entries without any inquiry as to the true nature, description, and survey of the lands, and without any attempt to prevent duplicate grants of the same property. If we consider, that Kentucky was at this time a wilderness traversed principally by hunters; that many places must have been but very imperfectly known even to them, and must have received different appellations from occasional and disconnected visitants; if we consider, that the lands were rich, and the spirit of speculation was pushed to a most extravagant extent, and that the spirit of fraud, as is but too common followed close upon the heels of speculation; if we consider the infinite diversity, which under such circumstances must unavoidably exist in the descriptions of the appropriated tracts of land, arising from ignorance, or carelessness, or innocent mistake, or fraud, or personal rashness;—we ought not to be surprised at the fact, that the best part of Kentucky is oppressed by conflicting titles, and that in many instances there are three layers of them lapping on or covering each other. The statute, to which I have alluded, required, that the description in the original entry should be so

certain, that other purchasers might be able to appropriate the adjacent residuum. The description of the tract might fail in two particulars. 1st. It might be bounded by known objects or boundaries, but yet so general and imperfect, that the description might equally well suit different tracts of land, and thus want what has been technically called 'identity.' 2d. Or the boundaries might refer to objects so universal as to defy all certainty, or to objects not generally known at the time by the particular names given to them, or known generally by another name; and then the description would be fatally defective for want of what is technically called 'notoriety.' Time would fail me to enumerate the doctrines, which have started from this origin, or to go over other peculiarities of the system. Perhaps human genius has been rarely more severely tasked, or more fairly rewarded, than in its labors on this occasion. The land law of Kentucky, while it stands alone in its subtle and refined distinctions, has attained a symmetry, which at this moment enables it to be studied almost with scientific precision. But ages will probably elapse, before the litigations founded on it will be closed; and so little assistance can be gained from the lights of the common law for its comprehension, that to the lawyers of other states, it will forever remain an unknown code with a peculiar dialect, to be explored and studied, like the jurisprudence of some foreign nation.

In order to avoid such serious evils, the Government of the United States, with a wisdom and foresight, which entitle it to the highest praise, has in the system of land laws, which regulate the sales of its own territorial demesnes, given great certainty, simplicity, and uniformity, to the titles derived under it. With a few unimportant exceptions, all lands are surveyed before they are offered for sale. They are surveyed in ranges, and are divided into townships each six miles square, and these are subdivided into thirty-six sections, each one mile square, containing six hundred and forty acres. All the dividing lines run to the cardinal points, and of course intersect each other at right angles, except where fractional sections are formed by navigable rivers, or by an Indian boundary line. The subdividing lines of quarter sections are not actually surveyed, but the corners, boundaries, and contents of these, are designated and ascertained by fixed rules prescribed by law; and regular maps of all the surveys are lodged in the proper departments of the government. In this manner, with some few exceptions, the

public lands in Alabama, Mississippi, Louisiana, Ohio, Indiana, and Illinois, have been sold; and the system applies universally to all our remaining territorial possessions. The common law doctrines have, in respect to these titles, taken deep root, and flourished; and the waters, which divide the states on the opposite banks of the Ohio, do not form a more permanent boundary of their respective territorial possessions, than the different origin of their land titles does in the character of their local jurisprudence.

5. Another circumstance, which will probably continue to form a leading diversity in the jurisprudence of the states, is the existence of slavery. This condition of society must necessarily involve a great variety of peculiar provisions, as to domestic policy and foreign intercourse, as to crimes, rights, and duties, to which no parallel can be furnished in states, whose constitutions or laws prohibit its introduction and existence. The property in slaves, partaking as it does of the double aspects of real and personal estate, being transmissible by descent, and being sold as personalty; being perpetually in demand and marketable, and of course affording solid revenue and wealth; giving value to lands by increasing the culture of agricultural products; being also of intrinsic value and general necessity in climates, where little or nothing is accomplished by other labor;—it follows, that slavery and its appendages must sink deep into the mass of jurisprudence of the slave-holding states, and furnish much litigation in the shape of contracts, conveyances, torts, or crimes, which other states are happily exempt from, and need not study, either for admonition or instruction.

6. Another diversity, which deserves attention, is the equity jurisdiction, which exists in complete operation in some states, in partial operation in others, and in others again is obsolete, or totally prohibited. In New England no such establishment is known as a separate, independent Court of Equity. In Connecticut and Vermont general equity powers are exercised by the judges of their Superior Courts; but in all the other New England states equity powers are confined to a few cases, which are specified and limited by legislative acts. In Pennsylvania a mixed system exists. No Court of Chancery, or court exercising chancery powers according to the forms and proceedings of that jurisdiction, is known. But in cases, where the parties possess rights, which a Court of Equity would

recognise and enforce, Courts of Law, following equity in this particular, endeavor to give efficacy to these rights through the instrumentality of remedies at law. Thus, a title to land merely equitable, or resting in a contract, of which a Court of Equity would compel a specific performance, is sufficient to sustain an ejectment at law. On the other hand, in New York, New Jersey, Maryland, Virginia, and South Carolina, Courts of Equity have a distinct existence and organization, independent of Courts of Common Law; and, as far as I have been enabled to learn, in the remaining states the equity jurisdiction is generally administered by the Courts of Common Law. Wherever the equity jurisdiction is exercised, its admitted basis is the general doctrines of the English Chancery. But it is so modified by local statutes, usages, and decisions, that it would be somewhat hazardous for a lawyer at the chancery bar of Westminster to form an opinion as to the authority to give, or to deny relief, however unequivocally those guides might speak, whom he was accustomed to consult.

If I were obliged to speak from my own very imperfect knowledge and experience, I should be compelled to declare, that the deviations in America from the established principles of equity were far more considerable than from those of the common law. A more broad and undefined discretion has been assumed, and a less stringent obedience to the dictates of authority. Much is left to the habits of thinking of the particular judge, and more to that undefined notion of right and wrong, of hardship and inconvenience, which popular opinions alternately create, and justify. There are indeed illustrious exceptions to these remarks, which it were invidious to point out, though it be of great importance to follow.

The slight sketches, which I have ventured thus to draw of some of the prominent features of state jurisprudence, do, as I think, justify the suggestion already made, that American jurisprudence can never acquire a homogeneous character; and that we must look to the future rather for increasing discrepancies, than coincidences in the law, and the administration of the law. This is a consideration of no small moment to us all, lest by being split up into distinct provincial Bars, the profession should become devoted to mere state jurisprudence, and abandon those more enlightened and extensive researches, which form the accomplished scholar, and elevate the refined jurist; which ennoble the patriot, and shed a never dying

lustre round the statesman. The establishment of the National Government, and of courts to exercise its constitutional jurisdiction, will, it is to be hoped, in this respect operate with a salutary influence. Dealing, as such courts must, in questions of a public nature; such as concern the law of nations, and the general rights and duties of foreign nations; such as respect the domestic relations of the states with each other, and with the General Government; such as treat of the great doctrines of prize and maritime law; such as involve the discussion of grave constitutional powers and authorities;—it is natural to expect, that these courts will attract the ambition of some of the ablest lawyers in the different states, with a view both to fame and fortune. And thus, perhaps, if I do not indulge in an idle dream, the foundations may be laid for a character of excellence and professional ability, more various and exalted, than has hitherto belonged to any Bar under the auspices of the common law;—a character, in which minute knowledge of local law will be combined with the most profound attainments in general jurisprudence, and with that instructive eloquence, which never soars so high, or touches so potently, as when it grasps principles, which fix the destiny of nations, or strike down to the very roots of civil polity.

In comparing the extent of American jurisprudence with that of England, we shall find, that if in some respects it is more narrow, in others it is more comprehensive. The whole ecclesiastical law of England, unless so far as it may operate on past cases, is obsolete. The genius of our institutions has universally prohibited any religious establishment, state or national. Nor is there the slightest reason to presume, that the imposition of tithes could ever be successfully introduced here, except by the strong arm of martial law, forcing its way by conquest. It was always resisted during our colonial dependency, and would now be thought at war with all that we prize in religion or civil freedom. The numerous questions respecting tithes and moduses, quare impedits, and advowsons and presentations, the fruitful progeny of that establishment, are gone to the same tomb, where the feudal tenures repose in their robes of state in dim and ancient majesty. In the next place, the right of primogeniture being abolished, and all estates descending in coparceny, and entails being practically changed into fee simple estates, there is no necessity for those intricate conveyances, settlements, and devises, with which

the anxiety of parents and friends to provide against the inconveniences of the law have filled all the courts of England. Of this troubled stream of controversy we may indeed say, 'it flows, and flows, and flows, and ever will flow on.' In the next place, we are rid, not only of the feudal services and tenures, but of all the customary law of our parent country, the ancient demesnes, the copyholds, the manorial customs and rights, and the customs of gavelkind and borough English. The cases, in which prerogative or privilege can arise, are few, and limited by law. Long terms, and leases, and annuities, charged on land, are rare among us; and the complicated questions of contract and of rent, which fill the books, are of course scarcely heard of in our courts. We have no game laws to harass our peasantry, or to form an odious distinction for our gentlemen; and the melancholy inventions of later times connected with them, the spring-guns and the concealed spears, and the man-traps, never cross our paths, or disturb our fancies. The penalties of a præmunire cannot be incurred, for we neither court nor fear, papal bulls, or excommunications. Outlawry, as a civil process, if it have a legal entity, is almost unknown in practice. An appeal of death or robbery never drew its breath among us; nor can it now be brought forth to battle in its dark array of armor, to astonish and confuse us, as it recently did all Westminster Hall. These are no small departments of the common law. A few of them indeed are almost obsolete in England; but the residue forms a body of principles so artificial and so difficult, that they leave behind them few, which can in these respects justly claim precedency.

With all these abridgments, however, our law is still sufficiently extensive to occupy all the time, and employ all the talents, and exhaust all the learning, of our ablest lawyers and judges. The studies of twenty years leave much behind, that is yet to be grappled with, and mastered. And if the law of a single state is enough for a long life of labor and ambition, the task falls still heavier on those, who frequent the National Courts, and are obliged to learn other branches of law, which are almost exclusively cognizable there. When it is considered, that the equity jurisprudence of the courts of the United States is like that of England, with the occasional adoption of the peculiar equities of local law; and their admiralty jurisdiction takes in its circuit, not merely the prize and maritime law, but seizures also for the breach of municipal regulations; when to

these are added, the interpretation of the treaties and statutes of the United States, and the still more grave discussion of constitutional questions, and the relative rights of states, and their citizens, in respect to other states;—it cannot well be doubted, that the administration of justice is there filled with perplexities, that strain the human mind to its utmost bearings.

The most delicate, and at the same time, the proudest attribute of American jurisprudence is the right of its judicial tribunals to decide questions of constitutional law. In other governments these questions cannot be entertained or decided by courts of justice; and therefore, whatever may be the theory of the constitution, the legislative authority is practically omnipotent, and there is no means of contesting the legality or justice of a law, but by an appeal to arms. This can be done only, when oppression weighs heavily and grievously on the whole people, and is then resisted by all, because it is felt by all. But the oppression, that strikes at a humble individual, though it robs him of character, or fortune, or life, is remediless; and, if it becomes the subject of judicial inquiry, judges may lament, but cannot resist, the mandates of the legislature.

Far different is the case in our country; and the privilege of bringing every law to the test of the constitution belongs to the humblest citizen, who owes no obedience to any legislative act, which transcends the constitutional limits. Some visionary statesmen, indeed, who affect to believe, that the legislature can do no wrong, and some zealous leaders, who affect to believe, that popular opinion is the voice of unerring wisdom, have, at times, questioned this authority of courts of justice. If they were correct in their doctrine, we might as well be without a written constitution of government, since the minority would always be in complete subjection to the majority; and, it is to be feared, that the experience of mankind has never shown, that the despotism of numbers has been more mild or equitable than that swayed by a single hand. This heresy, as questionable in point of sound policy, as it is unconstitutional in its language, has hitherto made but little progress among us. The wise, and the learned, and the virtuous, have been nearly unanimous in supporting that doctrine, which courts of justice have uniformly asserted, that the constitution is not the law for the legislature only, but is the law, and the

supreme law, which is to direct and control all judicial proceedings.

The discussion of constitutional questions throws a lustre round the Bar, and gives a dignity to its functions, which can rarely belong to the profession in any other country. Lawyers are here emphatically placed, as sentinels upon the outposts of the constitution; and no nobler end can be proposed for their ambition or patriotism, than to stand as faithful guardians of the constitution, ready to defend its legitimate powers, and to stay the arm of legislative, executive, or popular oppression. If their eloquence can charm, when it vindicates the innocent and the suffering under private wrongs; if their learning and genius can, with almost superhuman witchery, unfold the mazes and intricacies, by which the minute links of title are chained to the adamantine pillars of the law;—how much more glory belongs to them, when this eloquence, this learning, and this genius, are employed in defence of their country; when they breathe forth the purest spirit of morality and virtue in support of the rights of mankind; when they expound the lofty doctrines, which sustain, and connect, and guide, the destinies of nations; when they combat popular delusions at the expense of fame, and friendship, and political honors; when they triumph by arresting the progress of error, and the march of power, and drive back the torrent, that threatens destruction equally to public liberty, and to private property, to all that delights us in private life, and all that gives grace and authority in public office. * * * *

Something more I would say on this subject, but time fails me, and I feel, that I am entering on topics far too grave, and solemn, and delicate, for occasions like the present. May I be permitted, however, to say, that the duty devolved upon the profession in these times is of deep responsibility and interest. It depends upon the present age, whether the national constitution shall descend to our children in its masculine majesty to protect and unite the country, or whether, shorn of its strength, it shall become an idle mockery, and perish before the grave has closed upon the last of its illustrious founders.

In looking to the future prospects of the jurisprudence of our country, it appears to me, that the principal improvements must arise from a more thorough and deep laid juridical education, a more exact preparatory discipline, and a more methodical and extensive range of studies.

In the first place, it cannot be disguised, that we are far behind the English Bar in our knowledge of the practice, and of the elementary forms and doctrines, of special pleading. I do not speak here of the technical refinements of the old law in special pleading, which the good sense of modern times has suppressed, but of those general principles, which constitute the foundation of actions, and of those forms, by which alone rights and remedies are successfully pursued. There is a looseness and inartificial structure in our declarations, and other pleadings, which betray an imperfect knowledge both of principles and forms; an aberration from settled and technical phraseology, and a neglect of appropriate averments, which not only deprive our pleadings of just pretension to elegance and symmetry, but subject them to the coarser imputation of slovenliness. The forms of pleading are not, as some may rashly suppose, mere trivial forms: they not unfrequently involve the essence of the defence; and the discipline, which is acquired by a minute attention to their structure, is so far from being lost labor, that it probably more than all other employments leads the student to that close and systematical logic, by which success in the profession is almost always secured. Of the great lawyers and judges of the English Forum one can scarcely be named, who was not distinguished by uncommon depth of learning in this branch of the law, and many have risen to celebrity solely by their attainments in it. We should blush to be accused of perpetual mistakes in grammatical construction, or of a gross and unclassical style of composition. Yet these are venial errors, compared with those, with which the law is sometimes reproached. Diffuse and tedious as are the modern English pleadings, it cannot be denied, that they exhibit a thorough mastery of the science. We miss, indeed, the close, lucid, and concentrated vigor of the pleadings in the days of Rastall and Coke and Plowden, and even of Saunders and Raymond. But our taste is not offended by loose and careless phraseology, or our understanding by omissions, which betray the genuine 'crassa negligentia' of the law, or by surplusage so vicious and irrelevant, that one is at a loss to know at what point the pleadings aim, or whether they aim at any. We ought not to rest satisfied with mediocrity, when excellence is within our reach. The time is arrived, when gentlemen should be scrupulously precise in their

drafts of pleadings, and when the records of our courts should not be deformed by proceedings, which could not stand the most rigorous scrutiny of the common law in form as well as in substance. Exemplifications of our judgments may pass, nay, do already pass to England, and it ought to be our pride to know, that they will not be disgraced under the inspection of the sober benchers of any Inn of Court. We should study ancient forms and cases, as we study the old English writers in general literature; because we may extract from them not only solid sense, but the best examples of pure and undefiled language. There is a better reason still, and that is, that special pleading contains the quintessence of the law, and no man ever mastered it, who was not by that very means made a profound lawyer.

Another source of improvement is in the more general study of the doctrines of Courts of Equity. I do not here address myself to those, who expect to practise in such courts, for to them it is almost unnecessary to say, that the study is indispensable. But I address the remark to those, who are conversant only with Courts of Common Law. The principles of equity jurisprudence are of a very enlarged and elevated nature. They are essentially rational, and moulded into a degree of moral perfection, which the law has rarely aspired to. The arguments in courts of this sort abound with new views and elementary discussions. They present strong and brilliant contrasts to some of the perplexed notions of the old common law; and not unfrequently confirm and illustrate doctrines strictly legal, by unfolding new analogies, and expounding the nature and limits of principles, in a manner full of instruction and interest. It is a great mistake to confine our juridical researches to the narrow path in which we mean to tread. There is no great mind, but that feels itself cramped and fettered by such a course; and no moderate mind, but becomes ground up into the most dusty professional pedantry. The great branches of jurisprudence mutually illustrate and support each other. The principles of one may often be employed with the most captivating felicity in aid of another; and in proportion as the common law becomes familiar with the lights of equity, its own code will become more useful and more enlightened. In our country, the study of equity jurisprudence has not, until within a few years, attracted general at-

tention; and in New England, from causes, which have been already alluded to, it has fallen into more neglect than our advances in other branches of the law would justify or excuse.

Connected with this, and, as a mine abounding with the most precious materials, to adorn the edifice of our jurisprudence, is the study of the foreign maritime law, and above all of the civil law. Where shall we find more full and masterly discussions of maritime doctrines, coming home to our own bosoms and business, than in the celebrated commentaries of Valin? Where shall we find so complete and practical a treatise on insurance as in the mature labors of Emerigon? Where shall we find the law of contracts so extensively, so philosophically, and so persuasively expounded, as in the pure, moral, and classical treatises of Pothier? Where shall we find the general doctrines of commercial law so briefly, yet beautifully laid down, as in the modern commercial code of France? Where shall we find such ample general principles to guide us in new and difficult cases, as in that venerable deposite of the learning and labors of the jurists of the ancient world, the Institutes and Pandects of Justinian. The whole continental jurisprudence rests upon this broad foundation of Roman wisdom; and the English common law, churlish and harsh as was its feudal education, has condescended silently to borrow many of its best principles from this enlightened code. (See 12 Mod. 482 by Lord Holt). The law of contracts and personalty, of trusts and legacies, and charities, in England, have been formed into life by the soft solicitudes and devotion of her own neglected professors of the civil law.

There is no country on earth, which has more to gain than ours, by the thorough study of foreign jurisprudence. We can have no difficulty in adopting in new cases such principles of the maritime and civil law as are adapted to our own wants, and commend themselves by their intrinsic convenience and equity. Let us not vainly imagine, that we have unlocked and exhausted all the stores of juridical wisdom and policy. Our jurisprudence is young and flexible, but it has withal a masculine character, which may be refined and exalted by the study of the best models of antiquity. And the structure of our State and National Governments, while it easily admits of the incorporation of foreign maritime principles, at the same time makes it safe, useful, and commendable.

There is yet another study, which may well engage the at-

tention of American lawyers, and be, in the language of Lord Coke, both honorable and profitable to them. I mean the study of the law of nations. This is at all times the duty, and ought to be the pride of all, who aspire to be statesmen; and as many of our lawyers become legislators, it seems to be the study, to which, of all others, they should most seriously devote themselves. Independent of these considerations, there is nothing, that can give so high a finish, or so brilliant an ornament, or so extensive an instruction, as this pursuit, to a professional education. What indeed can tend more to exalt and purify the mind, than speculations upon the origin and extent of moral obligations; upon the great truths and dictates of natural law; upon the immutable principles, that regulate right and wrong in social and private life, and upon the just applications of these to the intercourse and duties and contentions of independent nations? What can be of more transcendent dignity, or better fitted to employ the highest faculties of genius, than the developement of those important truths, which teach the duties of magistrates and people, the rights of peace and war, the limits of lawful hostility, the mutual duties of belligerent and neutral powers; and aim at the introduction into national affairs, of that benign spirit of Christian virtue, which tempers the exercise even of acknowledged rights with mercy, humanity, and delicacy? If the science of jurisprudence be, as it has been eloquently described to be, 'the pride of the human intellect,' and 'the collected reason of ages, combining the principles of original justice with the infinite variety of human concerns,' where can we find more striking proofs of its true excellence, than in the study of those maxims, which address themselves to the best interests, and the most profound reflections of nations, and call upon them, as the instruments of providence, to administer to each other's wants, to check inordinate ambition, to support the weak, and to fence in human infirmity, so that it can scarcely transcend the bounds of established rules, without drawing after it universal indignation and resistance? Yet how few have mastered the elementary treatises on this subject, the labors of Albericus Gentilis, and Zouch, and Grotius, and Puffendorf, and Bynkershoek, and Wolfius, and Vattel? How few have read with becoming reverence and zeal the decisions of that splendid jurist, the ornament, I will not say of his own age or country, but of all ages and all countries; the intrepid supporter equally of neutral and

belligerent rights; the pure and spotless magistrate of nations, who has administered the dictates of universal jurisprudence with so much dignity and discretion in the Prize and Instance Courts of England! Need I pronounce the name of Sir William Scott? How few have aspired even in vision, after those comprehensive researches into the law of nations, which the introductory discourse of Sir James Mackintosh has opened and explained with such attractive elegance and truth?

Such are some of the studies, from which American jurisprudence may, in my humble judgment, derive essential improvements; and I cannot but indulge the belief, that they will be eagerly sought, and thoroughly examined by the good and the wise of succeeding ages.

The mass of the law is, to be sure, accumulating with an almost incredible rapidity, and with this accumulation, the labor of students as well as professors, is seriously augmenting. It is impossible not to look without some discouragement upon the ponderous volumes, which the next half century will add to the groaning shelves of our jurists. The habits of generalization, which will be acquired and perfected by the liberal studies, which I have ventured to recommend, will do something to avert the fearful calamity, which threatens us, of being buried alive, not in the catacombs, but in the labyrinths of the law. I know indeed of but one adequate remedy, and that is by a gradual digest under legislative authority of those portions of our jurisprudence, which under the forming hand of the judiciary shall from time to time acquire scientific accuracy. By thus reducing to a text the exact principles of the law, we shall, in a great measure, get rid of the necessity of appealing to volumes, which contain jarring and discordant opinions; and thus we may pave the way to a general code, which will present in its positive and authoritative text, the most material rules to guide the lawyer, the statesman, and the private citizen. It is obvious, that such a digest can apply only to the law, as it has been applied to human concerns in past times; but by revision at distant periods it may be made to reflect all the light, which intermediate decisions may have thrown upon our jurisprudence. To attempt more than this would be a hopeless labor, if not an absurd project. We ought not to permit ourselves to indulge in the theoretical extravagances of some well meaning philosophical jurists, who believe, that all human concerns for the future can be provided

for in a code speaking a definite language. Sufficient for us will be the achievement, to reduce the past to order and certainty; and that this is within our reach cannot be matter of doubtful speculation. It has been already accomplished in a manner so triumphant, that no cavil has been able to lessen the fame of the authors. The Pandects of Justinian, imperfect as they are, from the haste, in which they were compiled, are a monument of imperishable glory to the wisdom of the age; and they gave to Rome, and to the civilized world, a system of civil maxims, which have not been excelled in usefulness and equity. They superseded at once the immense collections of former times, and left them to perish in oblivion; so that, of all ante-Justinianean jurisprudence, little more remains than a few fragments, which are now and then recovered from the dust and rubbish of antiquity, in the codices rescripti of some venerable libraries. The modern code of France, embracing, as it does, the entire elements of her jurisprudence in the rights, duties, relations, and obligations of civil life; the exposition of the rules of contracts of every sort, including commercial contracts; the descent, distribution, and regulation of property; the definition and punishment of crimes; the ordinary and extraordinary police of the country, and the enumeration of the whole detail of civil and criminal practice and process;—is perhaps the most finished and methodical treatise of law, that the world ever saw. This code forms also the law of Holland, and, with comparatively few alterations, has been solemnly adopted as its fundamental law by the state of Louisiana. The materials of it were to be sought for among an almost infinite variety of provincial usages and customary laws, and were far more difficult to reduce into system, than any which belong to the common law. It is left to the future jurists of our country and England, to accomplish for the common law, what has thus been so successfully demonstrated to be a practical problem in the jurisprudence of other nations; a task, which the modest but wonderful genius of Sir William Jones did not scruple to believe to be within the reach of a single mind successfully to accomplish.

Gentlemen,—I have thus endeavored, not as I could wish, but as I have been able, amidst the cares of private life, and the distractions of official business, to lay before you some imperfect sketches of the past history of the law; of its future prospects, and of the sources, whence we may derive improve-

ment. May I add, in the language of the eminent living jurist, (Sir James Mackintosh, Introd. Disc. 62) whom I have already cited, that 'there is not, in my opinion, in the whole compass of human affairs, so noble a spectacle, as that, which is displayed in the progress of jurisprudence; where we may contemplate the cautious and unwearied exertions of a succession of wise men through a long course of ages, withdrawing every case, as it arises, from the dangerous power of discretion, and subjecting it to inflexible rules, extending the dominion of justice and reason, and gradually contracting within the narrowest possible limits the domain of brutal force and of arbitrary will.'

If, in the discussion of these topics, I have suggested a single hint, that may cheer the student in his laborious devotion to the elements of the law; or have awakened in the mind of a single advocate another motive to quicken his eloquence or zeal, my humble labor will not be without its consolations. We are all bound by the strong ties of civil obligation, by professional character, by patriotic pride, and by moral feelings, to cultivate and extend this interesting science. No Bar in America is more justly entitled to public confidence, than that of my native state; and none may more justly claim respect for its moral, literary, and juridical elevation, than that, which I have now the honor to address. Much, however, remains to be done, to satisfy a just ambition for excellence; and every day's experience admonishes us, that life is short, and art is long, furnishing motives at once to excite our diligence, and to restrain an undue ardor in any human pursuit. When indeed I look round, and contemplate the ravages, which death has made during my own brief career, not only among the sages of the law, but among those in the fresh bloom of youth, just struggling for distinction,—the consideration fills me with the most profound melancholy. Since we were convened here on the last anniversary, the modest and accomplished Gallison has closed his useful life, and buried with him many a brilliant hope of his parents, friends, and country. I will not dwell upon his distinguished talents and virtues, his blameless innocence of life, his elevated piety, his unwearied diligence, his extensive learning, his ardent devotion to literature, his active benevolence, exhausting itself in good deeds, and 'blushing to find it fame.' You knew him well, and your sympathies have mingled with the tears and sorrows, that embalm his memory. But I may propose him as an example,

polished, if not perfect, of that excellence, which the studies I have this day ventured to recommend are calculated to produce. Tacitus has recorded with affectionate solicitude the life and character of Agricola. May I be permitted to borrow from his admirable page a single passage, to grace the memory of my lamented friend and pupil. Placide quiescas, nosque, domum tuam, ab infirmo desiderio et muliebribus lamentis ad contemplationem virtutum tuarum voces, quas, neque lugeri, neque plangi, fas est; admiratione, te potius quam temporalibus laudibus, et, si natura suppeditet, æmulatione, decoremus. Is verus honos, ea conjunctissimi cujusque pietas.

We too must soon pass away to the tomb, where our friends and instructers, the Ameses, the Sullivans, and the Dexters, the Lowells, the Danas, the Parsonses, and the Sewalls, are gone before us. We cannot be indifferent to the fate of our children, or our country; and the happiness, as well as the honor of both, is indissolubly connected with the faithful administration of justice. Nor ought we to disguise, that that science, which has been the choice of our youth, and the ambition of our manhood, has much in its milder studies to sooth and cheer us in the infirmities of old age. Nor can it be deemed a human frailty, if, when we take our last farewell of the law, we 'cast one longing, lingering look behind,' and bless those rising lights, which are destined to adorn our judicial tribunals, however dimly they may be descried by our fading vision.

May our successors in the profession look back upon our times, not without some kind regrets, and some tender recollections. May they cherish our memories with that gentle reverence, which belongs to those, who have labored earnestly, though it may be humbly, for the advancement of the law. May they catch a holy enthusiasm from the review of our attainments, however limited they may be, which shall make them aspire after the loftiest possessions of human learning. And thus may they be enabled to advance our jurisprudence to that degree of perfection, which shall make it a blessing and protection to our own country, and excite the just admiration of mankind.

Art. II.—ON A NATIONAL BANKRUPT LAW.

The constitution of the United States provides, that 'Congress shall have power to establish uniform laws on the subject of bankruptcy throughout the United States.' In pursuance of this power, a bankrupt law was passed by Congress in 1800. It was, however, repealed in 1803, and consequently, as is asserted by the friends of the measure, before full time could have been given to the nation to judge of its practical operation. Since that time, several attempts have been made in Congress to pass another bankrupt law; but, though supported with great earnestness and eloquence by some of the most able and enlightened statesmen in the country, they have always met with a strenuous opposition, and have ultimately proved unsuccessful. During the last ten years the subject has been constantly before the public.

The warmth with which questions relating to a bankrupt law have been discussed in Congress, is of itself ample proof of the interest felt in them by the nation at large. Indeed, whatever may be the particular provisions of such a statute, whether it should copy all the principal features of the English system, or deviate from it to any extent, no measure probably within the power of the national legislature, with regard to the internal state of the country, could be adopted, which would affect the whole community more directly and perceptibly.

Many persons, however, who are in favor of a bankrupt law, consider the prospect of obtaining it from the national government as so hopeless, that it is useless to bring the discussion before the public. But the march of truth is ever onward. If the proposed measure is really good, it will be constantly gaining converts. It is also sometimes said, that the whole subject is completely exhausted, by the frequent discussions it has received in congress and elsewhere. This may be true; but it by no means follows, that it is in vain to repeat the arguments which have been already urged, and present them in a new form. The interest of the advocates of a bankrupt law in the question, while the evils of which they complain are present and pressing, cannot be lost, until their object is effected. Nor can the public mind be effect-

ually acted upon, except by a renewal of the discussion. The speeches made in congress in past years, and the pieces formerly published in the public journals, have no direct operation on the minds of men now. Nobody reads old newspapers, or old pamphlets. Their wisdom cannot reach the mass of the community, until it is presented in a fresher shape. And though it be true, that the arguments in favor of a national bankrupt system have not materially changed within a few years, yet the experience of every successive year is adding to their weight. No apology, therefore, can be necessary for asking the attention of our readers to the subject.

The present state of things in this country is intolerable. Every state has its own laws, with regard to debtor and creditor. The systems in some states are similar to, and in others very different from, one another; but in no two are they exactly alike. Admitting these laws to be all good, founded on correct principles, and correctly administered, yet the very want of uniformity is itself a serious evil. The law which regulates commercial contracts, is substantially the same throughout the United States,—we might almost say, the civilized world. In every part of our country the law of insurance, bills of exchange, partnership, principal and agent, is nearly the same. The diversities of the law in these cases, whether introduced by legislative enactments, judicial decisions, or established usage, in scarcely any instance, materially affect the nature of the contract. The obvious advantages of this uniformity are felt and acknowledged by every merchant. He knows his own rights, and the rights of those with whom he is dealing, and he regulates his proceedings accordingly. If uniformity be in these instances an advantage, would it not be equally so with regard to the law of debtor and creditor? On the subject of insolvency, especially, there should not be one law at New York and another at Philadelphia, one law at Charleston and another at New Orleans. If it be important for the merchant to know whether the law gives him a claim against an individual, is it not equally important for him to know, what means the law gives him of enforcing that claim against a man who is fraudulent or insolvent? No one can transact business with a stranger residing at a distance, with safety and confidence, unless he has some knowledge of the peculiar laws and usages by which his rights may be affected. At present, this knowledge in our own country, with regard

to debtor and creditor, is almost impossible. The rights of the creditor over the person and property of his debtor, are essentially different in different parts of the country. Few lawyers, and still fewer merchants, understand the statutes which regulate this subject out of the particular jurisdiction in which they reside. The merchant, it is true, learns from experience, that debts are less secure in some states than in others; that in some states there are insolvent laws, by which his debtor can get whitewashed, secundum artem; that in others he cannot get judgment against his debtor, until after a tedious and expensive contest of several years; that the oracular responses of his lawyer confound and distract him with the portentous names of *stay* laws, *stop* laws, *replevy* laws, and *relief* laws; that in some states, if he is fortunate, he may secure his debt by an attachment; but that in all, he is put to serious trouble and expense, if his debtor refuses to pay; and that in all, great frauds are practised by insolvent debtors upon their creditors, against which the laws afford a very inadequate protection.

A review of some of the laws relating to debtor and creditor which are in force in different parts of the country, will perhaps serve better than any argument to show the necessity of the interference of the national legislature. A great variety of statutes, called by the general name of *relief* laws, have been passed by our legislatures, chiefly in the western states; their object being, as the name sufficiently indicates, to give relief to insolvent debtors.

By the statutes of some of the states, the real or personal property of the debtor taken on execution, is appraised, and if it will not sell for a certain proportion of the appraised value,—in some states half, but more commonly two-thirds or three-quarters,—and the creditor will not receive it at that proportion of its valuation, there is a stay of execution for a longer or shorter period. By the replevy laws, as they are called, which are in force in several states, the execution debtor is allowed to give a bond to the sheriff for the payment of the debt, within a longer or a shorter period, according to its amount, and the execution is suspended till the end of that time. By other laws, if the creditor refuses to endorse on his execution that he will receive payment in the depreciated paper of certain banks, there is a stay of execution for some months or years. In more than one state, statutes have been passed,

which stopped the issuing of executions for an arbitrary period of some months.*

The policy of laws such as those to which we have adverted, we must be permitted to doubt, though they are sanctioned by the high authority of many of our state legislatures. Scarcity of money is unfortunately a disease beyond the power of

* Some of our readers may perhaps like to see a more particular account of a few of these laws. In Missouri, 'three valuers of real and personal property taken in execution, or to be sold under judgments and decrees, are appointed by the County Court, for each township annually. If the creditof, or his attorney, or agent endorses on the execution or order of sale that he will take property at two-thirds of its appraised value in whole or in part, the sheriff or officer then is to call upon the valuers, who are to appraise the property levied on. If within twenty days after, the defendant does not discharge the execution or order, the officer is to expose the property to sale, setting it up at two-thirds of its appraised value; if it brings more he is to pay the excess to the defendant; if it will not bring more than two-thirds of the appraised value, he is to deliver the same or so much as will satisfy the execution, at two-thirds of the appraised value to the plaintiff, and make a deed or bill of sale,' &c. 'If the plaintiff does not endorse as aforesaid, the debtor is allowed a *stay* of further proceedings on the execution for two and a half years, on giving bond to the creditor with surety approved by the officer, to pay the amount and six per cent. interest within the period aforesaid, and the officer is to release the person or property of the defendant.' 4 Griff. An. Law. Reg. 612.

In Pennsylvania, 'when the defendant, in the opinion of the court has an unincumbered freehold estate to the amount of the judgment, &c. he is entitled to a stay of execution; when the judgment does not exceed two hundred dollars, for six months; not exceeding four hundred dollars, nine months; exceeding four hundred dollars, twelve months, counted from the return day of the original process in the cause; and where he is not such freeholder, may have like stay on giving security for the debt and costs,' &c. 3 Griff. An. Law Reg. 250.

'By the present replevy law of Indiana, enacted at the last session of the legislature, (1821) all executions issued by justices of the peace are entitled to a suspension of nine months. Those from other courts to twelve, fifteen, eighteen, and twenty-one months in the order of their amounting to one hundred dollars; over one hundred dollars, and not exceeding three hundred dollars; over three hundred dollars, not exceeding six hundred dollars; and all sums over six hundred dollars to the last term of twenty-one months, on the defendant's tendering to the sheriff a bond with sufficient security to pay the execution, interest, and cost at the expiration of the time.' 3 Griff. An. Law Reg. 459.

In Kentucky, 'by an act of Dec. 21, 1821, real and personal estate taken in execution, on which the plaintiff shall not endorse or consent to accept notes of the Bank of the Commonwealth, and notes of the Bank of Kentucky in discharge of the execution, shall be appraised by commissioners appointed by the County Courts, and if the estate will not sell for three-fourths of the appraised value, it shall be returned to the owner and released from the execution, and be again liable to any other execution upon the same or any other judgment.' Mr. Griffith's correspondent adds, 'As the appraisers are sworn "to act impartially, in valuing the property *in money* under the provisions in the act," and as they in general choose to consider bank notes *as money*, this law is found in practice the most effectual *stop* to the collection of debts, which the ingenuity of the legislature has yet devised.' 4 Griff. An. Law Reg. 1114, 1115, note.

any legislative panacea to cure. These statutes are, in operation, a sort of insolvent system. And if their only effect were to enable insolvent debtors to discharge themselves by paying their debts in part, they would not, perhaps, be very objectionable. But the mode in which they operate is clumsy, unequal, and uncertain. If any relief for insolvent debtors is desirable, it ought to be given after making a ratable distribution of their property among all their creditors. But these laws do not operate for the benefit of all creditors, but only of those who first obtain a hold on the property. A great fault, however, in all of them is, that they enable men really solvent to discharge their contracts, without making full payment. They thus interfere in the worst way between debtor and creditor, and sap the foundations of commercial credit. Yet this is perhaps not their worst effect. They have a demoralizing tendency, by giving the debtor new motives and new means for defrauding his creditors. For what can be a greater fraud, than for a solvent merchant to pay a debt in a depreciated currency, or by appraised property? When such frauds are legalized by those who should be the guardians of the people's morals, they tend to break down the distinctions between right and wrong. The weak, the ignorant, and the interested, the great mass of the community, will not practise a morality which the laws disregard. Most of the states which have adopted these relief laws are young, and it is scarcely to be doubted that such expedients will finally be abandoned, as worse than useless. In the mean time, however, they must cause a great amount of evil, unless Congress interposes by a bankrupt law.

It is occasionally remarked, by those who deal in sweeping arguments, that these laws are unconstitutional, and therefore to be disregarded. We are not prepared to express, nor do we intend to intimate, any opinion on the constitutionality of these laws. For, even admitting that some of them do violate the provisions of the constitution, this circumstance of itself does not relieve the states which enacted them from their injurious effects. Until these statutes have been declared unconstitutional by some competent tribunal, their operation is the same as if their validity were unimpeachable. Many years must elapse before all the classes of these laws can be brought to the examination of the highest national tribunal. And new statutes can be passed much faster than the old ones can be

declared unconstitutional. For it is not to be supposed, that the existing statutory provisions exhaust all the devices which can be used to elude the grasp of the constitution.

The laws for setting off land on execution, which are in force in most of the New England states, are similar in tendency to the appraisement laws, of which we have already spoken. By these laws, when the creditor levies his execution on land, it is appraised, and set off to him at the appraised value. The practical operation of this system, is perhaps best shown by an example. A trader in a country town fails. His attachable personal property is either swept from him by attachment, or disposed of by himself. When the Boston creditor wishes to obtain security for his debt, nothing is to be found but land. He is forced, rather than lose all, to levy his execution on that; and it is set off to him by the appraisers, at an ideal valuation, which is uniformly above its real value. His debt being thus honorably discharged, the unfortunate creditor has no further remedy against his debtor, who perhaps shortly after comes again upon the stage as a man of fortune. The creditor, in the mean time, is very glad to sell his land at half, or even a smaller part of the appraisement.

Another class of laws, whose tendency seems to us exceedingly pernicious, is the statutes which give a priority to the creditor making the first attachment on property. Laws of this kind are in force in Massachusetts and several other states.* The equity of having the estate of an insolvent divided among his creditors in proportion to their debts, is so manifest, that it is astonishing that this system has been endured so long in the commercial community of Massachusetts. To give one creditor the benefit of his debtor's effects to the exclusion of the rest, seems only suited to a barbarous age, in which the seizure of property gives the right of possession. That the effect of these laws, is, like that of the relief laws, unfavorable to commerce and injurious to the public morals, does not, we think, admit of a doubt, and we believe that a majority of the commercial classes who have experienced their effects, entertain the same opinion. By way of illustration, we shall state one or two examples of the modes in which these laws operate.

* Few of the states have attachment laws of this character, and applying in all cases, though attachments against the property of absent and absconding debtors are generally authorized.

A merchant finding himself insolvent, is unwilling to have his property sacrificed, and appropriated to the payment of one or two of his creditors, to the exclusion of the rest. He therefore secretes his property in the best manner he can to secure it from attachments, intending by means of it to effect some compromise with his creditors. He does not however dare to present them a statement of his affairs, lest he should give them an opportunity of attaching part of his funds. But he offers them a certain dividend if they will discharge him. They refuse to accept it. Some of them commit him to jail. He commits perjury, and is released. He continues for years out of employment, carrying on a barren negotiation with his creditors, and in the mean time wasting the remains of his property. At last, either the patience of his creditors is exhausted, and they discharge him on receiving a trifling percentage of their demands; or else, his funds being entirely consumed, he retires to some distant region, as bankrupt in character as in fortune, his spirit embittered by ill success, and skilled in every art of defeating and delaying creditors.

This is a single picture; but many others as melancholy might be traced. The insolvent debtor, whose property has been made the prey of one or two creditors, having nothing by which he can induce his other creditors to discharge him, and being in a manner debarred from any occupation in which he can acquire property, too often wanders about in idleness and misery, and finally falls a victim to intemperance.

By the laws of many of the states the creditor cannot, in general, obtain the security of his debtor's property until after a judgment. During the course of the suit the debtor has the entire control of his resources, and can put them in such a shape that his creditors cannot reach them. They are in fact altogether at his mercy. If he pays them any thing it is a favor. If they do not promptly accede to such terms as his generosity may offer them, he bids them defiance; and when they become willing to accept his proposals, he treats them like a sovereign who is extending his grace to rebellious subjects.

In addition to the evils already mentioned there are many others which might easily be enumerated. Many species of valuable funds cannot be reached by the creditor under our present systems without the consent of the debtor. In Virginia only a moiety of the debtor's land can be taken on execution by

elegit. The interest of a mortgagee in land, however great, cannot be taken on execution. And, except in states where special provision has been made by statute, the same is the case with regard to shares in banks and other incorporated companies, which in many places form a large part of the property of the community. Choses in action, too, and the rights of *cestui que trusts* in land or other property, can rarely be reached by any process known to our laws;* in almost all cases of debts due to a man, his creditors have no means of reaching them, unless he is an absent or absconding debtor. It is true that in Massachusetts and most of the New England states, debts of this kind may be reached by the trustee process against the debtor's debtor. But where a negotiable note has been given to the debtor by his debtor, there is no process by which the debt can be reached by the creditor, and no means by which the debtor can be compelled to assign the securities which he holds, for the benefit of the creditor.†

It is essential to a good insolvent system, that as soon as the debtor discovers an unwillingness to pay his debts, all control of his property should be taken from him, and that the avails of it, when realized, should be divided ratably among his creditors. Attachment laws are good, in promptly taking away the debtor's power of disposing of his property; they are defective, in not reaching every description of funds which may be available to the debtor, and in not making a ratable division of the proceeds. The insolvent systems of some of the states are good, because they effect a ratable distribution of property. They are bad, because they are not compulsory, but in a great measure voluntary, on the part of the debtor, being in most of the states made on his petition; and therefore do not give the creditors so prompt and efficacious a mode of taking the debtor's effects out of his hands, as is afforded by a bankrupt law. It is evident, also, on the slightest examination of these laws, that they afford a very insufficient protection against the fraudulent transfer and concealment of property by the insolvent.

* There are exceptions to these rules; for in some states trust estates may be taken on execution for the debts of the *cestui que trust*.

† The right of imprisoning the debtor cannot be considered as such a process; for though it may occasionally produce the desired effect, yet its operation is always indirect, and, in many cases, ineffectual.

The power which the creditor has in most, we are happy to say not all, our states, of imprisoning his debtor, however it may be modified, is one which ought not to be tolerated in a Christian country. It may be that this power is seldom abused, but it ought not to exist. We are far from denying that some coercive power is necessary in order to compel men to perform their engagements, who are able, but unwilling; and to force real insolvents to disclose the state of their affairs, and to surrender their effects. But before any misconduct or fault is proved against a man, beyond the mere inability to pay his debts, he should not be liable to imprisonment like a criminal. If he is guilty of fraud, let him be tried and punished in the common course of justice; but let not the creditor be the judge of his guilt. The fraudulent insolvent is a criminal, who merits punishment. In moral guilt, indeed, there is little difference between the man who cheats his creditor out of his money, and the thief who steals a purse. A bankrupt law makes the just distinction between honesty and fraud. The fair trader, who gives up all his property for the benefit of his creditors, is discharged from their claims, and even receives a pecuniary reward; but the fraudulent bankrupt, who attempts to secure to himself the funds which justly belong to others, is punished as a criminal. This distinction indeed is far from being a new one. The same humane principle is to be found in the civil law. The honest debtor, whose inability to pay arose from misfortune, was protected from imprisonment by giving up his effects for the benefit of his creditors; while this protection was refused to debtors who were chargeable with fraud or extravagance. Such, too, is the law of France. A debtor, merely as such, is not liable to imprisonment. But the law specifies a number of cases, in which payment may be enforced by imprisonment. They are chiefly cases in which the debtor has been guilty of fraud, breach of trust, or some misconduct; and the imprisonment is considered in its proper light, as a punishment, and even where it is authorized, it can only be inflicted by virtue of a judgment.*

It cannot be denied, that there are many objections to the laws regarding the relation between debtor and creditor throughout the United States. It is also a serious evil, that the existing laws of the states on the subject of insolvency cannot be car-

* Code Civ. L. III. t. xvi.

ried into full operation. An insolvent or bankrupt law of a state, which provides for the discharge of the debt of an insolvent without the consent of his creditor, has been decided to be unconstitutional, except as applied to contracts made between citizens of the state, and after the passage of the act.* The ground of this opinion is, that such provisions for discharging the debt impair the obligation of the contract.

We admit the correctness of these decisions. The provision of the constitution on which they rest, is most honorable to the framers of that instrument, and the nation which adopted it. But still, the power of discharging insolvent debtors, is one which the welfare of the nation requires should be exercised. The man who has lost his property by misfortune, ought not to be debarred from all future exertion of his talents and industry. To the creditor, the right of taking the future property of an insolvent is of little value; but to the debtor, it is all-important to be able to exert his powers, without having the fear of his old debts forever impending over him. It is important, too, to the nation to be able to avail itself of the services of all classes of citizens; and to prevent the increase of the numbers of undischarged insolvents, and to convert them into active and useful members of society. Since, therefore, the state legislatures cannot give effect to one of the most important offices of a bankrupt law, by giving a complete discharge to the debtor, the duty upon Congress of passing laws for this purpose, is imperative, unless it is impossible to effect this object without producing evils greater than that which it is intended to remedy.

We are well aware that this discharging the debtor is often complained of as one of the evils of a bankrupt system. Yet those that make this objection, do not generally question the propriety of releasing an insolvent who has fairly given up his property for the use of his creditors; but contend that the power which each creditor has at present of granting or refusing a discharge, is a salutary restraint on the insolvent, and that it is never refused where he conducts honorably. We cannot assent to this argument. The release which is now so often wrung from a creditor where he gives his assent to an assignment, seems any thing but voluntary. And, in point of fact, a discharge is often refused from various causes which

* This is the doctrine as finally settled by a majority of the judges of the Supreme Court of the United States, in Ogden vs. Saunders, 12 Wheat. 213.

have no connexion with the debtor's good conduct. If discharges are proper, they ought to be governed by fixed rules, and should be the certain consequences of good conduct, and independent of the caprice or ill will of any individual creditor.

One of the greatest evils under which the country is now suffering, is the practice which men in failing circumstances have adopted of preferring certain creditors by assignments and other devises. As long as there is no legal fraud in these operations they are valid. This evil of assignments is really the natural fruit of our present laws. The mode in which the law would dispose of an insolvent's property by giving a priority to certain attachments, judgments, or executions, in preference to others, is so intolerable, that it has given birth to assignments in a thousand different shapes. Instead of one uniform, unbending rule for dividing the estate of an insolvent among his creditors, it is left to be disposed of by accident or caprice. One man prefers his father, brothers, and uncles, because they are his relations; another prefers his endorsers and custom-house sureties, because that is the general practice; and the business of a third is often settled by the sheriff's seizing his stock, before he has time to complete his arrangements.

In all the commercial states the practice of preferring creditors in assignments, is so prevalent, as to render the conclusion inevitable that the present laws regulating insolvency are unsatisfactory. And yet the system of preferring some creditors to others in assignments gives scarcely better satisfaction than the laws. Every one complains of the injustice and hardship of these preferences, except the individuals who receive the benefit of them. The fault, however, is not so much in the debtor as in the system of giving preferences; for while the system prevails, it seems the duty of the debtor to give such preferences as are generally expected. If he neglects to do so, it is as great a fraud as it would be to conceal any of his property for his own use. Those creditors whose demands are considered confidential, who have lent money to a merchant, or endorsed his notes, under a confidence or understanding that he will make them secure in case of failure, have a claim on him which he cannot in conscience disregard.

Yet the system of preferences is insufferable. The principles which regulate it are, in their very nature, uncertain and fluctuating. No two men can agree exactly as to what debts ought to be considered confidential. In almost every case of

assignments in which preferences are given, non-preferred creditors will complain that their demands were unjustly postponed, and that those of others were unreasonably preferred. Besides, to allow preferences at all, opens a wide door for fraud and collusion between the insolvent and his friends.

No legislative enactments, probably, can prevent all preferences by men on the verge of insolvency. But a bankrupt law does every thing which the case admits of; disregarding all confidential debts and honorary engagements, it avoids all transactions made with a view to bankruptcy, and places all creditors on an equal footing.

Some assignments, however, do provide for a ratable distribution among all creditors without distinction. But though the object of a bankrupt law is the same with that of an assignment of this kind, yet there are many obvious reasons for preferring a bankrupt law, even on the supposition that every debtor is desirous of making a ratable distribution of his effects. 1. The assignees of a bankrupt are chosen by the creditors, and will therefore in all probability be competent and responsible; in the case of a voluntary assignment the debtor selects his own assignees, for reasons which are personal to himself; and it therefore often happens that more improper persons could not be found. 2. Under a bankrupt law, the bankrupt is compelled to make his disclosures on oath; where an assignment is voluntary there is no power to compel him to make any disclosure at all. 3. The bankrupt is compelled to produce his books and papers, and submit them to examination; under a voluntary assignment the insolvent produces them or not, as he pleases. 4. In bankruptcy, a discharge is not allowed, unless two-thirds in number and value of his creditors sign his certificate;* an act which is entirely voluntary on their part;† and he has no claim to a discharge until after the surrender of his property and his examination are completed, and his creditors have had sufficient opportunity to judge of

* The provision of the old bankrupt law, is that the certificate must be signed by two-thirds in number and value, of the bankrupt's creditors, who shall be creditors for not less than fifty dollars respectively. St. 6 Cong. 1 sess. c. 19. s. 36. The last bills on the subject which have been before Congress contain the same provision. In England four-fifths in number and value of creditors who have proved debts of twenty pounds and upwards, are required to sign the certificate, or after six months from the last examination, then three-fifths in number and value of such creditors, or nine-tenths in number. St. 6 Geo. IV. c. 16. s. 122.

† See 17 Ves. 118.

the situation of his affairs and the honesty of his conduct. How is all this in the case of a voluntary assignment? A short time is allowed the creditors to sign it; they have but little means of ascertaining the state of the debtor's affairs; and if they refuse to sign the assignment within a limited time they are shut out from its benefits. In bankruptcy the discharge is voluntary; in a voluntary assignment the discharge is in a manner compulsory on the creditors, and they often choose to give it when they are in the greatest uncertainty as to the merits of the debtor, because they prefer to secure a small dividend, rather than run the chance of losing their whole debt by refusing to become parties to the arrangement.

There is another point of view in which a bankrupt law appears highly desirable—as an act of justice to foreign nations with which we are connected in commerce. The American creditor of a bankrupt who resides in England, has equal rights with the English creditor. But the English merchant to whom an American insolvent is indebted, frequently loses the whole of his demand, while the American creditor is enabled to obtain payment in full. This should not be. The time has long passed, since every stranger was an enemy. The whole civilized world now forms but one community of nations. And while we profess to carry on commerce on principles of reciprocity and equality, it becomes us in all our intercourse with foreign nations, to give their citizens the same rights in our country which we enjoy in theirs.

To take the management of the insolvent's property out of his own hands, and to make a ratable distribution of the proceeds among his creditors, and to discharge him from their claims where he is meritorious, and to effect all these purposes by a uniform system, are confessedly important objects, and only to be gained by a national bankrupt law. These positions, indeed, have not been generally disputed, even by those who oppose the measure. It is, however, frequently contended, that these objects never have been, and never can be, effected by any bankrupt system; and that the expense and vexation which will necessarily attend their operation, will make them far more intolerable than the present insolvent laws.

The grand arguments generally brought against bankrupt laws are, their general unsatisfactory operation in England, the enormous expenses attendant on commissions of bankruptcy there, and the small dividends received under them. It is

not, however, our intention to examine the various statements which have been made respecting the operation of the English bankrupt laws. We are not bound to follow any part of that system which we disapprove. The example of that country is before us, to imitate or avoid, as far as we may find expedient. The principles of commercial law are now far better understood than they were when the English bankrupt system was first introduced. And it will undoubtedly be far easier in this country than in that to introduce, from time to time, such changes as may appear expedient, either in the principles or details of a bankrupt system.* Besides, whatever may be the defects of the English law on this subject, the efforts that have been made to improve it, rather than abandon it, show that a deep conviction is felt in that country of the necessity of continuing the present system. With regard to expense, there can be no doubt that every thing under a bankrupt law in this country would be conducted far more economically than in England. The same causes which now render all law expenses far less in this country than in England, would operate with regard to the expenses attending a commission of bankruptcy. One obvious source of expense, the number of commissioners, which has been much complained of in England, would be cut off by any statute like that brought before the Senate in 1826. The one commissioner provided by that bill, would be much cheaper and far more effective as a judge, than the five who are named in the English commissions. In this country, also, we are free from stamp duties, which, until recently, were another source of expense in England.†

As it respects small dividends, we are inclined to believe, that the amounts realized by the creditors of persons failing, would be quite as great a percentage of their debts under a bankrupt system as they are at present, and probably greater. The distribution of the property of an insolvent, however, must, under any system, be expensive. His funds can no more be divided among his creditors without heavy charges upon them, than a material steam engine can be made to ope-

* See 2 Bell's Com. on the Laws of Scotland, 342, in which he makes some similar remarks to the above, in comparing the English and Scotch bankrupt systems.

† The last English bankrupt act has remedied this evil, all stamp duties being repealed with regard to bankrupt estates.

rate without friction. Indeed, we know of no system more expensive, than the one which is so common in our commercial cities of making voluntary assignments for the benefit of creditors, especially when we take into view, that the validity of many of these conveyances becomes the subject of long and burdensome litigation.

Another fruitful source of opposition to a bankrupt law, is that cankering jealousy of the general government with which some of the states are so deeply infected. The hostility to the measure from this quarter is not directed against the bankrupt system particularly; it has for its object, every exercise of power by the general government; in short, to dissolve the Union. For, if men oppose the introduction of a law, made in pursuance of a power clearly and undeniably granted to Congress by the constitution, and resting in Congress only, and a law shown not only to be expedient, but involving very materially the wellbeing of our society, and which the members of the community demand of right, as being essential to the protection of their persons and industry; if men oppose such a law, merely because it would give to the government an exercise of power, they would, upon the same principle, oppose every exercise of power by the general government,—in other words, they attack the Union itself, and are ready to use their influence towards its destruction. An opposition to a system of bankrupt laws upon this general ground, would be more excusable if it were proposed thereby to confer any extraordinary power upon the government, which might be especially liable to abuse, and susceptible of being perverted to the injury of the personal or civil rights of the citizens; but so far from this, the system of laws in question, in their most important provisions, is to be found in the legal code of most commercial and civilized communities: it is a measure dictated by the plainest principles of justice, humanity, and economy;—we say economy, for its object is to unfetter and promote the industry and enterprise of our population. Those who oppose such a law, merely upon the ground that it confers the exercise of a mild and harmless authority by the general government, would, with as good reason, oppose the distribution of a gift among the distressed members of a community which a benefactor should place at the disposal of the government, merely because its distribution through them, would confer an exercise of influ-

ence. An opposition so directly disorganizing in its character, and so sweeping in its consequences, ought to be resisted by the combined and most strenuous efforts of the friends of the Union, and of the wellbeing of its citizens.

The design and objects of a bankrupt law are frequently very much misunderstood and misrepresented. It is supposed by many, that it is in some unknown manner to operate for the exclusive benefit of one class of men at the expense of the others. Many people seem to think that the only object of such a system is to save any body the trouble of paying his debts who does not wish it; and that it is a species of machinery to assist fraud and roguery. But if the mercantile classes would fairly examine the subject, they could scarcely fail of coming to a conclusion in favor of a bankrupt system. The objects of the law are indeed obvious; the questions which ought to arise are all of detail. The opposers of the bankrupt system, while they admit in the abstract the correctness of the principles on which it is based, and that the only difficulty is in applying them in practice, are yet unwilling to examine fairly the details of any proposed system, but manifest the most violent opposition to every proposal of the kind. The clamor which is thus raised is truly surprising. Most of the states have now insolvent laws, which, in directing a ratable distribution of the debtor's effects, are truly systems of bankruptcy. But as far as we can judge of these laws, though their object is similar, they are very inefficient in their operation.

An objection often made to a bankrupt law is, that its operation is confined to the mercantile community, whereas its benefits ought to be extended to planters and other classes. But it is an obvious remark, that giving the merchant the benefit of the law is no injury to the planter. Those to whom it does not apply are in no worse situation after it goes into operation than they were before. But notwithstanding the opposition which has been made to clauses in bankrupt bills which proposed to extend their operation to other descriptions of persons besides merchants and traders; and although in England and France the operation of their bankrupt laws has been confined chiefly to the commercial classes, we are not sure that many other persons might not with propriety be made the subjects of the law. Planters and farmers who cultivate large estates, are subject to heavy and unexpected losses, as well as merchants, and are liable to ill success from similar causes.

The cause of a merchant's failure is sometimes a loss or destruction of property by the perils of the sea or land; a fall in the value of property; the failure or fraud of his debtors, or those for whom he is responsible; the excess of his expenses beyond the profits of his business; and sometimes a combination of some, or all these causes. But is not the cultivator of land exposed to similar chances? His barns, his houses, and his granaries may be burned; his flocks and herds may perish by disease; his crops may be destroyed by drought or inundation, or devoured by insects. In whatever way he may dispose of his produce, he is liable to loss from the unfaithfulness or misfortunes of those whom he trusts or employs. And he may be ruined by his own improvident expenditures on his estate, or by a prodigal mode of living.

Without, however, presuming to decide on the propriety of extending the provisions of the bankrupt law indiscriminately to individuals of all classes, in cases where they may choose to become subject to them, as has been sometimes proposed,* we think that the enumeration of the classes who are compulsorily subject to their operation ought to be very much extended, and we should not fear to include planters, farmers, and graziers, if they should desire it, though excluded in the English acts. It is well worthy of remark, however, that the classes of persons who may become bankrupt in England have been constantly increasing by successive statutes. The last act in that country, and which underwent a very careful revision, includes a great variety of classes that were never subject to the bankrupt laws before. As many of these classes, we believe, have never been included in any of the bankrupt bills which have been proposed in Congress, and some of them expressly excluded, and as we think they ought to be brought into any new act in this country, we give an enumeration of them; viz. warehousemen, wharfingers, packers, victuallers, innkeepers, dyers, printers, bleachers, fullers, calenderers, sheep and cattle salesmen, persons who seek their living by buying and letting for hire, or by the workmanship of goods or commodities. Though some of these persons might, perhaps, come in under the general words with regard to buying and selling, yet even as it respects them this full and explicit enumeration is useful,

* This was attempted in the bill brought into the Senate in 1826, and in the one which was before the House of Representatives in 1827.

as it prevents the numerous controversies which frequently arose in England, as to the classes to which the more general words extended.

The last English bankrupt act contains several very great alterations of the old laws. Some of them were introduced in the bill before the Senate in 1826, and in the bill before the House in 1827. As these or similar alterations are likely to be again discussed whenever a bankrupt system is proposed in this country, we have thought it might be worth while to consider some of the provisions contemplated in those bills, in connexion with the present English system. It ought to be recollected, that the last English statute was passed after the subject of the defects in the old system had undergone a thorough examination.

In the first bankrupt law in England, as is well known, the bankrupt was considered as a criminal, who was endeavoring to escape from and defraud his creditors. This idea of fraud being a constituent part of bankruptcy, was preserved in the English law long after more correct views were entertained, and while it was well understood that bankruptcy did not necessarily imply any thing worse than misfortune. Blackstone says, that this 'unfortunate person (a bankrupt) may, from the several descriptions given of him in our statute laws, be thus defined; a trader who secretes himself, or does certain other acts tending to defraud his creditors.' In consequence of the laws being framed with these views, it must have been often inconvenient for a person who was really insolvent and desirous of having his property distributed among his creditors, to commit the acts of bankruptcy enumerated in the statute, such as departing from the realm, secreting himself to avoid his creditors, lying in prison two months for debt, &c. In fact, most bankruptcies were previously concerted between the debtor and some of his creditors. And these concerted commissions often occasioned much litigation, in consequence of the concert between the debtor and his creditors, rendering the concerted act of bankruptcy 'of no avail against persons not privy or consenting to it.' The late English statutes, therefore, to remedy these evils, have provided several new acts of bankruptcy, one of which is the party's filing in the office of the secretary of bankrupts a written declaration under his signature, and attested by an attorney or solicitor, that he is insolvent, or unable to meet his engagements. In order to

make this declaration effectual, it must be advertised in the London Gazette within eight days, and a commission issue within two months from the time of the publication in the Gazette.* The last bills on this subject that have been before Congress, no doubt for similar purposes, declare a trader a bankrupt, who shall have generally stopped payment. This is undoubtedly an improvement in the law of 1800. But as it may often be a matter of controversy as to what amounts to stopping payment, and the point of time when it takes place, we think that it would be advisable to make the filing of a declaration of insolvency by a trader in the District Clerk's Office, or with the general commissioner, a sufficient act of bankruptcy, after its publication in a newspaper appointed for the purpose. This is so simple and explicit an act, that it seems scarcely possible that any question could arise whether it had been performed or not.

The last bills which have been before Congress provide, that the assignment by a trader of all his effects to trustees for the benefit of his creditors, shall not be considered as an act of bankruptcy, unless a commission issue within six months, provided the assignment is executed within fifteen days by every such trustee, and that notice be published of it within two months in one daily newspaper published near such trader's residence. The intention of this section, which is adopted from the last English bankrupt act,† is to give effect to fair assignments for the benefit of creditors, while it gives them an opportunity of avoiding any assignment with which they are not satisfied, by obtaining a commission against the debtor. No provision could be better adapted for preventing the unnecessary expense and trouble of a commission; and it ought to satisfy the warmest advocates for the present system of voluntary assignments.

The bill which was brought into the Senate in 1826,‡ provides 'that the assignment or assignments of the commissioner of the bankrupt's estate and effects as aforesaid, made as aforesaid, shall be good at law and in equity, against the bankrupt; and all persons claiming by, from, or under such bankrupt, by an act done or conveyance made at the time of his committing or after he shall have committed the act of bankruptcy upon which the commission issued: provided always, that all conveyances by,

* 6 Geo. IV. c. 16, s. 6. † 6 Geo. IV. c. 16. s. 4. ‡ S. 17.

all payments by and to, and all contracts and other dealings and transactions, by and with any bankrupt, *bona fide* made and entered into before the date of such commission, shall, notwithstanding any act of bankruptcy committed by such bankrupt prior to that on which the commission issued, be valid: provided, the person so dealing with such bankrupt had not at the time of such conveyance, payment, dealing, or transaction, any knowledge, information, or notice of any act of bankruptcy having been committed by such bankrupt within six months before that time: and provided always, that in case of a *bona fide* purchase, made before the issuing of the commission, from or under such bankrupt, for a valuable consideration, by any person having no knowledge, information, or notice, of any act of bankruptcy committed within six months before such purchase, such purchase shall not be invalidated or impeached.' This section, which contains several clauses not to be found in the old act, seems to us very defective. On principle all acts and dealings in the common course of business with the bankrupt, by persons ignorant of the act of bankruptcy, ought to be protected up to the time of issuing the commission, and not merely up to the time of the act of bankruptcy on which it issues. Similar provisions to those of the French law on this subject might be adopted with advantage. Thus, 'All commercial acts or engagements contracted by the debtor within the ten days preceding the date of the insolvency, are presumed to be fraudulent as it respects the insolvent: they are void, when fraud on the part of the other contracting parties is proved.'* There are several other similar provisions in the French law, founded on the correct principle of regarding with jealousy the transactions immediately preceding an avowal of insolvency, and yet respecting the fair dealings of other persons. The strict rule of avoiding all transactions of the bankrupt subsequent to the act of bankruptcy, which is frequently secret, was in England often productive of the most monstrous injustice. This rule, so harsh and severe, has been constantly softening in the successive British acts on the subject. So that the rules now adopted in that country are more liberal than the provisions of the bill we have just cited. The sections which relate to this subject may be briefly stated as follows. All *bona fide* conveyances by, and all contracts and

* Code de Com. Liv. III. a. 445.

dealings by and with any bankrupt, and all executions and attachments against his real or personal property, executed or levied more than two months before the issuing of the commission, are made valid, notwithstanding a prior act of bankruptcy by him committed; provided the person dealing with the bankrupt, or at whose suit or on whose account such execution or attachment issues, had not notice of any prior act of bankruptcy: And provided, that where a commission has been superseded, if any other commission issues within two months after it is superseded, no such conveyance, contract, dealing, or transaction, execution, or attachment, shall be valid, unless made, entered into, executed, or levied, more than two months before the issuing of the first commission.* The American bill only protects fair transactions made before the act of bankruptcy on which the commission issues, notwithstanding an act of bankruptcy prior to that. In many, if not most cases, it is evident that this protection would amount to nothing. In the English act, all fair transactions done more than two months before the issuing the commission, are valid. It may, however, be doubted whether the English rule is not still too severe.

Other sections of the English statute provide, that all *bona fide* payments of money by the bankrupt to his creditors, and *bona fide* payments to the bankrupt, made before the date and issuing of the commission, without notice of any prior act of bankruptcy, shall be valid :† and that no person having in his hands goods, money, or effects of the bankrupt, shall be endangered by the payment or delivery of them to the bankrupt, provided such person had not notice that such bankrupt had committed an act of bankruptcy.‡ These sections protect a great variety of fair transactions with the bankrupt up to the time of the issuing of the commission. The American bill, on the contrary, only gives such protection to a purchase from the bankrupt.

The bill reported to the House of Representatives at the session of 1826–7, (s. 49) contains a provision, that at any meeting of creditors after the bankrupt's last examination, (of which meeting twenty-one days notice is to be given), if the bankrupt or his friends shall make an offer of composition, or security for such composition, which three-fourths in number and value

* 6 Geo. IV. c. 16, s. 81. † 6 Geo. IV. c. 16, s. 82. ‡ 6 Geo. IV. c. 16, s. 84.

of the creditors shall agree to accept, another meeting shall be appointed; and if at such second meeting three-fourths in number and value of the creditors shall agree to accept such offer, the judge who issued the commission shall, on such acceptance being testified by them in writing, supersede the commission; and the composition shall be a discharge of all the debts of the bankrupt. In deciding on the offer, creditors under fifty dollars are not reckoned in number, but in value only. This provision, which is borrowed from a similar one in the last English bankrupt act,* having been introduced into England from the Scotch system, is an important improvement, as it restores to the debtor the management of his affairs, where his creditors think him trustworthy, and his proposals favorable to themselves. This arrangement will often enable the debtor by resuming his business to manage his property to greater advantage than any assignee could do, besides relieving it from many of the expenses attending a commission. The debtor will, therefore, be willing to offer security for a larger dividend to his creditors than they could possibly obtain in any other manner. The composition contract will also be advantageous to the creditors in many cases, by giving them negotiable paper with good names, which will be immediately available in the money market, instead of an uncertain claim against a bankrupt estate, from which nothing may be realized for a long period. This power of accepting a composition is manifestly required for the mutual benefit of the bankrupt and those who have claims against his estate. There is no danger to be anticipated from such a provision, as the creditors are usually the best judges of their own interests.

Both the American bills that we have cited, contain the following liberal provisions on the subject of set-off, which are a great improvement on the old statute. Where 'there hath been mutual credit given by the bankrupt and any other person, or mutual debts between them at any time before the issuing of the commission,' 'one debt may be set off against the other, and what shall appear to be due on either side on the

* 6 Geo. IV. c. 16, s. 133, 134. 2 Bell Com. Laws Scot. 484. In both England and Scotland the consent of nine-tenths of the creditors in number and value is required, in order to make the offer of composition binding on them. In France a majority in number and three-quarters in value of the insolvent's creditors, can accept a composition so as to bind the remainder. Code de Com. a. 519.

balance of such account, after such set-off, and no more, shall be claimed or paid on either side respectively.' This seems to give the protection to fair transactions, which the rigidness of the former law denied; in that statute the right of set-off being confined to transactions previous to the act of bankruptcy. The rights of other creditors seem to be sufficiently protected by the proviso at the end of the section, that in case the debt was contracted or credit given within two months before the date or suing forth of the commission, the party must 'prove that such credit or debt was given or contracted in the ordinary course of business, *bona fide*, for valuable consideration, and with no intent to obtain preference to such person.'

With regard to what shall be notice of an act of bankruptcy, the bill introduced in the Senate* provides, that the issuing of a commission shall be deemed notice of a prior act of bankruptcy, if the adjudication of the person against whom the commission has issued shall have been notified in one or more public newspapers, and the person to be affected by such notice may reasonably be presumed to have seen the same. We think that there ought to be but one paper in each state for the official publication of bankruptcies. In the corresponding section of the last British act,† there is but one paper, the London Gazette, named in which bankruptcies are to be published. The advantages of having a single paper, which will be generally known, for these publications, are obvious.

In the preceding remarks it has been our aim to keep the attention of the nation awake to a subject in which all have the deepest interest. It is important, as it regards the commercial intercourse between the different parts of our own country, our credit and trade with foreign nations, the welfare of large classes of our population, and, more than all, the morals of the community. We feel a strong conviction that if the merits of the measure were once well understood, a bankrupt law would pass in Congress almost by acclamation. The impression on the public mind of its necessity has been gradually increasing for many years. Prejudice and party spirit may perhaps prevent it from passing in Congress this year or the next; but that it will ultimately prevail, and at no distant period, appears to us certain. It is but little to the credit of the second commercial nation in the world, that her

---

* Sec. 62.

† St. 6 Geo. IV. c. 16, s. 83.

citizens should have so long been permitted to suffer for the want of a bankrupt system. And the duty on Congress is imperative to afford that relief to the nation which is pointed out, if not enjoined by the constitution, and which that body alone is authorized to bestow.

Art. III.—LAW OF REAL PROPERTY.

Observations on the Actual State of the English Laws of Real Property; with Outlines for a Systematic Reform. By James Humphreys, Esq. of Lincolns Inn, Barrister. Second Ed. London. John Murray. 1827.

Men in all ages have been accustomed to look upon the civil and political institutions of their ancestors with a reverence which has often become superstition. Even England has not been free from an excess of this filial regard. The history of that country shows that after abuses and defects in the law, of the most important character, have been proved and admitted, every attempt to reform them has been met by the most stubborn resistance. To every argument, the lawyers and statesmen had still their ready answer, 'quod nolunt leges Angliæ mutare, quæ hucusque usitatæ sunt et approbatæ:' the laws whose merit has been tested by the experience of centuries, are not to be examined, but to be admired and worshipped. This reasoning is not to be wondered at. The changes in the condition of the country which had rendered changes in the law desirable, having been slow, and to many minds imperceptible, the people clung to existing institutions, as if they could by no other means retain the wisdom and glory of their ancestors, forgetting that the peculiar character of antiquity, which had given vital energy to these institutions, had long departed. The real excellences of the common law and the growing prosperity of the nation, added new arguments against innovation, and led men to fear any great reform in their system of laws, lest it should touch the secret spring of the fortunes of the country; they feared that in attempting to root out the tares they might pull up the wheat also. Their national vanity, too, which was fostered by the eulogies bestowed by their most popular law-writer on the common law, even in its most questionable provisions, induc-

ed doubts as to the real existence of any important defects, either in their frame of government or their civil or criminal codes. To these feelings, which were common to all, the party in power always added the agreeable persuasion that whatever is, is right; the multitudes who were fed by the expensive mode in which justice was administered, had a direct interest in checking all inquiries; and the lawyers felt a double fondness for the system whose intricacies they had mastered.

The United States form a striking contrast to England. From the very beginning of our colonial history down to the present time, important alterations in our laws have been comparatively frequent and easily effected. So that the law of any one of our states, at the present day, presents a much greater contrast, than the present English system does, to the common law as it existed two hundred years ago. When our forefathers first settled here, justice was administered in a very summary and paternal mode, and though the English common law was the basis of the laws of the colonies, yet no more of it was in fact introduced, than was thought to be suited to their condition. Parts of the system were never adopted, others fell into disuse; the colonial legislatures were constantly altering it by statutes, and customs, greatly modifying it, grew up gradually and silently. The changes that were introduced, whatever their defects may be, had a healthy and vigorous character, as they were not made to suit the antiquated system of feudalism, but the actual state and wants of the community. The fathers of our country were so fortunately situated that it was in their power to introduce the wisdom of a highly civilized nation, while they had scarcely any of the obstacles to encounter, which in an old country the prejudices of many, and the interests of a few, always throw in the way of improvement. They could apply remedies directly and promptly to the sources of evil, and with a single view to the general welfare.

Since the revolution the legislatures of the states have not been sparing in their enactments. Their willingness to make amendments, indeed, has led them into an error directly the reverse of that of England. If in that country legislation has been too slow and timid, in this it has been too rash and precipitate. In the zeal for improvement the good has sometimes been prostrated with the bad, and a new evil introduced in the place of an old one. A want of system is every where

perceptible, and in consequence, remedies have been in some instances inconvenient and complicated, and in others incomplete. In some legislative provisions it is but too apparent that the framers of the statute did not understand the law as it existed on the subject they were tampering with, and of course could not perceive the precise effect of the changes they were introducing. We have undoubtedly suffered much from crude experiments in legislation. Still we readily admit that the great exertions which have been made to improve our civil and political institutions, have not altogether failed in producing good effects.

The bigoted attachment of the English to the common law, has, within a few years, been gradually giving way to the conviction, that great reforms are required. The state of the public mind is obvious from the commission to inquire into the Court of Chancery, the changes that have been effected in the criminal law and the bankrupt system, the work of Mr. Humphreys on Real Property, Mr. Brougham's speech in Parliament, the votes which it produced, and the free discussions respecting the state of the law in periodical works and many other publications. The symptoms of uneasiness and activity, which are ever the forerunners of great changes, are every where discernible.

"The work of Mr. Humphreys on Real Property has excited great attention, by the bold and uncompromising manner in which it points out the evils of the existing laws of England on that subject. Though he shows himself to be familiar with the history and character of the complicated system which he attacks, he does not shrink from any conclusions to which his principles lead him, however new or startling they may appear. He is, in short, a friend to a thorough, we had almost said a radical reform, in this branch of English law. His work breathes throughout a liberal and philosophic spirit, and exhibits that clear understanding of what is merely formal, and what essential in the institutions of his country, which is only to be gained by the study of the systems of different nations. In the first part of his work he gives a general view of the law of real property in England, placing its defects in a very striking light; and in the latter part proposes as a remedy, a statute 'for amending, declaring, and incorporating the laws of real property.'

In reading the pages of Mr. Humphreys we have been led

to remark how many of the evils in the English system, which he exposes, have been remedied in this country. Though the alterations which have been made in the common law are, no doubt, familiar to our professional readers, yet as they are not often called on to consider them in a connected view, we shall endeavor to point out some of them which relate to the subject treated in the work before us. Amid considerable diversity in the details, it is interesting to remark the great similarity in the general provisions which have been adopted in the different states, although departing widely from the system of our parent country. The causes of this uniformity are well stated in the following extract from one of our most learned jurists.

'Most of our ancestors who settled Federal America, came from the same country, England, and brought with them not only the English common law, but also numerous English statutes. Some of these statutes were adopted and practised upon here as common law, and some of them re-enacted here in substance, into American statutes, by the colonial, provincial, territorial, and state legislatures. Thus state statutes, in all the most material points of titles, as well as common law principles, being derived from the same source, the English laws, there naturally grew up in our colonies and states, this sameness in titles to property above-mentioned. Further, all our colonies early adopted the English deed, in all its essential parts, and this acknowledged, or proved, and enrolled, or registered, became every where our deed acknowledged, or proved, and recorded, in the county or district in which the land conveyed by it lay. The American lawyer likewise recollects that our American settlements, and so titles, began in Virginia and Massachusetts nearly on the same foundation, and so derived from the same fountain-head, the English law books; and they differed but little, except as to the descent of real estates, a difference of late years done away nearly. The northern colonies, afterwards settled, adopted their laws and usages very much from Massachusetts; and the southern ones from Virginia.

'Besides Massachusetts and Virginia, fourteen of the present states were settled, and titles in them took root, before the territorial ordinance or constitution was established by Congress in July, 1787; under which all the other states in the Union, except Louisiana, have been settled, and titles to property, real and personal, in them, have grown up on uniform principles among themselves, and also in regard to the other states. This ordinance, (formed by the author of this work), was framed mainly from the laws of Massachusetts, especially in regard to titles, and as to them, contains the following clauses, to wit: "The estates

of both resident and non-resident proprietors, in the said territory, dying intestate, shall descend to, and be distributed among their children, and the descendants of a deceased child in equal parts; the descendants of a deceased child or grandchild to take the share of their deceased parent, in equal parts among them; and where there shall be no children or descendants, then in equal parts to the next of kin, in equal degree; and among collaterals, the children of a deceased brother or sister of the intestate, shall have in equal parts among them their deceased parent's share, and there shall in no case be a difference between kindred of the whole and half blood; saving in all cases to the widow of the intestate her third part of the real estate for life, and one third part of the personal estate." "And estates in the said territory may be devised or bequeathed by wills in writing, signed and sealed by him or her, in whom the estate may be, (being of full age), and attested by three witnesses. And real estates may be conveyed by lease and release, or bargain and sale, signed, sealed, and delivered, by the person, being of full age, in whom the estate may be, and attested by two witnesses, provided such wills be duly proved, and such conveyances be acknowledged, or the execution thereof duly proved and recorded." '*

Mr. Humphreys in the beginning of his work states very clearly and forcibly what ought to be the characteristics of the law of real property.

'But, if system ever be requisite in laws, institutions respecting landed property, under its various modifications, both as regards transactions among the living, and the return to the quick from the dead,† imperiously demand, (and the requisitions are perfectly practicable), that their characters be direct and well defined;—free from mere technical distinctions, whether of tenure, of nominal ownership, or of jurisdiction;—that possessions be kept distinct, unaffected by interfering rights of third persons; that the rules of succession, whether primogeniture or equal partibility prevails, be simple and uniform;—that the power of alienation be unrestrained, and its mode bear immediately on the object;—that the rights of creditors be ample and prompt;—that the periods of prescription, or bar by adverse possession, be clear and of limited extent;—above all that, instead of vainly seeking, by equitable interference, to adapt the crude and scanty institutions of early ages to the complicated relations of cultivated society, one uniform system of laws regulate the whole;—and that no act be done, nor right conferred, by circuitous means, whether of legal fiction, or nominal interest, where the object may be effected *directly*, with its real name and character.' pp. 3, 4.

* 7 Dane's Dig. 388—390. † *Le mort saisit le vif*, say the feudal jurists.

The history of the present very technical and complicated system of real property in England, which grew out of the feudal tenures, and the efforts made to elude their operation, is given in a very brief, yet comprehensive manner, by Mr. Humphreys.

'Passing by the simple rules of ownership under the Anglo-Saxon dynasty, as they may be collected from the relics of their laws, and their extant charters, the *Norman* conquest overwhelmed our landed property with feudal tenures, and their burdensome privileges. These were introduced, not in the spirit of military conquest and partition, on the terms of rallying round the chief, to protect the common acquisitions, but as a system of jurisprudence already established, and even refined upon in their own country, by this proverbially litigious race. They gave us, not the spirit, but the dregs, of that singular system, which has so largely influenced the laws and manners of modern Europe. The extent and variety of the burdens and restrictions of tenure, (*fruits* as they are called), may be found in all our writers on this branch of jurisprudence; forming, as they did in their primitive vigor, rather an assemblage of unconnected institutions, than parts of a general system. To these were early added, (and their effects are still felt), the devices of ecclesiastical bodies to amortize land, or appropriate it to themselves in perpetuity. For this purpose, when prevented by the government from acquiring it by direct means, they introduced a variety of inventions; as, leases for long terms of 500 or 1000 years, recoveries in feigned actions at law, grants to nominal holders, *to the use of* the religious house. These uses, which were borrowed from the civil law, were not recognised by the judges of the land, but enforced by the Lord Chancellor, who was then usually of the clergy. The two former practices parliament very early extinguished, as far as they were evasions of the laws against mortmain; though they are still in use as artificial modifications of property. Against equitable uses, too, it interfered; first in the reign of Richard III. and afterwards in that of Henry VIII. but unsuccessfully, since chancery has still preserved them under the name of *Trusts*.

'By the reduction, indeed, of these to a system, they have assumed a settled character. They, however, still form a body of laws, distinct from, but operating concurrently, and occasionally in confliction, with the rules of common law; not only over the same property, but even over the different modifications of it in the same instrument. This branch of our law presents, perhaps, a solitary instance in modern jurisprudence, where the niceties of the feudal and the civil law occur in the same system.

'The intricacies and burdens of tenure, indeed, were greatly diminished at the Restoration. Much of the original system,

however, still remains; together with many theories, built upon it, and fictions, invented occasionally to elude it. The whole tinctures deeply our laws of landed property; though discordant from the sentiments and habits of modern society, and even from that leading maxim of modern law, which wisely regards land as a commercial property, and discountenances all undue restriction on its alienation. When, to the above catalogue, we add the various local customs, (having also their origin, for the most part, in the caprices of tenure), the inaptitude of such a body of law to the purposes of commerce, and to the rights of creditors; the subtile refinements of uses and trusts; the distinct and intricate laws of tithes, (a subject so sensitive, as at present scarcely to endure allusion), and numerous other servitudes on land, of a less ostensible description, we cannot but be sensible of a dense medium interposed between us and the only legitimate qualities of property; namely, its capacities of enjoyment, succession, and alienation; its liability to the debts of the owner, and to his duties to the state.' pp. 4—7.

The subject of tenures is treated by Mr. Humphreys with his usual ability.

'It was a maxim of tenure, that the tenancy should be always full, that is, there should be always a tenant, or a succession of tenants, to do the lord's service. Hence land could not be granted, to vest at a future day, or on a future event. It was frequently granted to one for life, with remainder to another in fee. In that case, the immediate tenant, being seized of the property, was intrusted with the protection of the possession. If he failed in this duty, it was a forfeiture of his estate. It was another rule, that land could only pass by delivery of the possession, or *seizin* as it is technically called. This was accompanied by a feoffment, of which the livery of seizin was the essential part, the tenant for life accepting it on behalf both of himself and those in remainder; while the deed only authenticated the transaction. This livery passed a fee, either by right or by wrong; since whoever had the seizin was competent to deliver it over. The same effect was attributed to a fine; a species of assurance, whereby the person seized in possession acknowledged, in a feigned action at law, the right to be in another. The result of these positions was, that an immediate interest in land could only be transferred on the spot, or by a judicial acknowledgment—that all in remainder took through the medium of the delivery of seizin to the first tenant,—that this tenant, being intrusted with the seizin, was competent, by the same mode of feoffment or fine, to transfer it, not merely for his own rightful interest, but *absolutely* to another. Such an act, indeed, was a forfeiture of his own estate; and if

the grantee in remainder was in existence, and his interest was vested, and not depending on a future event, he might enter for the forfeiture. If, however, there was no such grantee, then, from the imaginary ouster or devestment of the seizin on which the limitations depended, and the want of an existing right of entry to restore it, the contingent remainders were destroyed. The grantor indeed, or his heir, might, in that case, re-enter, the seizin under the grant being at an end; but if the latter colluded with the tenant in possession, the whole grant might be defeated, and a complete estate acquired by wrong, with impunity. After uses were converted into legal interests by the statute of Henry VIII., the effect of this inconvenience was prevented, in settlements to uses, embracing provisions for unborn issue, by limiting to trustees an estate commensurate with that of the immediate tenant for life, for preserving these remainders, with a right of entry for that purpose. This cured the particular evil; but it introduced into settlements another system, that of trusts, in order to remedy the inadequacy of the laws of tenure to the necessary modifications of landed property.

'At common law, whatever was vested, in a legal sense, was alienable; and dispositions were effected, where the estate was immediate, by feoffment or fine, with livery of the possession; but, where it was expectant, by grant; as none but the tenant in possession could give seizin. Contingent remainders, however, or eventual interests, were inalienable to third persons; but they might be released, or extinguished in the fee.

'These different properties of destructibility and inalienableness in contingent remainders have occasioned distinctions between them and vested estates; and again, between them and the modifications of interests called springing uses, and executory devises, which will be hereafter noticed. The variety and nicety of these may be best depicted, by referring to two treatises of about half a century old on these subjects, which, for exact arrangement and acuteness of reasoning, stand almost unrivalled in English jurisprudence.* It is to be regretted, that the times were not then ripe for directing the talent that produced them, towards simplifying, instead of systematizing, the refinements of landed property.' pp. 9—12.

'Though the doctrine of a feudal tenure by free and common socage, may be applicable in theory to a great part of the real property in this country chartered and possessed before our revolution, and though every proprietor be considered as holding an estate in fee-simple, none of the inconveniences

* Fearne on Contingent Remainders, and Executory Devises.

of tenure are felt or known.'* Lands for all purposes of enjoyment and alienation, are really allodial. In the charter of the Colony of Massachusetts Bay the grant of the territory declares it 'To be holden of us, our heirs, and successors, as of our Manor of East Greenwich, in free and common socage, and not in capite, nor by knight's service: and also yielding and paying therefor to us, our heirs, and successors, the fifth part only of all ore of gold and silver, which from time to time, and at all times hereafter, shall be there gotten, had, or obtained, for all services, exactions, and demands whatsoever.'† In the Province charter the same form is followed, with one or two unimportant additions.‡ But though the feudal rights of the sovereign in the soil were thus formally recognised, yet even under the colonial and provincial governments the interests of owners in their estates were really as beneficial as if they had been allodial. The charters of Rhode Island and Connecticut on this subject are substantially the same as that of Massachusetts.§ In 1692 an act of the latter state provided, that lands granted or to be granted by the assembly, or by towns, should be held 'by the most free tenure of East Greenwich in the county of Kent, in the realm of England, according to our charter grant.'‖ A statute passed in 1793, after referring to the charter, and reciting that by 'the establishment of the independence of the United States the citizens of this state became vested with an allodial title to their lands,' enacts, 'that every proprietor in fee-simple of lands, has an absolute and direct dominion and property in the same.'¶

In New York a statute was passed soon after the revolution, which abolishes all feudal services, and declares that all lands held of the king or any other person before the 4th day of July 1776, shall be construed and adjudged to be turned into free and common socage, and all grants by the state theretofore made, or thereafter to be made, shall be and remain allodial and not feudal.**

On the subject of copyhold tenures, which are now in full force in England, and forming a peculiar and distinct system, it is not necessary to comment. Mr. Humphreys observes of it, that 'it is in itself incapable of amelioration; and would it admit of any, still it forms a superfluous system of property.'

* 3 Kent's Com. 412. † Anc. Charters, &c. 4. ‡ Anc. Charters, &c. 26.
§ Laws Conn. Ed. 1808, p. 8. ‖ Laws Conn. p. 432. ¶ Laws Conn. 433–4.
** St. Feb. 20, 1787. 1 N. Y. Laws, ed. 1813, p. 70.

We can only congratulate ourselves that this country is free from the grievance of copyholds, which must act as a heavy clog on the enterprise and industry of England.

After speaking of tenures, Mr. Humphreys considers uses and trusts; and animadverts with great severity on the English law of trusts. He divides them into active, passive, and constructive.

'The first and only substantial character of them prevails, where actual duties are imposed upon the trustee; as, to sell the estate and discharge incumbrances; to settle the residue of the estate after payment of debts; to receive the rents and apply them for any given purpose. These are ever efficient; and, with reference to our habits of society, essential.' pp. 16, 17.

'*Passive* trusts impose no duty whatever upon the trustee. He is merely the *legal* owner for another's benefit; as, where an estate is conveyed *unto and to the use* of A. *in trust* for B., or where a term of years is vested in A. for securing a yearly or principal sum of money to B. In either of these cases the sole effect is, to oblige B. to use A.'s name in enforcing his right at law. Other trusts of this class present a still more inert and shadowy character; as, where introduced into a purchase deed for preventing dower; into a settlement for preserving contingent remainders; into assignments of terms for protecting the inheritance. They are the several results of impolitic institutions, technical fiction, and defect of judicial principle.' pp. 17, 18.

'*Constructive* trusts form the third class. They consist of interests concerning which no trust is declared; and where the legal property is often held in direct hostility to the equitable pretensions. Such as purchasers taking, with notice of a bargain and sale not enrolled; a deed not registered; a judgment not docketed. I shall discuss hereafter the policy of these and similar rights. Other descriptions of such latter trusts, and those of a less questionable character, are, where a person purchases with the money of another; or, possessing a partial interest only in a leasehold estate, for life or for years, avails himself of the preference given to the tenant in possession to effect a renewal. On closely examining, however, the character of all these equitable claims, we shall find, that they have but little of the real nature of trusts. No confidence is ever actually reposed concerning the implied trustee's estate; as is done in the instance of *resulting* trusts. He is the legal owner: but affected, from circumstances, with a right in some third person, which a court of equity will enforce. It is a jurisdiction assumed by it from a defect of justice in courts of law, which only adjudicate upon legal interests. For this purpose equity has applied its jurisdiction over trusts;

and by a fiction has designated legal owners, affected by such equitable claims, *constructive trustees.* It distinguishes, however, between these rights and actual trusts, by holding that the former are barrable by the adverse possession of the legal owner; but that there is no prescription between trustee and cestui que trust.* Were one uniform course of justice, however, applied, the interests in question would not be distinguishable from any adverse legal rights.

'Trusts, being a personal confidence, ought to cease with the person of the trustee. Our law, however, continues the estate, though not always the confidence, vested in a deceased trustee, to his heir; or, if it be for a term of years, to his executor or administrator. Still a new trustee is to be appointed, whenever the deed creating the trust, or the refusal or incapacity of the representative, requires it. This is effected, either by the parties beneficially interested, if they have a power for that purpose, or else through the circuitous and expensive medium of the court of chancery. To such new trustee the technical property, called the *legal estate*, in whomever resident, is to be conveyed. The heir, however, may be a married woman, an infant, or a lunatic. In the first instance, the fictitious and expensive process of a fine is necessary. In the two latter cases, a conveyance was formerly impracticable; and consequently, the title of the beneficial owner was rendered defective from the incapacity of a stranger. To remedy this singular mischief, various acts were successively passed, which have recently been consolidated into one, namely, 6 Geo. IV. c. 74, whereby infant trustees and mortgagees, and persons acting on behalf of insane trustees and mortgagees, or of trustees out of the jurisdiction, or whose existence is uncertain, are authorized to convey, under the direction of the court of chancery, or, in specified cases, of other equitable jurisdictions. While the present system prevails, the provisions of this act are indispensable; but the delay and expense of its proceedings must be too obvious; as must also be their needlessness, when it is reflected, that the estate ought to cease with the trustee, and pass over with the trust, as a shadow with its substance.

'Nor is this all—Land, vested in a trustee, being deemed his own *at law*, is subject to escheat for want of heirs, or on attainder, on his part. Another consequence of this position is, that the land will pass at law by his will, containing a general devise of all his estate. But this may be so qualified, as to the object of the disposition, as to pass such lands only as he is beneficially entitled to. As, when the gift is to one for life, with remainder to another; or charged with debts or legacies; since these inter-

* 17 Ves. 87.

ests cannot be raised in the estate of another. Other instances occasionally occur, as may be supposed, of a more doubtful character; as, where the devisee is also executor, with a general direction for payment of debts; and then, it is said, there is no inconsistency between the devise and the trusts, as the debts were meant to be paid by the devisee out of the personal estate, of which he is the executor. This for a single specimen; but, on contracts for sale, many a title has been ruinously hung up in chancery, on a question in reality foreign to itself, and regarding only the will of a stranger.

'Similar difficulties, it may be noticed, occur as frequently on the death of a mortgagee in fee; the legal estate in whose security descends to his heir or devisee; but clothed with an implied trust, first for his executor or administrator, and then for the mortgagor; while the money, the substantial part, devolves to the executor. The act already quoted provides for the inconvenience in this case also; but upon the same vicious principle, of regarding the legal estate as something distinct from the lien.

'Should the trust be of a term, then it must be assigned by the personal representative of the deceased trustee. It sometimes happens, that he dies insolvent, and no one proves his will or administers to him. It more frequently occurs, (and, should the term be of any antiquity, must invariably be the case), that the personal representatives of the trustee are all dead, and his assets distributed; and then there is no occasion to administer further to his effects. In each of these cases, the useless charge of suing out a *limited administration*, (as it is called), that is, so far only as respects the term, thus technically continued from the deceased, is cast upon the beneficial owner, in order to acquire a legal interest in his own property.' pp. 18—22.

The evils enumerated in this passage have not been much felt in the United States, partly because some of them, such as the incapacity of married women to convey, the difficulty occasioned by the legal title of land descending to the heir of the mortgagee, and escheat on the attainder of a trustee, have been remedied in some of the states; but chiefly, as we believe, because marriage and other family settlements are not so common here as in England.

The modifications of interest in real property next engage our author's attention.

In England, to create an estate in fee-simple, 'words of inheritance are necessary: that is, the gift must be to the grantee *and his heirs*, unless in cases of wills, where tantamount expressions are admitted, as will be shown hereafter. This requisite is not essentially inherent to the nature of real property, but it arose

out of the progress of the feudal system, the first grants under which were for the life only of the feudatory, in return for his military services. Thence grants were gradually extended to his heirs; but for this purpose it was necessary to name them. The rule has long survived its object; and, as it is not grounded on the ordinary reasoning of mankind, with whom, to dispose of a house or a field imports, as in the instance of a jewel or a horse, the disposition of all the donor's interest in it, his neglect of this technicality frequently defeats his intention.' pp. 29, 30.

It would not be easy to estimate the amount of litigation which has been produced both in England and in this country by an adherence to this absurd rule, which might have been altered by a single line of legislation.

In some of the states the rule has been abandoned. In North Carolina and Tennessee, where lands are devised, the estate shall be construed to be in fee-simple, unless by plain or express words, or by plain intent, it appears that the testator intended to convey an estate of less dignity.* A similar law is in force in New Jersey. The statutes of Virginia and Kentucky provide, that 'every estate in lands that shall hereafter be granted, conveyed, or devised to one, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee-simple if a less estate be not limited by express words, or do not appear to have been granted, conveyed, or devised by construction or operation of law.'†

These provisions in the codes of Virginia and Kentucky, coincide exactly with the proposal of Mr. Humphreys in his act, the forty-eighth article of which is, 'In alienations in perpetuity it is not necessary to name the heirs or assigns of the alienee. Their interest emanates from his.' (p. 275.)

After fee-simple Mr. Humphreys considers estates tail. The modes in which the latter may be converted into fee-simple estate, are thus stated.

'Where the tenant in tail has also the immediate fee in expectancy, he may acquire the absolute ownership by the fictitious process of *a fine*, whether his estate tail be immediate, or expect-

* 4 Griff. Law Reg. 751–2, note, cites 1 Scott, 297. In giving the statute law of the states in this article, we have, in many cases where we could not procure the statute books, taken our information from Griffith's Law Register. Some account of the state laws with regard to real property, may also be found in Dane's Digest, ch. 223.

† 1 Virg. Rev. Code, 159; Toulmin's Laws of Ky. 230.

ant on a preceding life, or other partial estate. Where, however, on failure of the lineal heirs in the entail, the property stands limited over to another, there the tenant in tail, to acquire the absolute fee, must resort to another and more intricate judicial fiction, called *a common recovery;* but this is practicable only where either he is himself entitled to the possession, or can obtain the concurrence of the immediate possessor, having an estate of freehold at least; that is, for life, either for his own benefit or as a trustee for another; as in the ordinary instance of a son tenant in tail, expectant upon the death of his father, who has the preceding life estate, either in himself or his trustee. These processes of fines and recoveries are feigned actions for the recovery of the land; and, in legal supposition, they can only take place during a law term. By another fiction, however, (which it would be needless to state here), fines may be passed in vacation, by relation to a preceding term; but recoveries must still be perfected *in* term. This, and the necessity for an estate in possession, in order to suffer a recovery, constitute the essential difference between the operation of these two dramatic assurances.' pp. 32, 33.

The following passage from Mr. Brougham's speech on the present state of the law, is also very full with regard to the inconveniences of the present English system.

'Without throwing away a thought upon the pain which I should necessarily inflict upon some of my learned friends, much wedded to such lore—without caring a rush for the quantity of curious learning which would thus be thrown to waste—or dropping a tear over the musty records which must be swept away—I would abolish at once the whole doctrine and procedure of Fines and Recoveries. I hope I may not offend the ears of my respected brethren the conveyancers; but I must say, that if ever there was an absurdity not to be tolerated, it is those fictitious suits, at any time, but, above all, in the present state of society.

'I wish to make myself understood, for I see by the countenances of some gentlemen, that they do not quite comprehend the whole absurdity of the law respecting Fines and Recoveries. I do not by any means wish to interfere with the power of making or of barring entails: I consider the English law as hitting very happily the just medium between too great strictness and too great latitude, in the disposition of landed property; sufficient restraints upon perpetuities, upon endless settlements, are provided, to allow a free commerce in land, as far as that is consistent with the interests of agriculture, and the exigencies of our mixed constitution; while as much power is given of annexing estates to families, as may prevent a minute division of property, and pre-

serve the aristocratic branch of the government. With the substance of our law of entail, then, I have no wish to meddle; all I desire is, to abolish the ridiculous machinery by which fines are levied and recoveries suffered. Every gentleman knows, that if he has an estate in fee he can sell it, or bestow it in any way he may please; but if he has an estate tail, to which he succeeds in the long vacation, he can go, on the first day of Michaelmas Term, and levy a fine, which destroys the expectant rights of the issue in tail, or he may, by means of a recovery, get rid of those rights and of all remainders over. He can thus, by going through certain mere forms, make himself absolute master of his estate, and do with it as he pleases. But this must be done through the Court of Common Pleas, at certain seasons of the year; and why should there exist a necessity for going there? Why not, if it be necessary, pay the fines which are due, without going there at all? I, the other day, asked this question of some learned friends, Why force tenants in tail into court, for mere form sake? They laughed at my simplicity, and said, "All this was asked a hundred years ago; there is no necessity for the proceeding, only to keep up the payment of the King's silver, alienation fines, and other duties." In case of bankruptcy, the necessity for those forms is not felt. A trader who is tenant in tail commits an act of bankruptcy, and by the assignment under the commission not only the interest vested in him is conveyed, but all remainders expectant upon it are destroyed, for the benefit of his creditors, and the estate passes to his assignees free from all restriction. The courts have held the conveyance in bankruptcy to be a statutory barring of the entail—an enlarger of the estate tail to a fee, as indeed the Bankrupt Laws evidently intended. Now, I would do that for honest landowners which the law at present permits to be done for insolvent tradesmen and their creditors. So, too, a man and his wife cannot convey an estate of the wife without a fine or a recovery, neither can the wife be barred of her dower without a similar proceeding. The reason is the influence her husband may possess over her mind; and, consequently, a judge takes the woman, in these cases, into a private room, to examine her, first, as to whether she acts from fear, and then, when that is out of the case, whether she is influenced by favor and affection: and he also examines her, as to any temporary increase of affection from any passing cause; and then, when she has purged herself of all temporary increase of affection, of all fear, and all love, she is allowed to give her consent. I would propose, in place of all this inquiry, not always very delicate, nor ever very satisfactory, to let husband and wife join in a common conveyance, with the consent of a guardian to be appointed, or of the next male relative of the wife, who is not related to the husband, and not interested in either the succession or the conveyance.' pp. 62—64.

A great improvement in the law of real property in the United States, is in using simple and direct modes of conveyance, instead of fines and recoveries. All this complicated and expensive machinery is thrown aside; and the law allows parties to carry their intentions into effect by direct means. In Massachusetts the tenant in tail may, by a deed signed in the presence of two witnesses, and acknowledged before a magistrate, and recorded in the usual manner, bar the 'issue in tail and all others claiming under and by virtue of the original gift or grant which creates the estate tail, and all reversions and remainders expectant upon the determination of such estates tail.'* The law is the same in Maine.† The law in the remaining states is generally on a similar footing. This will fully appear from the following statement of Mr. Duponceau in a note to his Dissertation on the Jurisdiction of the Courts of the United States.‡

'*Of estates tail in the several states of the Union.* In four states never known to have been in existence, viz. Vermont, Illinois, Indiana, and Louisiana. In one, viz. South Carolina, the statute *de donis* never was in force, but fees conditional at common law prevail. In *twelve* they have been abolished or converted by statutes into fee-simple absolute, viz. New York, Ohio, Virginia, North Carolina, Georgia, Missouri, Tennessee, Kentucky, Connecticut, Alabama, Mississippi, and New Jersey; but in the last *four* a species of estate tail still exists, being for the life of one donee, or a succession of donees then living. In *six* they may be barred by deed acknowledged before a court or some magistrate, viz. Rhode Island, Maine, Pennsylvania, Massachusetts, Maryland, and Delaware; but in the last four may also be barred by fine and common recovery. And in one only do they exist as in England with all their peculiar incidents, viz. New Hampshire.'

With regard to conveyances of estates held by married women in their own right, or in which they would be dowable, we have effected all that is desired by Mr. Brougham. In North Carolina and Tennessee, the wife is only dowable in lands of which the husband dies seized; and in the other states she may be barred of her dower by joining in the conveyance with her husband; and in all, she may convey her

* Mass. st. 1791, c. 60. † Laws of Maine, c. 36, s. 4.

‡ P. 115, he states that the summary was extracted from Griffith's Law Register, by a young gentleman of the law academy.

own estate by joining with him in a deed. For either purpose in most of the states an acknowledgment on a private examination of the wife before a judge, in order to ascertain whether she executed the deed freely and without fear or compulsion of her husband, is required, in order to make it effectual against her. This private examination is necessary in Vermont, New York,* New Jersey, Pennsylvania, Delaware, Maryland, Ohio, Illinois, Indiana, Virginia, Kentucky, North Carolina, Tennessee, Alabama, Missouri, Mississippi, and South Carolina. In Georgia a private examination of the feme is necessary in order to bar her dower; her real estate vests absolutely in the husband on marriage. In Rhode Island a private examination is necessary in order to pass any estate held by the wife in her own right; but is not necessary to bar dower. In the remaining states, Massachusetts, Maine, New Hampshire, and Connecticut, no private examination of the wife is required in order to pass any estate of which she may be owner, or to bar her dower. Indeed, we are inclined to think this private examination, notwithstanding its prevalence, is a very needless ceremony. For if the wife is induced by fear to sign a deed with her husband, it cannot be supposed that his influence over her will cease during the half minute's private conference which she has with a magistrate.

The evils of the present system of mortgages in England, arising from various causes, such as the tediousness and expense of foreclosure in equity, the descent on the mortgagee's death, in the case of a mortgage in fee, of the demand and the security for it, to different classes of representatives, are pointed out by Mr. Humphreys with masterly force and precision. We must, however, be content with his remarks on the subject of tacking.

'The first principles of property would assign effect to every security, according to its priority of date: from that moment the land, to the extent of the charge, is no longer in the mortgagor's power, but belongs to the incumbrancer; and such is actually the case, where the charges are all of one character, either legal or equitable. The artificial distinction, however, between these two species of interests, has introduced a correspondent one into mortgages, under the term of TACKING, which is often subversive of the above just rule. That a first mortgagee, holding the title-deeds, not having notice of a second mortgage, may make a fur-

* 1 Laws N. Y. 369.

ther advance on the credit of his original security, is incontestable. It was incumbent on the second mortgagee, when the deeds were not forthcoming, to seek out their possessor, and give him notice. That rule, however, is of a far different character, by which, an estate being mortgaged to two in succession, the second mortgagee, if he had no notice of the prior charge when he advanced his money, may, by getting an assignment or declaration of trust of any outstanding judgment, term of years, or other legal interest anterior to the first mortgage, tack his subsequent incumbrance to this anterior interest, and thus take precedence of the first mortgagee. Nor does it vary the case, if the subsequent incumbrancer, after having advanced his money, has notice of the first mortgage, when he gets in the prior legal estate; or even if it be done, *pendente lite*, in an equity suit, so it be before the decree. This privilege of tacking is, however, confined to a mortgagee, and not allowed to a judgment creditor; on the ground that the latter, though he acquires a lien on the land by his judgment, does not advance his money on the immediate credit of the debtor's real estate; since he has other remedies; viz. the goods and the body. The reverse case, however, of a first mortgagee lending a further sum on judgment, and thereby excluding an intermediate mortgage, of which he has not notice, is admitted, on the rather refined presumption, that he made the further advance as knowing he had a hold of the land by the mortgage; and the judgment, though it passed no present interest in the land, yet formed a lien upon it.

'In one instance, first and third securities have been allowed to be tacked, to the exclusion of an intermediate one, in violation of a principle established by courts of equity themselves; namely, that the incumbrancer, getting in a prior charge, must, in order to exclude the second mortgagee, have made his further advance on the security of *the property charged.* The instance alluded to is, where two estates being subject to a prior incumbrance, the owner mortgaged both of them to A., and then mortgaged only one of them to B. The last incumbrancer, on getting in the preceding charge, was allowed to hold both estates against the former mortgagee, although he advanced his money on the credit of one estate only, without having contemplated the other estate, not even to the extent of acquiring a general lien by a judgment!*' pp. 49—51.

This absurd doctrine of tacking is entirely exploded throughout the United States. Our statutes for registering deeds have superseded the English rules on this subject.† In the

* Eq. Ca. Abr. 323.

† In New York it has been expressly decided by the Court of Errors that the doctrine of tacking does not apply between registered mortgages. Grant

New England states, and in some of the others, every incumbrance by deed takes priority according to the order in which it is recorded. In other states all mortgages duly recorded within a certain period from the date, take effect from the date or rather the delivery. But under neither system would the doctrine of tacking be admitted. The equitable rule which the English courts profess to follow, we in fact observe, 'Qui prior est tempore, potior est jure.'

The inconvenience, that the mortgaged land descends to the mortgagee, while the interest in the demand which is secured by the mortgage devolves on the executor, has been obviated in Massachusetts and Maine. Lands mortgaged, as well as the debt which the mortgage is given to secure, if the mortgagee dies without taking possession, are assets in the hands of his executor or administrator, and he has the same interest in the land as if it had been personal estate pledged for the security of the debt; and he may bring actions to recover seizin and possession of such land. After he has obtained possession, it is distributed like personal estate, or may be sold for the payment of the deceased's debts, subject in both cases to the right of redemption. While the executor or administrator remains in possession of the mortgaged property, if it is redeemed, he is empowered to make a release or other conveyance of it.* Rhode Island, too, has adopted the same provisions for making mortgages assets in the hands of the mortgagee's executor.†

The principle of survivorship in joint tenancy is thus spoken of by Mr. Humphreys.

'Each joint tenant may aliene his share by *deed*, but not by *will*. In default of such disposition, it accrues, not to his own heir, but to the surviving joint tenants; and so on to the last survivor. This species of property originated in the principles of tenure, which discouraged the splitting of fiefs, as producing an inability to perform the lord's services. In other than feudal systems of jurisprudence it is, I believe, unknown; and, from the decay of tenures, and its repugnancy to natural justice, as placing property on a chance, and depriving the creditors and the families of the owners first dying of their just claims, it is

v. Bisset, 1 Cain. Cases, 112. This is in conformity with the decision of Chancellor Redesdale in Ireland, Latouche v. Dunsany, 1 Sch. & Lef. 137. See also the Statute of New York. 1 Laws of N. Y. 373; and Loring v. Cooke, 3 Pick. R. 50.

* Stat. Mass. 1788, c. 51. Laws of Maine, c. 39, s. 9 and 10.

† Laws of R. I. ed. 1798, p. 302.

now less favored than formerly. Indeed, in cases of joint purchasers and mortgagees, each advancing his distinct share of the money, equity interferes, with some exceptions, to prevent its legal effect.' pp. 54, 55.

The fault, however, in the common law is not, we think, so much the permission of joint tenancies, as creating them when the parties probably do not intend them. Blackstone says, 'If an estate be given to a plurality of persons without adding any restrictive, exclusive, or explanatory words, as if an estate be granted to A. and B. and their heirs, this makes them immediately joint tenants in fee of the lands.' This rule is just the reverse of what it ought to be. In ninety-nine cases out of a hundred, of persons purchasing land together, they would prefer not to be joint tenants, but tenants in common. The law ought therefore to follow what is the common wish of parties, in every case where this intention is not expressly declared, and in every case of a conveyance of land to several persons should make them tenants in common, unless the conveyance expressly stated a different intention. This making the rule of construction different from the common understanding of the words, is of course the source of litigation, which is increased by the inclination which the courts, though bound down by this narrow rule, naturally feel to construe all doubtful expressions in favor of tenancies in common.

Our states, with scarcely an exception, have reversed the English rule. In Massachusetts it is enacted, 'That all gifts,' 'devises, and other conveyances of any lands, tenements, and hereditaments,' 'to two or more persons' 'shall be' 'adjudged to be estates in common and not in joint tenancy, unless it' is 'therein said that the grantees, feoffees, or devisees, shall have or hold the same lands,' &c. 'jointly, as joint tenants, or in joint tenancy, or to them, and the survivor, or survivors of them, or unless other words be therein used, clearly and manifestly showing it to be the intention of the parties' 'that such lands,' &c. 'should vest and be held as joint estates, and not as estates in common.'* In the other states there are similar laws to abolish the *jus accrescendi*, unless the instrument conveying the estate expressly provides for it. The law in Maine, New Hampshire, and Rhode Island, is the same as in Massachusetts, having been copied from the statute just recit-

* St. Mass. 1785, c. 62, s. 4.

ed.* The statutes of Vermont, New York,† Delaware, and New Jersey, have the same effect. A statute of Virginia, passed in 1786, provides that the parts of joint tenants 'who die first shall not accrue to the survivors, but shall descend or pass by devise, and shall be subject to debts,' &c. and 'be considered to every other intent and purpose in the same manner as if such deceased joint tenants had been tenants in common.'‡ The same law is adopted in Kentucky.‖ It seems to us a defect in the acts of these two states, that no provision is made for giving the right of survivorship, in cases in which the parties desire it. It is not easy to say from the words of the acts whether a right of survivorship could be created even by express words. And yet such a right is very important in the case of joint trustees. The right of survivorship in joint tenancies is also abolished in Connecticut, Pennsylvania, Illinois, Indiana, North Carolina, Alabama, Missouri, Tennessee, and South Carolina In Ohio, where there is no statute on the subject, it has been decided that the *jus accrescendi* does not exist to the exclusion of the right of *dower* in the widow of the joint tenant first dying.§ It seems, from Griffith's Law Register, that joint tenancies remain as at common law in Georgia, Mississippi, and Maryland. In New York and Delaware, estates conveyed to executors and trustees are excepted from the new rule of construction introduced by statute.¶ The propriety of this exception is obvious. The actual law of New York and Delaware coincides exactly, both with regard to the general principle and the exceptions, with a provision proposed by Mr. Humphreys.

'Where land is aliened to two or more jointly, whether with or without distinction of shares or interests, or in whatever terms, the share of each of them, upon his death, shall pass to his real representatives, and not to any surviving proprietor, unless an express right of survivorship be given, or in the case of active trustees.' p. 325.

After considering the different estates in land, Mr. Humphreys treats of the different modes of acquiring them.

'Real property is acquired—1. By descent. 2. To a partial extent, by the rights of marriage. 3. By disposition by deed or

* Laws of Maine, c. 35, s. 1. Digest of Laws R. I. 1798, p. 272, s. 8. N. H. Laws, p. 194, st. June 21, 1809.

† 1 Laws N. Y. 54. ‡ 1 Rev. Code of Virg. 31.

‖Toulmin's Laws of Ky. 233. §4 Griff. Law Reg. 1395. ¶1 Laws N. Y. 54.

will. 4. Under the rights of creditors. 5. By escheat or lapse to the lord of the fee, upon either a total failure of inheritable blood, or corruption of it by attainder for felony. 6. By forfeiture to the crown by attainder for treason. And 7. By adverse possession, usually called limitation of time.' p. 57.

The greatest change that has been introduced in the law of real property in this country is with regard to descents. Almost all the peculiar rules of the common law have been abandoned, and others, approaching those of the civil law, adopted in their place. So that now in the greater part of the states the real and personal property of an intestate, except as it regards the rights of the husband and wife, will go to the same persons; the rules for both sorts of property having been formed chiefly upon the English statutes of distributions. In order, however, to exhibit more fully the nature of the alterations in the law of descents which have been made in this country, we shall compare our laws with Blackstone's Canons of Descent.

His first canon is, 'that inheritances shall lineally descend to the issue of the person who last died actually seized *in infinitum;* but shall never lineally ascend.'*

As the first part of this rule holds good in this country, we shall speak only of the latter clause, which contains one of the most unreasonable provisions of the English law. A father or mother shall never become heir to a son, but the estate shall in preference descend to the most remote collateral relation, and even escheat to the lord. This rule, however, Blackstone undertakes to defend, and endeavors to prove that it is founded 'on good legal reason.' But his arguments, at most, merely show the reasons for introducing it into the feudal law, and do not afford any justification of its continuance at the present day. In the United States the rule has been every where abandoned; and the right of the father and mother to become heirs to their children, is fully established. We have not room to enumerate the laws of all the states on this subject, as they are very various. Lineal descendants are every where preferred to parents. In some states brothers and sisters are preferred to both parents, in some the father excludes brothers and sisters, in some the mother inherits equally with them; and in some of the states the father or mother can never have any thing more than a life estate in the

* 2 Bl. 208.

real estate of a child. New York, we believe, is singular, in totally excluding the intestate's mother from the inheritance of real estate.

Blackstone's second canon is, 'that the male issue shall be admitted before the female;' and his third, 'that where there are two or more males in equal degree, the eldest only shall inherit; but the females all together.'*

On both these points the English law has been reversed in the United States, and it may be laid down as a general rule here that in the descent of estates to lineal descendants, no distinction of age or sex is made. In regulating descent to collateral relations, too, we are not aware that any distinction on account of age or sex is made, except in the state of New York, in which the common law still continues in force with regard to all collateral relations, except brothers and sisters, and their descendants.†

Though primogeniture and the preference of males, are now thus universally given up in this country, yet in some states they remained in full force, and in others modifications of them continued for a long period. The common law with regard to descents prevailed in New Jersey until 1780, in Maryland and South Carolina until 1786, and in Virginia until 1787. In Massachusetts, Rhode Island, and Connecticut, the eldest son, probably in imitation of the Jewish law,‡ had formerly a double portion of the real and personal estate, and in Delaware of the real estate, of his father. And male children in Vermont inherited, until very recently, twice as much of their father's real estate as females.

We shall not here inquire whether the system of primogeniture is not proper under a limited monarchy with an hereditary aristocracy. But it is more equitable, and more suited to our government, that all children should have equal shares in their parents' property. It checks the excessive accumulation of property in the hands of individuals, and prevents the increase of those classes who are supported without their own personal exertions. But we shall spare our readers any remarks in favor of a system, which is so firmly fixed in the opinions of our citizens, as to need none.

The fourth canon is, 'that the lineal descendants, in infinitum of any person deceased, shall represent their ancestor;

* 2 Bl. 213, 4. † 1 Laws N. Y. 54.
‡ Deut. xxi. 17; Hale's Hist. Com. Law, 243.

that is, shall stand in the same place as the person himself would have done had he been living.'*

No general rule applicable to all the states can be laid down with regard to representation in descents. In some of them, as New York, North Carolina, Tennessee, Pennsylvania, Virginia, and Kentucky, it appears to be allowed in favor of the most remote collateral relations. In most of the other states, though representation is without limit in the direct descending line, in the collateral it does not extend beyond brothers and sisters' children, as in Massachusetts, Maine, Rhode Island, New Hampshire, Georgia, and Maryland; or descendants of brothers and sisters, as in Alabama and Mississippi; or brothers and sisters' grandchildren, as in Delaware. When the heirs of an intestate stand in different degrees of relationship, they inherit per stirpes, with scarcely an exception in any of the states But when they are all in the same degree, different rules have been adopted. In Massachusetts and Maine, in such case, they inherit per capita, by the express words of the statutes. Statutes in New York and Pennsylvania also provide, that when lineal descendants of an intestate all stand in the same degree of consanguinity to him, they shall take per capita. In Connecticut it has been held, that when all the heirs are in the same degree, they still take per stirpes.

Blackstone's fifth rule is, 'that on failure of lineal descendants or issue of the person last seized, the inheritance shall descend to his collateral relations, being of the blood of the first purchaser; subject to the three preceding rules.'†

The rules with regard to the blood of the first purchaser, which have been adopted in the United States, are very various. In some of the states, the real property of which any person dies seized descends in precisely the same manner, whether it came to him from his paternal or his maternal ancestors, or was acquired by purchase. Such is the provision of the laws of Illinois, Missouri, South Carolina, Georgia, Alabama, and Mississippi; and of those of Massachusetts and Maine, except with regard to minor children dying not having been married, whose real estate, if inherited from their father or mother, descends to the children of the parent from whom the estate came and their issue, in preference to other brothers

* 2 Bl. Com. 217.

† 2 Bl. Com. 220.

and sisters. In many of the states the descent of real estate is regulated in some measure by a regard to the mode in which it became the property of the intestate, whether by actual purchase, or by descent, gift, or devise from a paternal or maternal ancestor. The preference, however, given in the latter case to certain relations of the blood of the line through which the estate came to the intestate, in most of the states, is not general; and does not operate as an entire exclusion of relations who are not of the blood of the ancestor through whom the estate came, who inherit in case of a failure of the persons preferred. It is, however, 'a governing principle of the intestate laws of Pennsylvania, that all who are not of the blood of the ancestor from whom the estate came, are excluded from the inheritance, however remote in degree the descent may be.'* The common law, also, directing descents in New York, except in the cases specified in the statute, relations not mentioned in the statute would be excluded, if not of the blood of the first purchaser. The statute of Rhode Island, also, appears to exclude from the inheritance of any estate of an intestate all persons who are not of the blood of the relation from whom it came to him by descent, gift, or devise.†

It is not easy to say what rule is best on this subject. It does not seem unreasonable that estates should continue to descend among the relations of the first purchaser. And, on the other hand, to regard always merely the person dying seized in determining the heir, is more simple and convenient. If the probable wishes of the person dying seized ought to be the rule of descent, there is no doubt that in a majority of cases his estate would go to his nearest relations, without regard to the mode in which it became his property.

Blackstone's sixth rule is, 'that the collateral heir of the person last seized must be his next collateral kinsman of the *whole blood*.'‡

We only intend to remark on a part of this rule, which is more fully expressed by Blackstone afterwards. 'The heir need not be the nearest kinsman absolutely, but only *sub modo;* that is, he must be the nearest kinsman of the *whole* blood; for

* Bevan v. Taylor, Sup. Ct. 1821, Wharton's Dig. 357.

† Laws of R. I. ed. 1798, p. 288.

‡ 2 Bl. Com. 224. It is not worth while to criticise this rule, though it is inaccurately expressed, unless considered in connexion with the other rules of descent. See Christian's and Chitty's notes on the passage.

if there be a much nearer kinsman of the *half* blood, a distant kinsman of the whole blood shall be admitted, and the other entirely excluded; nay, the estate shall escheat to the lord, sooner than the half blood shall inherit.'*

This rule is so absurd, that it must offend even the most zealous partisans of the common law. Blackstone, indeed, attempts to defend, or rather apologize for it, on feudal principles; but, after all, confesses 'that it is certainly a very fine-spun and subtle nicety,' and 'that the practice is carried farther than the principle on which it goes will warrant.'

This rule for excluding the half blood, which, Mr. Humphreys truly says, is 'repugnant to every principle of property, and to the moral feelings of kindred,' has been abandoned in every part of the United States. The provisions, however, which have been adopted are far from being uniform. In some of the states no distinction is made in any case between relations of the whole and the half blood; and one brother of the whole blood, and another of the half blood of an intestate, will inherit equal shares of his estate. In the states of Maine,† New Hampshire,‡ Massachusetts,‖ Vermont, Rhode Island, Indiana, Illinois, North Carolina, and Tennessee, no distinction is made between the whole and half blood, except in some of them as it respects estates which came to the intestate from some one of his ancestors, a preference being in such cases given to the blood of that ancestor. In all other states, relations of the half blood can inherit, but relations of the whole blood are preferred.

Blackstone's seventh rule is, that 'in collateral inheritances the male stocks shall be preferred to the female, (that is, kindred derived from the blood of the male ancestors, however remote, shall be admitted before those from the blood of the female, however near,) unless where the lands have in fact descended from a female.§ Thus,' he continues, 'the relations on the father's side are admitted in infinitum, before those on the mother's side are admitted at all; and the relations of the father's father, before those of the father's mother, and so on.'¶

A good law of descents ought as far as possible to be governed by what, in a majority of cases, would be the wishes of

* 2 Bl. Com. 227.
† Laws of Maine, ed. 1821, c. 38, s. 17.
‡ Laws of N. H. ed. 1815, p. 207.
‖ Mass. St. 1805, c. 90, s. 1.
§ 2 Bl. Com. 234.
¶ 2 Bl. Com. 234.

the intestate. Now the preference this rule gives to a remote collateral paternal relation to a near maternal one, as of a paternal third or fourth cousin to a maternal uncle, violates the natural feelings of kindred. The origin of this rule is alleged to be, because it was 'more likely that the land should have descended to the last tenant from his male than his female ancestors.'* But it operates unfairly on the maternal relations in the case of an estate which in fact came to the intestate through that line, and of which he is merely technically a purchaser. The taking the estate from the maternal, and giving it to the paternal line, in such a case, is to make the reason of the rule yield to a technical subtlety.

In the United States though the blood of the first purchaser is regarded in some of the states in regulating descents, and in some a preference is given to the line of that ancestor from whose estate came to the intestate, whether by descent, devise, or gift, yet in the case of estates really and not technically purchased by the intestate, there are few instances in which any preference is given to the paternal relations. In New York the common law governs all descents to collateral relations, except brothers and sisters and their issue,† of course the preference of the paternal line would take place. In Georgia a preference is given to brothers and sisters of the half blood in the paternal line. In Tennessee, as in New York, descents to remote relations appear to be governed by the common law. In Maryland a slight preference is given to the male line, the paternal grandfather and his descendants being preferred to the maternal grandfather and his descendants, and 'so on, without end, alternating the next male paternal ancestor and his descendants, and the next male maternal ancestor and his descendants, and giving preference to the paternal ancestor and his descendants.'‡

A provision in favor of the surviving husband or wife of a person dying without kindred, seems to be wanted in the English law. It appears unreasonable to give a person's property to the state, while a husband or wife, who would in most cases be one of the first objects of the deceased's bounty, survives. A few of the states have amended the law in this particular. Statutes of Maryland, Virginia, and Kentucky, provide, that in case there are no kindred of the intestate, his

* 2 Bl. Com. 235. † 1 Laws of N. Y. 54.
‡ 2 Laws of Mar. Maxcy's ed. 17. 4 Griff. Law R. 925.

estate 'shall go to the wife or husband of the intestate, and if the wife or husband be dead, then to her or his kindred, in the like course as if such wife or husband had survived the intestate, and then died entitled to the estate.'* A further provision is made in Maryland for the case of the intestate's having survived more than one husband or wife. Mr. Humphreys in his act has a proposal somewhat similar to laws above stated. 'For want of any kindred of the intestate within the degrees prescribed, the land descends to the surviving spouse, if any.'†

In order to show more fully the character of the laws of descent, we give the substance of the statutes of two or three of the states. The statute of Massachusetts provides, that an intestate's real estate,—

'1. Shall descend in equal shares to his children, and to the lawful issue of any deceased child, by right of representation. 2. And when the intestate shall leave no issue, the same shall descend to his father. 3. And when there shall be no issue nor father, the same shall descend in equal shares to the intestate's mother, and to his brothers and sisters, and the children of any deceased brother or sister, by right of representation. 4. And if the intestate leave no issue, father, brother, or sister, then the same shall descend to his mother. 5. But if there be no mother, then to his next of kin, in equal degree: the collateral kindred claiming through the nearest ancestor, to be preferred to the collateral kindred claiming through a common ancestor more remote; and the degrees of kindred, in all cases, to be computed according to the rules of the civil law. 6. And when there shall be no kindred, the same shall escheat to the Commonwealth, for want of heirs; saving always to the intestate's husband his tenancy by the curtesy, and to his widow, her dower at the common law. 7. *Provided however*, That when any child shall die under age, not having been married, his share of the inheritance, that came from his father or mother, shall descend in equal shares to his father's or mother's other children then living respectively, and to the issue of such other children as are then dead, if any, by right of representation. 8. *And provided further*, that when the issue or next of kin to the intestate, who may be entitled to his estate by virtue of this act, are all in the same degree of kindred to him, they shall share the same estate equally, otherwise they shall take according to the right of representation.'‡

---

* 1 Vir. Rev. Code, 169; Toulmin's Laws of Ky. 280; 2 Laws Mar. Maxcy's ed. p. 17.

† P. 248.

‡ Mass. St. 1805, c. 90, s. 1.

The law of Pennsylvania is as follows.

'1. If the intestate leaves *children* only, they take *equally* as tenants in common; if children and the issue of children, such *issue* represent their *parents*, and take equally among them what their parents would have taken if living. If the intestate leaves grandchildren *only*, they take *equally* as tenants in common; if grandchildren and the issue of grandchildren, such *issue* represent their parents as aforesaid, and so on as to *lineal* descendants in the remotest degree. 2. If the intestate leaves only *brothers or sisters* or both, they take *equally* as tenants in common; if any be dead, their issue represent them, and take what the parent if living would have taken. 3. If there be a father or mother *and* brothers or sisters, the father takes all during his life; if no father, the mother all during her life, and after his or her death, the brothers and sisters and the issue of deceased brothers and sisters, take as they would have done, if the father or mother had not survived the intestate. 4. If there be no brothers or sisters or their representatives, the father if he be living takes the whole in fee, or in case he be dead and the mother living, then she takes the whole in fee; *unless* the estate came to the intestate from the part of the mother, in which case the father shall not inherit; if from the part of the father, then the mother shall not inherit, but it shall be considered as if the intestate had survived such father or mother. 5. If there be no lineal descendants, nor father, mother, sisters, or brothers of the whole blood or their issue, then brothers and sisters of the *half blood* and their issue shall take in preference to more remote kindred of the whole blood; *unless* the estate came to the intestate by descent, devise or gift of some of his ancestors, in which case all who are not of the blood of such ancestor are excluded. 6. If there be no lineal descendants, nor father, nor mother, sisters, or brothers of the whole or half blood, or issue of such brothers or sisters; the inheritance descends to and is divided among the *next of kin of equal degree* of or unto the intestate; and if any of such kindred be dead, their issue represent them. 7. *Posthumous* children inherit in like manner, as if born in the lifetime of the father. 8. If there be a *widow*, she takes if there be lineal descendants one-third, if no lineal descendants one-half of the estate during her *life;* and this not as dower at common law, but under the statute of distribution, and in lieu and satisfaction of such dower. 9. In all cases of descent, not particularly provided for by the statutes, the *common law* is to govern; but this is not by statute provision, but by judicial decision.'*

The following is the law of North Carolina.

'1. Inheritances shall lineally descend to the *issue* of the per-

* 3 Griff. Law Reg. 256, 257.

son who died last actually or legally seized, forever, but shall not lineally ascend, except as is hereafter provided for. 2. Females shall inherit *equally* with males, and younger with older children. 3. The lineal descendants of any person deceased, shall *represent* their ancestor, and stand in the same place as the person himself would have done, had he been living. 4. On failure of lineal descendants, and where the inheritance has been transmitted by *descent* from an *ancestor*, or has been derived by *gift*, devise or settlement from an ancestor, to whom the person thus advanced would in the event of such ancestor's death have been the heir, or one of the heirs, the inheritance shall descend to the *next collateral* relations of the person last seized, who were of the *blood* of such *ancestor*, subject to the two preceding rules. 5. On failure of lineal descendants, and where the inheritance has *not* been transmitted by descent, or derived as aforesaid from an *ancestor*, or where, if so transmitted or derived, the blood of such ancestor is extinct, the inheritance shall descend to the *next collateral relations* of the person last seized, whether of the paternal or maternal line, subject to the second and third rules. 6. Collateral relations of the *half blood*, shall inherit equally with those of the whole blood, and the degrees of relationship shall be computed, according to the rules which prevail in descents at common law: *provided* always, that in all cases where the person last seized, shall have left no issue, nor brother nor sister, nor the issue of such, the inheritance shall vest for *life* only in the *parents* of the intestate, or in either of them, if one only be living, and on the death of one of the parents, then in the survivor, and afterwards be transmitted according to the preceding rules.'*

We believe that Mr. Humphreys does not speak of the disabilities of aliens with regard to real property. Yet these seem to us one of the harsh features of the English system. In England though an alien may purchase and convey land, yet he cannot hold against the king, to whom it is forfeited on an inquest of office; neither can he, nor any person claiming through him, inherit land. And though it is said that an alien who purchases land has a good title against all the world except the king, yet if he be dispossessed of it by a stranger, he cannot maintain any action to recover it. So that though his right is clear, his remedy is lost.

These provisions against aliens originated in ages of barbarism, out of the hatred and jealousy with which foreigners were regarded; and ought long since to have been removed. Yet they have always found advocates. Thus in Calvin's case† the judges are reported to have given the following

* 3 Griff. Law Reg. 211, 212. † 7 Co. 18.

reasons 'wherefore an alien born is not capable of inheritance within England;' '1. The secrets of the realm might thereby be discovered. 2. The revenues of the realm (the sinews of war and ornament of peace) should be taken and enjoyed by strangers born. 3. It should tend to the destruction of the realm.' 'It tends to destruction tempore belli, for then strangers might fortify themselves in the heart of the realm, and be ready to set fire on the commonwealth. Secondly, tempore pacis, for so might many aliens born get a great part of the inheritance and freehold of the realm.' This reasoning at the present day can only excite a smile. Blackstone's, however, is little better. 'If an alien,' he argues, 'could acquire a permanent property in lands, he must owe an allegiance equally permanent with that property to the king of England; which would probably be inconsistent with that which he owes to his own natural liege lord: besides that thereby the nation might in time be subject to foreign influence, and feel many other inconveniences.'* As to the argument with regard to allegiance, it requires no answer: and we think no man in his senses would have any fears of foreign influence from foreigners holding lands in such countries as England or the United States. The danger could only arise from their holding a very large part of the real estate in the country, which is obviously impossible.

The disabilities of aliens with regard to real estate continue in a large part of the United States, though their continuance is contrary to the general policy of the country, which has always been to encourage foreigners to settle amongst us. The ease with which aliens can be naturalized here, do in a great measure remove the practical evils which might otherwise arise from the present system. But during the five years residence which is requisite in order to acquire citizenship, an alien cannot safely purchase real estate. Now although we should admit the policy of the old law with regard to non-resident aliens, yet to those who are actually resident amongst us, the best policy seems to encourage their industry by giving them all reasonable facilities in the acquisition of property. Some of the states have entirely abandoned the common law on this subject. Pennsylvania and Ohio, in free population now the second and third states of the confederacy, having large tracts of unsettled land, have yet placed aliens nearly on

* 2 Bl. Com. 372.

the same footing with regard to the ownership of real estate as citizens. Aliens in Ohio can hold land by descent or purchase in the same manner and with the same privileges as citizens. The law is the same in Pennsylvania with regard to alien friends, except that an alien cannot purchase more than five thousand acres of land. In Louisiana, too, aliens can purchase, inherit, and hold real estate, without any restriction. In Indiana and Missouri aliens resident in the United States who have declared their intention of becoming citizens, have all the privileges of citizens with regard to real estate; and North Carolina gives the same privileges to aliens resident in the state who have taken the oath of allegiance to the state. In Kentucky any alien who has resided two years in the state has the same privileges.* Resident aliens who have declared their intention of becoming citizens of the United States can purchase land in Delaware, not exceeding one thousand acres. Some of the other states have likewise passed statutes removing the disabilities of aliens in some degree.

In regard to the modes of conveying estates, those in use in this country are much more simple, direct, and convenient than the English. The most common mode of conveyance in England is by lease and release.

'It is thus conceived—A lease at common law requires entry by the lessee to complete its validity. But a term of years may be also created without entry, by a bargain and sale, for a pecuniary consideration, which raises an use—this the statute legalizes, as already explained. The amount or truth of the consideration is not material. Five shillings is the ordinary sum. The statute of enrolments, it has been noticed, does not extend to terms for years. The alienor, therefore, for a nominal consideration of five shillings, bargains and sells the land for one year to the alienee; who being thus, by means of the statute of uses, fully invested with the possession, is capable, like any other possessor, of accepting a release, operating at common law, of the reversion and inheritance, which is accordingly granted to him by a deed executed immediately afterwards, but dated the next day, in order to have the semblance of a future act.

'The conveyance by lease and release possesses, over a feoffment, the advantage of not requiring the formality of livery of seizin on the spot. It is doubly preferable to a bargain and sale, as not needing enrolment, (a process, in its present incomplete state, utterly useless as a registry,) and as admitting of legal uses

* Toulmin's Laws of Ky. 239.

being raised upon the seizin, which the release tranfers at common law. But, whatever it may gain by comparison with other parts of a confused system, it certainly is not imbued, either in its conception or in its operation, with the spirit of simplicity.' pp. 65, 66.

Let this be compared with the common mode of conveyance in the United States, a deed in the nature of bargain and sale recorded. This deed, however, is not precisely the English deed of bargain and sale, but derives its operation from the state statutes. When the vendor is seized the legal possession passes to the vendee on the delivery of the deed, which is in a very simple and explicit form, without livery of seizin or any other act or ceremony. All deeds, however, are required to be executed, acknowledged or proved before a magistrate, in the manner prescribed by the local statutes, and afterwards recorded. The acknowledgment and recording in most of the states are not necessary to pass the estate as between the grantor and the grantee, but merely to give priority to the purchaser, against subsequent incumbrances of the grantor or his heirs. In the above comparison we have supposed the simple case of a sale of land, without the intervention of trustees for any purpose, and the grantor having in himself a clear fee-simple estate, and not requiring a fine or recovery for any purpose. The advantages in directness and practical convenience are clearly with the American conveyance. But the case supposed is one which, we believe, rarely occurs in England with regard to valuable estates, though by far more common in this country than any other.

But perhaps this subject is best illustrated by stating fully the law of a particular state. In Massachusetts every deed signed and sealed by the grantor, and acknowledged before a justice of the peace in the state, or before a justice or magistrate in any of the other states, or any place in which the grantor resides at the time of making the deed, and recorded at length in the registry of deeds in the county where the lands, tenements, or hereditaments lie, is valid to pass the same without any other act or ceremony; and no conveyance in fee-simple or tail, or for life, or any lease for more than seven years from the making, is good and effectual to hold the lands, tenements, or hereditaments conveyed, against any other person but the grantor and his heirs only, unless the deed is acknowledged and recorded in manner aforesaid.* This statute, as well as

* St. Mass. 1783, c. 37, s. 4.

those of the other states, contain suitable provisions for proving deeds in order to have them recorded, where the grantor is unwilling, or from absence or death is unable, to acknowledge the instrument. It has always been held in the construction of this statute that the recording of a deed is not necessary in order to give it full effect, either as it regards the grantor and his heirs, or a subsequent purchaser with notice. As it respects bona fide purchasers without notice, the deed has priority only from the time of recording. The laws of the other New England states are substantially the same as that of Massachusetts,* except that in Vermont, Connecticut, and Rhode Island, deeds are registered in the town clerk's office of the town where the land lies, instead of the county registry.

The statutes of all the remaining states, except New York, require all deeds to be acknowledged or proved before a magistrate and recorded, but with some variety in their provisions. In Tennessee recording is necessary even as it regards the parties to a deed. But with regard to the parties it is not necessary to its validity that it should be acknowledged or recorded, by the laws of Pennsylvania, New Jersey, Ohio, Indiana, Illinois, Missouri, Virginia, Kentucky, South Carolina, Georgia, Alabama, or Mississippi. The deed, however, is void as it respects subsequent bona fide purchasers without notice, unless it is recorded within twelve months from its date, in Indiana, Illinois, Tennessee, and Georgia; eight months in Virginia and Kentucky; six months in Pennsylvania, Ohio, and South Carolina; three months in Missouri, Alabama, and Mississippi; and fifteen days in New Jersey; or unless it is recorded before the deed to the subsequent purchaser. The deed if recorded within the times specified has priority from its date as to subsequent purchasers without notice; if recorded afterwards, it takes priority only from the time of recording. In most, if not all these states, notice of an unrecorded deed will affect a subsequent purchaser in the same manner as the actual recording of the deed would have done. Virginia and Kentucky make a distinction between mortgages and deeds of trust, and other deeds. In Virginia the former are valid as to subsequent purchasers without notice only from the time of recording;

* Laws of Maine, c. 36, s. 1; Laws of N. H. 191, st. Feb. 1791, s. 4; 1 Laws of Vermont, ed. 1808, p. 188—196; Laws of R. I. 263, 4; Laws of Conn. 653, 4.

in Kentucky they take priority from the delivery, if recorded within sixty days. The states of Pennsylvania and New Jersey also give a priority to mortgages against subsequent bona fide purchasers only from the time of recording. In New York all mortgages are required to be acknowledged or proved, and recorded; and in some of the counties all other deeds of land are required to be recorded. The effect of unrecorded deeds which ought to have been recorded, is nearly the same as in Massachusetts.*

Deeds in a few of the states, if not recorded within a certain time, are void. Thus in Maryland deeds must be enrolled within six months from the date, otherwise they have no validity even as it respects the parties and their heirs: if regularly enrolled they take effect from the date.† Notice of an unrecorded deed of course has no effect in this state. After six months a deed may be permitted to be recorded by a decree in Chancery. A deed in North Carolina must be registered within two years from its date, otherwise it is void. When registered it takes priority from its date. Acts, however, have been passed by this state from time to time, to allow the registration of deeds which had not been seasonably registered. Mortgages and conveyances in trust are allowed only six months for registry; and mortgages, unless registered within fifty days from the date, take priority only from the time of registry. In Delaware mortgages take priority from the time of recording, but are void if not recorded within twelve months.

The utility of having all deeds recorded is perhaps sufficiently proved from the circumstance of the legislatures of so many different states having introduced such a system by statute. That its practical operation is beneficial, will not be disputed by any one who has had occasion to examine titles to real estate in our country. Every person before buying a piece of land, in the states where deeds take priority from the time of registry, has it in his power, with a very moderate degree of trouble and expense, to obtain satisfactory evidence of the state of the title. The cases indeed are rare in which a suitable examination shows an apparently clear title in the vendor, that the purchaser is in any danger from latent adverse claims.

Mr. Humphreys, whose opinion on this subject is entitled to great respect, proposes the general registration of deeds, or

* 1 Laws of N. Y. 370, 373. † 1 Laws of Mar. Maxcy's ed. p. 264, 5, 6.

rather memorials of them, in England, and he appears to consider it as one of the greatest improvements in the law of real property.

The rights of creditors against the property of their debtors, also come under the notice of Mr. Humphreys. By the writ of elegit, the creditor may take on execution 'a moiety of the lands which the debtor was seized of at the time of the judgment given; or (as it has been construed) had afterwards acquired, until the debt was paid.' An equity of redemption of a mortgage cannot be reached by this process, nor can copyhold lands. In all the states, we believe, except Virginia, all the debtor's lands are liable to be taken for his debts. In Massachusetts the land of the debtor when taken on execution is appraised and set off to the creditor at the appraised value, the debtor having a year in which to redeem. Equities of redemption may also be sold on execution. In a few of the other states lands are appraised and set off to the creditor. But in a majority of the states they are sold on execution, and the proceeds of the sale applied to discharge the debt.

The distribution of the real and personal property of a deceased person among his creditors, is one of the most important objects of the law. Mr. Humphreys says,—

'By *assets* are meant the property of a deceased debtor applicable to the discharge of his debts and legacies. These are essentially divisible into land and moveables, or real and personal. The former has hitherto been my immediate subject; but, in this instance, the two classes are not severable, any more than is the secondary charge of legacies in a will from the more important one of debts.

'If there be any description of laws which peculiarly requires to be simple in its rules, and prompt in its execution, it is that for the discharge of the debts of a deceased. It forms an act of justice of the highest order. The creditor has lost his debtor: he is a stranger to the estate, and to those into whose hands it has fallen; and that estate is about to be dispersed, without leaving any one *personally* answerable beyond its produce. How far this principle actually pervades our laws for the distribution of assets, will appear presently.

'Passing the lien of the crown upon the estates, both real and personal, of its debtors and accountants, with the single remark, that they are equally available, and with the same priority, against their assets, when deceased, as when living, I shall proceed to the division of assets, which is of twofold character; *viz.*, into *real* and *personal*, in relation to the nature of the property, as has

been already noticed; and into the more technical one of *legal* or *equitable*, with respect to the courts and systems of jurisprudence by which they are administered.

'At common law, debts to the subject were payable in the following order;—*First*, judgments and other debts of record. *Secondly*, specialty debts, as upon bond, covenant, or other instrument under seal. *Thirdly*, simple contract debts. The appropriate fund for payment of these was the personal estate; but specialty creditors had, in addition, their remedy against the heir *personally*, to the extent of any lands descended to him in fee-simple. If the heir, however, aliened the assets before an action was brought, the creditor could not recover; as the heir might allege, in the technical language of pleading, that he *had* nothing by descent. But this was redressed by the 3 and 4 Wm. and Mary, c. 14. Again, after the statute of 32 Hen. VIII. the debtor might will his land, in which case the creditor was equally remediless, as the action lay only against the *heir*. But the above act of Wm. and Mary gave the action against the heir and devisee jointly. Trust-estates, too, which were cognizable only in Chancery, were held not to be assets in the hands of the heir; by analogy, as it was said, to the old law of uses, when cognizable only there. It might, indeed, have been reasonably expected, from the more general analogy which that court professed to establish between legal and equitable estates, and from the almost-legislative stretches it had often made to do substantial justice, that it would have held the heir answerable in respect of trust-estates descended, in the same manner as of legal; but it left this act of justice to be performed by the legislature, which it accordingly did by 29 Car. II. c. 3. s. 10. Another remedy, of a more enlarged character, has been given in modern times, by 47 Geo. III. sess. 2. c. 74, which renders the lands of traders within the bankrupt laws assets, on their deaths, for payment of their debts by simple contract, as well as by specialty, but reserving to specialty creditors their former priority.

'The imperfections and inequalities, however, which pervaded the *legal* system of the liability of assets, as it originally stood, occasioned the early interference of equity, which, as usual, has ingrafted a more extensive and equal distribution at the expense of simplicity. In order to enlarge the funds, it has *marshalled* or classed the assets. In order to equalize their distribution, it has created the distinction of *legal* and *equitably* assets. Of these, each in its order.

'The rule in equity is, that the assets shall be so arranged, as to satisfy, as far as practicable, the claimants of every description. With this view, if a specialty creditor, who has a lien on the real assets, receive his debt out of the personal estate, equity will place a simple contract creditor in his place against the realty, so

far as the former may have exhausted the personalty. The same character of relief is also given to a legatee; as, where lands are subjected by a testator to all his debts, but not to his legacies, a legatee shall stand in the place of a simple contract creditor, who has been satisfied out of the personal estate, when he might have resorted to the real. But the latter case was soon found to require some qualifications. A pecuniary legatee and a devisee of lands were equal claimants under the testator's bounty; but one claimant ought not to disappoint another. Though a legatee, therefore, may stand in the place of a specialty creditor, as against lands *descended;* yet he shall not as against lands *devised.* On the other hand, although it be a rule, (as will appear hereafter,) that a mortgage shall be primarily paid out of the personal assets, as being a personal debt, and not out of the mortgaged estate, yet equity will not allow this application of assets to take place to the defeating of a pecuniary legacy; but will place the legatee in the place of the mortgagee; or, in other words, will confine the latter to the land, even though the estate be particularly devised. Upon a similar principle, although a contract for an estate renders the purchase-money a debt payable out of the personalty, in favor of the heir, yet equity will not allow him to resort to it, to the disappointment of a pecuniary legatee. These are among the refinements, rendering its rules a mass of individual cases, to which equity has been driven, to enforce a principle which should be moulded into one simple, undeviating law.' pp. 120—124.

After speaking of legal and equitable assets, he thus proceeds:

'Such are the leading rules for the administration of assets in equity, within whose jurisdiction they are now principally drawn. Their twofold objects, of rendering, by means of marshalling, real property assets for payment of simple contract debts, and of an equal distribution between creditors of every description, were not only consistent with natural justice, but liberal to a degree which, had their political effects undergone discussion on their first introduction, would have not only alarmed the prejudices of feudal land-owners, but even startled the very framers of the rules. The circuitous means adopted, however, (to some extent unavoidably,) for effecting these purposes, have introduced a discordant and most complicated body of laws. First, we have the harsh, though simple, rule of common law. Then comes equity; not subverting, but undermining it, in changing the character of creditors from simple contract to specialty, by marshalling the assets. Her next step is bolder:—Framing a new description of assets, under the title of *equitable*, and administering these, not

according to the rule, (always professed, though seldom respected,) that equity follows the law, but after a new system of perfect equality, both as to persons and property. These assets, however, necessarily require to be administered in conjunction with legal ones. Indeed the distinction being purely technical, the two characters may pervade the same property. Equity, too, is obliged to bend itself, sometimes to the law, sometimes to the legislature; as, in equities of redemption of mortgages for terms of years, and in trust estates. It, however, generally rights itself and its rule, by giving a new direction to some other property, over which it may have a more absolute jurisdiction.

'But, in effecting these objects, what accounts—what classification—what apportionments—what assemblages of parties and property into one general mass of litigation—what direction and superintendence become necessary! To such an extent, indeed, that a large proportion of the assets of the country are now administered under the direction of the Court of Chancery. The only adequate cure consists in one simple set of rules for the administration of assets of every description. The principle which should pervade it is, that of equal distribution. It is sanctioned both by natural justice, and the long-established practice of courts of equity.' pp. 127—129.

The laws of Massachusetts have effected every thing which is wished for by Mr. Humphreys. The real, as well as the personal estate of the deceased is liable for the payment of his debts, without any distinction, except that the executor cannot get leave to sell the real estate for the payment of debts, unless there is a deficiency of personal assets.* In case of the estate's proving insolvent, all debts, whether judgment, specialty, or simple contract, stand on the same footing, and are paid ratably out of the assets, 'saving that all debts due for all rates and taxes, and debts due to the Commonwealth, and for the last sickness and necessary funeral expenses of the deceased, are to be first paid.'† The laws in the other New England states, and New Jersey, Ohio, Alabama, and Mississippi, are substantially the same as those of Massachusetts with

* The opinion of one of our old historians on this subject, is worth transcribing. 'In the year 1670 a law was made in the Massachusetts for giving liberty to administrators to sell lands for payment of the debts of the deceased, with the leave of the court; an order very just and necessary to make men honest, and careful to pay their debts before they leave the world; in that place where men often die seized of much land and little other estates, so as creditors would be extremely damnified without the provision of some such law.' Hubbard's Hist. N. E. 592.

† Mass. st. 1784, c. 2.

regard to the pro rata distribution of assets, and the liability of the real estate for all debts. In Maryland judgments and decrees, and in Missouri judgments, have a priority over other claims, but all other debts must be paid ratably, and the real estate is bound for the payment of all debts. In most of the other states debts are paid in a certain order, as in England, though this order varies in different states. But it is believed that even in most of these states the land of the deceased is liable for the payment of debts of any class. The pro rata distribution of equitable assets is practised in some of the states. Such is the case in New York. In that state, also, where the whole real estate of a deceased person is sold for payment of his debts, the judge of probates or surrogate is required to make a ratable distribution among all the creditors, without giving any preference to bonds or other specialties.*

Mr. Humphreys' next subject, is 'Alienation by adverse possession; or Limitation of Time.' He concludes as follows:

'On perusing the preceding sketch, the reader must be struck with the obliquity of operation by which our present law produces the ordinary bar of twenty years. But, passing the mode, and supposing the period a suitable one, it is very far from being general. It is exceeded in the instance of an heir, who may enforce his claim, where grounded on the mere right of his ancestor, at any time within sixty years, while a devisee is confined to twenty; so, also, where the remedy of the claimant is not grounded upon his right of entry, but rests, though with forlorn chance of success, upon either the mere right of himself, or the possessory title of his ancestor, in which cases the periods of limitation seem to be, in some cases thirty, and in others fifty years; and again, in the instance of incorporeal hereditaments, which, not requiring an entry, may be recovered at any time within fifty years; with the exception of advowsons and tithes, which are not subject to any limitation. On the other hand, the period of six years, at the end of which all present rights may be concluded, by means of a fine with proclamations, is brief beyond all analogy and reason; and is confined, capriciously in principle, to *freeholds*, leaving the inferior tenure of copyhold unaffected by it.

'With respect to the two excepted descriptions of corporations, it is fit that some extraordinary protection should be thrown around bodies so peculiarly circumstanced; but it surely is not too much to propose—that ecclesiastical bodies should be restrained to the same limits as the crown.

* 1 Laws of N. Y. 452.

'It may be here observed, that the present law of entails forms a great impediment to any uniform limitation of time; since, although one line of heirs in tail may be barred by adverse possession, yet, on its failure, a second has a new and similar period within which to make its claim; and so in succession, as long as the different limitations endure, which may possibly be for a century or more.' pp. 136, 137.

In Massachusetts fines are not in use, though they have not been abolished by statute. But some of the other objections of Mr. Humphreys apply with force in this state and most of the others; though the time of limitation has been shortened in most of the states. In Massachusetts writs of right are limited to forty years, writs of entry to thirty years,* and writs of formedon to twenty years.† In some states the time of limitation has been shortened perhaps too far. Thus in Vermont no writ of right, or other real action, no action of ejectment, or other possessory action, can be maintained, but within fifteen years after the cause of action, accrues to the plaintiff or demandant, or those under whom he claims. In Georgia and Tennessee seven years adverse possession of lands is a bar to any action by the right owner and his heirs, where they are not within the usual exceptions. And in South Carolina five years adverse possession is a bar.

In the preceding pages we have been able to give nothing more than a very general view of some of the alterations in the law of real property which have been made in the United States. We had intended, also, to speak of tithes, wills, real actions, equitable interposition, and some other subjects treated of by Mr. Humphreys; but we fear that we have already trespassed on the patience of our readers. Enough, however, has been stated to show, not only that a complete revolution, but a substantial improvement, has been made in this country in the law of real property. The nature and extent of this improvement will perhaps be placed in a stronger light by the following recapitulation of changes that have been made in one or more of the states. 1. Abolition of feudal tenures, including copyholds: 2. Abolition of tithes: 3. Making both the real and personal property of intestates descend to the same persons: 4. Enabling parents to become heirs to their children: 5. Abolition of primogeniture, and preference of males in descents: 6. Making all estates descend in the same

* St. Mass. 1807, c. 75, s. 1, 2. † St. Mass. 1786, c. 11. s. 4.

course, whether acquired by purchase, or by descent from paternal or maternal relations: 7. Abolishing the preference of male stocks in descents: 8. Enabling half blood relations to inherit: 9. Making husband and wife heirs to each other in case of failure of blood relations: 10. Making seizin of land pass by the mere delivery of the deed: 11. The general registration of deeds: 12. Making a fee-simple pass without the word 'heirs' or any equivalent, where a less estate is not expressed: 13. Enabling tenants in tail to convey estates in fee-simple without a fine or recovery: 14. Enabling married women to convey their estates and bar their dower without a fine: 15. Change of joint tenancies into tenancies in common: 16. Removing the disabilities of alienage with regard to real property: 17. Abolition of the doctrine of tacking in mortgages: 18. Placing land mortgaged, as well as the debt for which it is security, at the disposal of the mortgagee's executor: 19. Making all real estate liable to execution for debt, and having it sold on execution, like personal property: 20. Rendering real estate assets for payment of all debts without any preference: 21. Shortening the time of limitations.

The object and effect of the changes that we have enumerated, are to render the principles of law applicable to real property more simple and equitable; the rules of construction more conformable to common sense; the modes of transferring it more cheap, direct, and expeditious; the title to it more clear and easily investigated, and in consequence its purchasers more secure.

Art. IV.—SEVERAL QUESTIONS OF INSURANCE.

The following case, arising under a policy of insurance made by the Boston Insurance Company on the ship Paragon and appurtenances, owned by Josiah Marshall, Esquire, was referred to two arbitrators, who, not agreeing, called in a third as umpire; by whom the following opinion and report on the several questions arising in the case, were drawn up. It is unnecessary to state the name of the umpire, by way of fixing the weight to which the opinion is entitled, since the grounds are stated, and the correctness of the conclusions will depend upon that of the reasoning on which they are founded. The questions arising in the case are interesting, and of practical importance;

and we do not know that they have been judicially decided. They are the following.

1. A question respecting seaworthiness.

2. In case of damage at successive periods, what damage is to be included in *one* loss, under the exception of losses less than five per cent.; and by what rules is the damage sustained at various times to be considered as belonging to the same, or to distinct losses?

3. If damage is repaired by defective materials, is the expense of subsequently replacing these with good materials a part of the original loss, so as to bring it out of the exception of losses under five per cent., if the *whole* expense exceeds that amount?

4. An anchor being lost, and replaced by a heavier and more expensive one, which is subsequently lost; in adjusting this second loss, is the value of an anchor of the weight of the first, or of the second, to be included?

5. Under an exception of losses under five per cent. of the value, is the five per cent. to be computed upon the value inclusive or exclusive of premium? Or, in other words, if the premium be included in the value, is a corresponding per-centage to be added to the cost of repairs?

6. Is the provision for an abatement of one per centum on payment of a loss, a ground for deducting that rate in fixing the value under a valued policy?

7. Under a clause in the policy providing that the insurers shall not be liable to a loss unless it amounts to five per cent. 'exclusive of the expenses incurred for the purposes of proving the loss,' are the fees paid for a survey of a part of a chain cable, which was saved, to be considered *a part of the expenses of proving the loss?*

8. In case of the loss of an anchor, is it sufficient that the underwriters should replace it by, or pay the cost of, another second-hand anchor as good as the one lost, or are they bound to pay the value of a new anchor?

This case arises upon a policy of insurance upon the ship Paragon and appurtenances, with a provision that 'the insurers shall not be liable for any partial loss, unless it amounts to five per cent., exclusive of the expenses incurred for the purpose of proving the loss.'

The loss or losses in question happened in the Bay of Gib-

raltar, between the 2d of December, 1825, and the 26th of the following January.

On the 2d of December, 1825, the Paragon, then lying at anchor at Gibraltar, according to the protest of the master and one of the seamen, 'the wind blowed a fresh gale from the northwest, which caused the ship to start her anchor, when they let go the sheet anchor and housed the topgallant-masts.' No material damage appears, however, to have been sustained, and this extract is made from the protest merely for the purpose of shewing the state of the weather.

'On the 5th of December, the wind blowed a very severe gale from the southwest, which occasioned a heavy sea, and by a strain and heavy pitching, *the ring of the chain anchor was broke*, brought up with the best bower, and at a moderate moment moored the ship with that and the stream.'

December 6th. 'On the 6th, received a new anchor from the shore, to replace that which had parted from the chain: same day, as the sun declined, the gale increased with greater violence, causing a heavy sea, the ship riding a hard strain: the night very dark, attended with torrents of rain. By 11 o'clock, P. M. it blowed a perfect hurricane from the southwest, about which time the ship struck adrift: let go the starboard bower anchor, and paid out the chain, which brought her up.'

'At half past 12 o'clock, on the 7th December, the brig Ann Christian drifted down under the bows, and by riding over the stream cable cut it off; at the same time carrying away the spritsail yard and some part of its rigging. About this time the main paul of the windlass capsized, with the smaller pauls; the cables then run out, and were only checked by the clinches round the masts; the windlass, in running round, broke the falls and blocks which were on to second it. About this period, the brig Mary drifted foul of the ship, carrying away the jib-boom, flying jib-boom, martingale, and all their rigging: she then drove on the starboard side, and carried away the starboard main channel, with five of its chains. At 9, A. M. a boat came off with six men, to render assistance. She had been drifted close to the shore or mole head, in less than three fathoms of water. During the gale the longboat was badly injured, and the pinnace broke adrift.'

'On the 8th December, being more moderate, hove up the sheet anchor, and let it go again at night, as the wind had freshened, and the weather appeared threatening.'

'On the 9th, got a new grass stream cable on board, with an anchor, for the safety and preservation of the ship—no other kind of cable to be procured at that time.'

'On the 10th, hove up the sheet anchor, and found the stock gone'—'when the chain anchor was hove up, and found the buoy gone.'

'On the 12th, received on board a new hemp stream cable, with another stream anchor, to replace those lost in the gale.'

The subsequent time to the 30th, was employed in repairing the damage.

January 3d, 1826. 'In a violent gale of wind, the chain cable parted, leaving fifty-five fathoms on board—the remainder of the chain and anchor, together with the buoy and buoy-rope, being lost.'

January 25th. During a hard squall 'found that the ship was drifting from the stream anchor, let go the chain anchor, which brought her up, then hove up the stream anchor, and found the flukes broken off; sent on shore and got another.'

This was one of the anchors purchased at Gibraltar to repair the damage on the 5th and 7th December; and though new, and to all appearance sound, it proved to have been defective when purchased, being hollow, and a mere shell, at the end where the flukes met. It was heavier by about two hundred weight than the anchor which had been lost, and to replace which it was procured; and it was heavier by that weight than was required for the use of the ship; the reason of procuring so large a one being, that none of a suitable size, that is, the size of the one which had been lost, could be procured.

The master, Captain Thompson, states that the damage sustained on the 5th, 'was fully repaired' on the 6th of December.

The anchor-ring which broke on the 5th of December was originally intended for the use of a hempen, and not a chain cable, which latter is ordinarily attached by means of a shackle, in case of the anchor being originally intended for a chain.

One question arising on these facts, is, whether the ring which was broken on the 5th of December, was a suitable one. This ring being originally intended for a hempen cable, was larger than one intended for a chain cable. An anchor originally fitted for a chain cable, is furnished with a smaller ring, and attached to the chain by means of a shackle. According to the statements of experienced persons, a ring of

large diameter is not so strong and safe as a smaller one of the same size of iron, in case of the use of a chain cable; which gives rise to the question whether the use of the larger ring, originally intended for a hempen cable, exonerates the underwriters from any liability for damage by its breaking; or, even, whether a ship thus equipped is seaworthy.

Seaworthiness depends upon usage, and the state of the arts connected with shipbuilding, at any particular time and place. The equipage and outfits, which would have rendered a ship seaworthy fifty years ago, might, at the present time, be considered altogether insufficient. To determine the question of seaworthiness we must inquire whether the ship is constructed and furnished according to the usual and approved manner, at the time and place, and for the voyage, to which the inquiry relates. In the present case we understand, from satisfactory statements, that in 1825, and before that time, when chain cables were just getting into use in this port, many vessels were fitted out by substituting the chain for the hempen cable, without any alteration of the ring; and that there were at that time so many instances of this mode of furnishing ships, that it might be considered a common and ordinary mode of equipment. I think, therefore, that a vessel thus equipped in this port at the time of the Paragon's sailing, was seaworthy, as far as this mode of fitting out is concerned, and that the underwriters are answerable for the loss occasioned by the breaking of the ring.

2. Another question is, whether the loss happening in consequence of procuring a defective anchor, is to be borne by the underwriters? It does not appear that, in this respect, any blame attaches to the master; the anchor was in appearance a perfectly good one, but it proved to be hollow, and a mere shell, near the junction of the flukes. It accordingly became necessary, in order to replace the anchor lost December 7th, to purchase two others, and the question is whether the expense of these two anchors is to be comprehended in the amount of that loss. And I am of opinion that the cost of both is to be included in estimating the amount of the loss. It seems to be not unlike the case of repairs becoming necessary where materials are unusually dear, in which case it is the ordinary practice to include the whole cost at the enhanced prices, in estimating the amount of the loss. This is the extent of the damage in the particular case. A case in point is said to have been adjusted by the late Mr. George Cabot. A

vessel had lost some of her sails, and others had been procured by the master to replace them, which were consumed in the sail-loft, before they had been put on board of the ship. The expense of these sails, as well as those procured afterwards and actually used, was included in the loss.

3. A question then arises in relation to the *identity* of a loss. The policy exonerates the insurers from losses under five per cent.; this exception gives rise to the question whether the losses of the 5th and 7th of December, and the 3d and 25th of January, are to be added together, so that if they amount in the whole to more than five per cent. of the amount at risk, the underwriters are to be held answerable, or to be separated and considered distinct losses, so that they are to be answerable only in case the damage on each occasion exceeds the rate specified in the exception.

In favor of considering the damage sustained at these different periods, as constituting *one* loss within the meaning of the policy, it is said that damage sustained in one part of a voyage or passage, is often conducive to subsequent losses, and a liberal and equitable construction of the terms of the policy, requires that the damage sustained at different periods should be estimated in the aggregate, and that the exception should not be applied when the whole amounts to more than five per cent. On the other side it is urged that such a construction would be inconsistent with the express provisions of the policy, and defeat the object for which this exception was introduced into the contract.

It is not, however, assumed in behalf of the assured, that the underwriters are answerable in all cases where the whole damage *sustained during the continuance of the risk* amounts to more than five per cent. Such a rule would evidently be exceedingly irregular in its operation, when applied to risks of a month, a year, or two or three years. It seems to be admitted, on all hands, that the exception applies to *a* loss, or *one* loss. Now damage may be considered as constituting the *same* loss, either 1. Because it occurs at about the same time; or, 2. Because it is occasioned by the same causes; or, 3. Because the damage sustained at one time may be presumed to have contributed to that which subsequently takes place.

In case of capture, a total loss happens in an instant, but in a loss, either total or partial, by sea-damage, the whole injury

is not usually sustained at once by a single shock. A case may be easily imagined, and, no doubt, frequently happens, in which great damage is sustained by successive impulses and shocks, the injury from each of which does not amount to five per cent. When the peril continues to press unremittingly, hour after hour, or day after day, until the damage exceeds five per cent., no question is ever made of its being *one* loss. The most ordinary cases of loss are these aggregate damages resulting from the continued operation of the perils insured against. It is not requisite, then, in order to render damage *one* loss, that it should be caused at one time or place.

One rule proposed is, that the damage of *one passage* should be held to constitute *one loss* on the ship, as it usually is considered to do on the cargo. The reason for thus limiting the period for accumulating the various cases of damage into one loss, is, that the ship may be repaired in port, after performing a passage, and any damage sustained previously to her entering port, cannot, therefore, be reasonably presumed to contribute to that which is subsequently sustained. Many species of damage may, however, be as completely repaired at sea as in port, and the object in supplying the vessel with outfits, is to provide the means of making such repairs; and if the damage is such as to admit of being as fully and completely repaired at sea as in port, there seems to be no reason, after it is once repaired, for presuming it to contribute to any subsequent loss, any more than if the same repairs had been made in port.

One objection made to including all the damage of one passage in one loss, is, that the liability of insurers in a continued risk, will be greater than in case of successive policies made for short periods. If, for instance, the whole damage sustained by a ship in six months amounts to five per cent., and half of this is sustained during the first three months, the underwriters in successive policies for three months each, would not be liable for any loss, whereas the whole damage might be claimed of underwriters in a policy for six months. But it does not seem to be a conclusive objection to the rule that it involves this consequence, since no construction of the policy can be adopted which may not involve it. It will not be questioned, that the loss by sea-damage occasioned by a storm continuing three or four days, constitutes *one loss;* and yet if it amounts to only five per cent., and we suppose one policy to have expired, and another to be made to commence, in the

midst of the storm, the underwriters in these successive policies will be liable for no part of this damage. No rule can be adopted which will necessarily make the operation of this exception the same, whether the risk be continued in one policy, or divided between successive policies. It is not, therefore, a conclusive objection to a rule, that it makes the liability of the underwriters different in these different cases.

But though this objection is not conclusive against the rule, there seems to be no sufficient reason in its favor. To adopt as a general rule that all the damage of a passage is to be considered as *one loss*, whether that passage be long or short, or the damage be such as may be, or cannot be, repaired at sea, and whether the port at which the ship arrives, be a suitable place for repairs or not, seems to be a very sweeping doctrine, and to require for its support a very general and unquestionable usage. According to the statements of a number of underwriters, it does not appear that any such usage has been established in Boston. It must then depend upon the particular circumstances of each case, what successive instances of damage belong to the same loss.

In the present case a question is made whether the *presumption* is to be in favor of separate or aggregate losses; that is, whether it is incumbent on the assured, to show that the damage, for which he demands indemnity, is *one* loss, or, on the underwriters, to show that it constitutes several distinct losses. It undoubtedly belongs to the assured to prove a loss in order to support his demand for indemnity, and to do this under the policy in question, it must be made to appear that the loss exceeds five per cent. But when he has established certain facts, it seems to be a matter of mere construction whether those facts prove a loss over five per cent., and there seems to be no reason for *presuming*, independently of the testimony, either that these facts do or do not show a loss amounting to five per cent.

To apply these general views to the case under consideration, it appears from the protest that the wind blew 'a perfect hurricane' at 11 o'clock, P. M. of the 5th of December, and at 12, A. M. on the 7th, the brig Ann Christian came drifting down, and the principal damage was sustained. Though a new anchor was brought on board on the 6th, and it seems the violence of the gale had abated, it is apparent that the intermission must have been short, and rather a lulling, than a sub-

siding of the gale, which was at its height at the beginning and at the conclusion of the 6th. It may, therefore, be considered as one continued gale or storm—an *unremitted pressure of the same peril* upon the subject insured, so as to render the damage of the 5th and 7th *one loss*. The case is not unlike that of successive damage to spars and rigging at sea, during a continued storm, affording an opportunity, however, to repair the damage, and replace the articles lost, successively. The damage in such a case would undoubtedly be considered as constituting one loss, though the first damage should be repaired before the last was sustained. So in the present case, though an anchor was brought off on the 6th, whereby the damage of the 5th was repaired, still that of the 7th seems to have arisen from the operation of the same peril, and so to constitute a part of the same loss.

As to the damage occasioned on the 3d of January, the referees are not all agreed, one being of opinion that it constitutes a part of the same loss with that of the 5th and 7th of December; the other two are of opinion that it must be considered a distinct loss, as it was not occasioned by a continued pressure of the same peril; and they do not perceive any reason for supposing that the injury sustained on the 5th and 7th of December contributed to the loss of the 3d of January.

4. The anchor lost on the 3d of January was the same which had been purchased and brought on board on the 6th of December, and which, together with the stock, cost over two hundred dollars. This anchor was heavier by about two hundred weight than was required for the ship; the reason of the master's buying so large a one, being, that one of a suitable size could not be found at Gibraltar. The first question on this part of the case is whether the insurers are bound to replace this anchor, after the loss of it on the third of January, by another of equal size, that is, by one larger than was required for the ship's use, and larger than that with which the ship was supplied at the commencement of the risk.

In case of a vessel being supplied abroad with an anchor, rigging, &c. of larger size or better quality than the insurers are bound to supply to repair a loss, for the reason that articles of the proper quality and size, are not to be had at the port of repair, the assured is usually required to make an allowance on this account, if these articles subsequently, and after the termination of the risk, come to his use, so that he is

ultimately benefitted in consequence of the extraordinary expense of the repairs. Where the article can be taken from the ship, as a cable, for instance, it is sometimes sold, and the underwriters credited with two-thirds, and the assured with one-third of the proceeds, (it being an article subject to the deduction of one-third for new) and another is procured corresponding in size and quality to that which was lost. There seems to be no question of the correctness of this rule, though it must evidently be attended with some difficulties in its practical application. But if the superior article does not come to the use of the assured, aside from and independently of its use under the risk covered by the policy—if it be not sold, pending the risk, and does not survive so that the assured is benefitted by it—there evidently is no occasion for the application of this rule; there is no ground for requiring any extraordinary allowance by the assured on account of the superior quality or greater size of the article, in comparison with the one which had been lost. If the article is lost pending the risk under the policy, it only serves, while it continues in use, as the repair of the previous loss, and the only effect is, that the repair of that loss is more expensive than it would have been if an article of suitable size and quality could have been obtained.

The assured, consequently, has no greater insurable interest or real value at risk in the superior article, than he had in the former one, except it be from the circumstance of his paying for one-third of it, on account of its being new. In every other respect he can only lose the value of the original article. Two-thirds of the excess of value are wholly at the risk of the underwriters; if the article is lost, the underwriters, not the assured, lose the two-thirds of the excess of value. As far as this proportion of the excess of value is concerned, therefore, they are not liable to pay the assured for the loss of it, for they, and not the assured, have lost it. Consequently they are not, in case of its loss, liable to replace it by another of equal size and quality. In the present case, at least, the article in question being an anchor, from which a deduction of a third for new is not made, the underwriters are, upon the above principles, only bound to replace it, in case of its loss, by another equal in size and quality to the one originally on board.

5. Another question, raised in this case, relates to the

amount upon which the exception of losses under five per cent. is to be computed. The ship is valued at twelve thousand dollars, including premium. The value exclusive of the premium is eleven thousand two hundred and eighty dollars; and the question is, upon which of these two sums the five per cent. is to be computed.

At the commencement of the risk, the insurable interest in the ship and cargo, is enhanced by the whole amount of the premium, and the *real* value is enhanced by the same amount, for the particular risk or voyage insured. If the owner of a ship wishes to send her to Europe, and has paid five hundred dollars for insurance on the vessel and cargo, their value to him for that voyage, is greater, by that amount, than if he had not obtained the insurance. In case of damage being sustained and repairs made, the policy attaches to the repairs; if the premium be one per cent. then the repairs, the moment they are made, are worth one per cent. more than they would be if no insurance had been effected. The enhancement of value, by reason of the policy, attaches to this part of the ship no less than the rest. If, therefore, the cost of the repairs, with the addition of one per cent., makes a twentieth part of the value of the ship as estimated in the policy, the loss amounts to five per cent. of the value. This, accordingly, appears to be the correct method of computing a loss under this exception in the policy, and it is a confirmation of the correctness of this method, that it renders the application of the exception the same, both to ship and cargo, and the policy evidently intends that it shall have a similar application to these two species of interest.

The anchor lost in the case under consideration on the 3d of January, was replaced by one which had previously been lost from the same ship, on the 5th of December, and which had in the mean time been recovered. A question, partly of fact and partly of principle, arises, as to the value at which this anchor is to be estimated in computing the two losses, one of which is to be credited and the other charged with the value of this anchor. It was, in fact, sold at auction and bid off by the master for the sum of forty-seven dollars and a little over. But this sale is of no importance, excepting as evidence of the value of the article, for he was buying it for the very party or parties to whom it already belonged, subject, however, to the claim of the salvors for salvage. The object of the sale, as he states, was to determine the amount

of salvage; and he further states, that other shipmasters present at the sale purposely refrained from bidding against him, and thereby enhancing the amount of salvage. He further states, that he was congratulated after the sale on account of the small amount at which he had fixed the salvage, and says he could have sold the anchor on the spot, for a price much above that at which he bid it off. He cannot fix the price of the article very definitely, but says it was worth, at that time and place, from eighty to a hundred and thirty dollars. A gentleman of Boston, conversant in the anchor business, states the usual market value of a good second-hand anchor to be about two-thirds of the value of a new one. Captain Thompson says that this anchor answered for the use of the ship as well as a new one. It may, therefore, be estimated fairly, at least at the highest rate at which the best second-hand anchor of the same size could be supposed to be sold at that time at Gibraltar. I do not understand Captain Thompson to mean that this anchor was worth as much, or would wear so long, as when new, which was evidently not the case, as it had not only been used during the voyage in question, and lain under water about one month of the time, being altogether about a fifteenth or twentieth part of what experienced persons state to be the ordinary wear of an anchor, but was not new at the commencement of the voyage. His meaning must, therefore, be, that it was a very good anchor for one that had been so long in use, and such a one as rendered the ship perfectly seaworthy as far as this particular article was concerned.

It appears, however, that though this anchor, considered as a part of the repairs of this second loss, should be estimated at the highest value mentioned by the captain, namely, one hundred and thirty dollars, still it will be questionable whether the loss amounts to five per cent. of the value of the subject insured. It verges so closely upon the precise rate of the exception, that a slight variation of the amount will either on the one hand establish, or on the other defeat, the claim of the assured.

Three questions here occur, two of which, if settled in the affirmative, will enhance the amount of the loss; and the other, if so settled, will have a similar effect in establishing the claim, by reducing the amount on which the five per cent., being the rate of the exception, is to be computed. We will reverse the order of these questions, and first consider the one last mentioned.

6. The policy contains the usual provision that an abatement of one per cent. shall be made upon the payment of any loss. It is a well known rule of insurance, that the assured can, by making full insurance, entitle himself to full indemnity, and, in case of a total loss, receive back the whole value of the property insured, together with the premium he has paid for insuring it. In order to this, it is customary, in case of a loss, under an open policy, in which the value of the article insured is not agreed upon, to compute the value by adding to the cost, not only the premium of insurance, but also one per cent. on account of this abatement. This mode of adjustment gives back to the assured the whole amount of his disbursements, both in the purchase and the insurance of the subject. As a matter of payment and receipt of money, therefore, this abatement becomes a mere ceremony, and the contract is, in its practical operation, precisely the same as if it did not contain this provision. Had the policy under consideration been an open one, this one per cent. would be added in computing the value of the interest, and then, if the loss, before making the abatement in question, amounted to five per cent. on this value, it would not come within the exception, and, of course, the underwriters would be liable for it.

But this is a valued policy, and the question is, whether the agreed value includes this addition of one per cent.; and it seems to me that it must, unquestionably, be considered as including it. Of this there seems to be no ground of doubt, and for this reason it is suggested that one per cent. more is to be deducted from this value to obtain the amount on which the five per cent. is to be computed. But I do not see any reason for this deduction. When it is agreed, in the policy, that a loss, to be payable, must amount to five per cent., the meaning must be, that the computation shall be made upon the insurable value, for that alone can be supposed to be in the contemplation of the parties to the contract. I am, therefore, of opinion, that this deduction cannot be made from the value to obtain the amount on which the five per cent. is to be estimated.

7. Another question is raised in relation to the expenses of a survey of the part of the chain cable which was left, as will be observed by recurring to the facts, when it parted on the 3d of January. Whenever, in case of loss, some remnants of the damaged article remain, which are not used in the repairs,

the adjustment of the loss is made by deducting the value of these from the cost of repairs, and if the loss does not amount to five per cent. after this deduction, it is not a good ground of claim upon the underwriters. Thus, in the present case, the value of the part of the chain that was saved, is deducted from the cost of the new anchor and chain, and the loss must, after this deduction, amount to five per cent. in order to render the underwriters liable. But there was an expense of sixteen dollars incurred in this case, in a survey of the remnants of the chain; and the question is, whether this sum is to be taken out of the net proceeds of the sale, before deducting those proceeds from the expense of repairs; and I think it is not to be so taken out. The policy provides that no loss shall be paid unless it amounts to five per cent. *exclusive of the expenses incurred for the purpose of proving the loss*, and the expense in question seems to come within this description. It could not have been incurred with any other object than that of establishing a claim against the underwriters.

8. The other question is, whether the assured has a right to a *new* anchor. As the captain states that the anchor recovered, and actually used, was a very good one, if only the difference in value between this and a new one was in question, the amount would be of comparatively small importance; but in the present case the question of loss or no loss, may depend upon the right of the assured to be supplied with a new anchor.

One view of this case gives rise to a question whether the assured has a claim, not merely for the cost of a *new* anchor, but for that of any anchor at all; for it may be said that, considering the whole voyage together, this anchor was never lost; the assured was deprived of the use of it while it lay at the bottom, during which time he supplied its place by another, and, on its being recovered, he again applied it to the use of the ship. And the inference would be, that the expense of an anchor is not to be included in this loss of the 3d of January; which would be equivalent to the assumption, that there was at that time no loss of an anchor; an assumption, however, too directly in contradiction to the facts to be admissible. That there was, at that time, a loss of an anchor, and a new one, and one more valuable than the recovered anchor was when new, there is no question. Now whether this loss is supplied by one from the bottom of the harbor of Gibraltar, or from a storehouse on shore, or from the extra outfits of the

ship; or whether the owner or the underwriters, or both of them, supply it by an anchor already on hand, or by one purchased for this particular purpose, it can make no difference in the principles upon which the amount of the loss is to be computed in reference to the exception of losses under five per cent., though it might make some difference in the amount to be charged on account of this part of the loss. A loss was at that time sustained of the value of an anchor equal to that of the original chain anchor when it was new. If, therefore, (since this loss is computed as a distinct one) the loss of an anchor of such a value makes the amount over five per cent., the underwriters are liable to pay it.

But if the loss had been that of an old anchor, and not, as it was in fact, a new one, still the question arises, whether the underwriters are not bound to replace it by a new one of the weight and kind of that with which the ship sailed; and I think they were liable thus to replace it. It is admitted, on all hands, that in case of a loss of any other article, it must be replaced by *new*. But as, in the practice in this port, no deduction of one-third for new is made to the insurers, on the expense of an anchor to replace one lost, it is said that in regard to a loss of this description, they are not bound to replace it by a new article. And consequently where no such deduction is made on a chain anchor or copper sheathing, it would be maintained, upon the same principle, that the insurers are only bound to replace lost articles of these descriptions, with others as good as those lost were previous to the damage; and another consequence would be, that if the lost articles were replaced by other *new* ones, the underwriters would have a right to throw upon the assured all the expense of the excess of their value over that of the lost article, before the happening of the damage. But since the practice in adjustments does not afford any distinction of this sort, or authorize any claim of the above description, though cases of the kind are happening every day, the uniform and universal usage seems to give the assured as good a right to a new anchor, or chain cable, or new copper sheathing, as to new sails or rigging. Expediency and convenience are certainly very decidedly in favor of this rule, since there is no part of the ship or its appurtenances, the quality of which is more important than that of the anchors and cables.

The rule of deducting a third for new on articles generally,

goes upon the presumption that they will, on an average, be one-third worn out when lost, or when so damaged as to require to be replaced, though in some instances they are all but new, and in others nearly worn out. The rule contemplates that repairs shall be made with new materials; but it also provides that the assured shall pay for the excess of their value over those which were damaged or lost. It involves two principles, first, that the underwriters are to be at the expense of making the ship as good as she was before the loss happened; second, that repairs are to be made with new materials. Which part of this rule is, in practice, applied to the case of anchors—that part only which supposes the insurers to be merely liable to make the ship as good as she was before the loss happened, or that part only which requires repairs to be made with new materials, or at least those as good as new? I think the latter. The exception of anchors from the rule of charging the assured a third for new, has always been understood to be in favor of the assured, whereas, if he is only entitled to an anchor as good as the one lost was immediately before the loss, this exception is entirely against him; since it would subject him, in each particular case, to bear all the excess of the expense of a new anchor over the value of the one lost; a rule which would not only be exceedingly troublesome in practice, but undoubtedly more unfavorable to the assured than that of the deduction of a third for new. The adoption of any such doctrine would certainly be a great and a very inconvenient innovation.

That the value actually lost on the 3d of January did amount to more than five per cent. on that of the ship, is admitted, if we estimate it by the cost or market value of the articles lost; and if the loss be estimated by the cost of the repairs, the result will be the same, if the underwriters are bound to replace a lost anchor by a new one, which, for the reasons already given, I think they are bound to do. The parties, it is true, found an anchor, which they had themselves previously lost; but how does this affect the amount or the adjustment of this loss of the 3d of January, any more than if they had found an anchor which had been lost by somebody else? The amount and adjustment of this loss are entirely distinct from the advantage and gain by finding an anchor. There is nothing in the circumstances necessarily making the recovered anchor a part of the appropriate and indispensable repairs of this partic-

ular loss. Suppose the risk under this policy to have commenced on the 2d of January, there would in that case, beyond all question, have been a loss of more than five per cent., and when we assume that this is a *distinct* loss, what is this but to assume that it is to be adjusted in the same way as if it had happened under a distinct policy? It would certainly be very unfair, as respects the assured, first to separate this loss from the preceding, so as to cut off his claim unless this loss should amount to five per cent., and then to connect it with a preceding loss or a preceding transaction, so as to reduce it below that rate. The assured ought to have all the advantages or disadvantages, either of its being a distinct loss, or only a part of an aggregate loss which had commenced nearly a month before. He ought not to be subjected to all the disadvantages of its being an entire and distinct loss, and also those of its being only a part of an aggregate loss. If, under the circumstances of the case, taking the whole history of the risk together, the underwriters are entitled, as between themselves and the assured, to consider the recovered anchor as equivalent in value to a new one, then the salvage on the first loss would be enhanced in proportion. This would be an advantage connected with, and growing out of, the first loss, and to be taken into consideration only in settling that loss, and not be made to affect a subsequent one, which we assume in the outset to have no connexion with it. The most favorable adjustment of these losses that can be claimed by the underwriters, seems to me to be the allowance, on the first loss, of the whole value of a new anchor as salvage, with the deduction of the expense of recovering the lost anchor. I doubt whether in strict *right* they are entitled to this *allowance;* but I am inclined to make it rather than to go into an elaborate investigation of a new question, in a case on which so many have already been raised; especially as the amount involved in this question is very inconsiderable.

Art. V.—LIFE AND WRITINGS OF SIR WILLIAM BLACKSTONE.

It is worthy of observation, that in proportion to the space which they occupy in the public eye whilst living, few persons leave behind them more scanty marks of their progress than lawyers whose pursuits and character have been purely professional. Posterity knows little of their career at the bar, unless they happen to possess literary qualifications, or other incidental means of distinction, or attain pre-eminently elevated rank as advocates or judges. Their usefulness, considered in the light of legal counsel only, lies within the narrow circle of the courts of justice. They expend, upon a technical argument of a law question that takes up a page, perhaps, in a blackletter book of reports, or which never reaches the press at all, a degree of industry, learning, talent, and intellectual vigor, which would earn them a cheap immortality, if exerted in the senate or in the walks of popular literature. It should be remembered that, of the juridical writers whose compilations fill our shelves, not all, nor the greater number, were in their day the most conspicuous members of their profession. A portion of them, it is true, like Sir Edward Coke, Sir Francis Bacon, Sir Matthew Hale, whose works stand among the highest of our legal classics, retain a reputation at the present time commensurate with their professional importance among their cotemporaries. But these are the few, not the many; they constitute the exception, not the rule. A decided taste for, and successful cultivation of, letters; a long continued career of usefulness in a public station of a mixed judicial and political nature; the possession of popular talents devoted to active exercise in parliament;—these, and other causes which will readily suggest themselves to the reflecting mind, are sufficient to account for the existence of all such departures from the general principle.

Take any single period, for example, in the juridical history of England, and search for the memorials of those who were the pride of Westminster Hall, the leading counsel in every cause of difficulty or magnitude, not the acute and laborious special pleaders merely, but the eloquent barristers of the times, applauded by the listening throng, and called upon

continually for intellectual efforts of the most arduous and honorable character, yet as evanescent as the transitory hours that witnessed their exhibition. The period when Mansfield adjudicated, and Blackstone wrote,—certainly one of the most brilliant in our history,—is german to the matter. Open at random in Burrow, or any other of the cotemporary reporters, and hardly a case occurs in the King's Bench but Sir Fletcher Norton, or Mr. Wallace, or Mr. Morton spoke to it as counsel. Of their associates in practice many rose to the prominent judicial offices, which they declined; but of Yates, Aston, Eyre, De Grey, Gould,—nay, of Dunning, Wedderburne, Bathurst, the unfortunate Charles Yorke, and Serjeant Hill, the most learned lawyer of his age, as of Norton, Wallace, and Morton,—how few are the traces which survive, and how narrow the field of their fame. A brief abstract of the most admirable and the most admired forensic address graces a page or a paragraph in the reports. There is nothing to show for the eloquence of the orator and the genius of the lawyer, but the meagre abridgment of some pains-taking collector of legal cases, where the arguments of counsel are after all of but secondary consequence, and where indeed all the wisdom of the judge commends itself to the notice of a single profession alone. Yet these are the great lawyers who shed a lustre over the court in which the greater Lord Mansfield was proud to preside. Probably as a lawyer, certainly as an advocate and practising counsellor, Sir William Blackstone was inferior to all these; and but for the display of other qualities, of talents as an elegant, correct, and instructive writer, his reputation would be confined to the same restricted limits. Indeed his high standing at the bar and his judicial preferment were the consequence of the talent and erudition displayed in academical pursuits, his Commentaries, the foundation of his fortune, being simply the substance of lectures delivered in the University of Oxford.

Sir William was the third son and youngest child of Charles Blackstone, a silkman of London. He was born in that city on the 10th of July, 1723, some months after the death of his father; and was indebted for his education to the affectionate care of his maternal uncle, Thomas Bigg, an eminent surgeon of London.* His two brothers, Charles and Edward, took orders,

* Our authority for this account of Sir William Blackstone's life is a memoir prefixed to his Reports, and written by his kinsman and executor, James

and lived in comparative obscurity as country clergymen. William was put to school at the Charter House in 1730, and applied himself to his studies with so much assiduity and success that at the early age of fifteen, he was at the head of the school, and qualified for admission into the University; and accordingly was entered a commoner at Pembroke College, in Oxford, November 30th, 1738, with distinguished marks of approbation from the governors of the Charter House.

At the University his favorite studies were the classics and belles lettres; although he did not neglect abstruse and exact learning, having made a respectable proficiency in mathematics particularly, which he applied to the science of architecture, as the recreation of his leisure hours. But his decided turn for the cultivation of polite literature was indicated by his attention to composition in prose and verse; and at this period of his life he undoubtedly laid the foundation of that finished, pure, and elegant style of writing, which constitutes not the least excellence of the Commentaries. Notwithstanding his juvenile taste for poetry, and his success in occasional prize essays in verse, we do not believe that the Muses have lost much by his abandonment of them for the severer studies of active life. But his passion for poetry was laid aside with reluctance, when he came to decide upon the choice of a profession, and adopted the law; and his feelings on the occasion were expressed in a copy of verses published in Dodsley's Miscellanies, which may not be unacceptable to our readers.

THE LAWYER'S FAREWELL TO HIS MUSE.

As, by some tyrant's stern command,
A wretch forsakes his native land,
In foreign climes condemned to roam
An endless exile from his home;
Pensive he treads the destined way,
And dreads to go, nor dares to stay;
Till, on some neighboring mountain's brow
He stops, and turns his eyes below;

Clitherow; and a singularly eccentric, but learned work, published in 1782, of the following title: 'The Biographical History of Sir William Blackstone, late one of the Justices of both Benches; a Name as celebrated at the Universities of Oxford and Cambridge as in Westminster Hall: And a Catalogue of all Sir William Blackstone's Works, manuscript as well as printed: With a Nomenclature of Westminster Hall: The whole illustrated with Notes, Observations, and References, &c. By a Gentleman of Lincoln's Inn.'

There, melting at the well known view,
Drops a last tear, and bids adieu:
So I, thus doomed from thee to part,
Gay Queen of Fancy and of Art,
Reluctant move, with doubtful mind,
Oft stop, and often look behind.

Companion of my tender age,
Serenely gay and sweetly sage,
How blithsome were we wont to rove
By verdant hill or shady grove,
Where fervent bees, with humming voice,
Around the honeyed oak rejoice,
And aged elms, with awful bend,
In long cathedral walks extend!
Lulled by the lapse of gliding floods,
Cheered by the warbling of the woods,
How blest my days, my thoughts how free,
In sweet society with thee!
Then all was joyous, all was young,
And years unheeded rolled along:
But now the pleasing dream is o'er,
These scenes must charm me now no more;
Lost to the field, and torn from you,—
Farewell!—a long, a last adieu!

Me wrangling Courts and stubborn Law
To smoke, and crowds, and cities draw;
There selfish Faction rules the day,
And Pride and Avarice throng the way;
Diseases taint the murky air,
And midnight conflagrations glare;
Loose Revelry and Riot bold
In frighted streets their orgies hold;
Or, when in silence all is drowned,
Fell Murder walks her lonely round:
No room for Peace, no room for you,
Adieu, celestial Nymph, adieu!

Shakspeare, no more thy sylvan son,
Nor all the art of Addison;
Pope's heaven-strung lyre, nor Waller's ease,
Nor Milton's mighty self must please:
Instead of these, a formal band
In furs and coifs around me stand
With sounds uncouth and accents dry,
That grate the soul of Harmony.

Each pedant Sage unlocks his store
Of mystic, dark, discordant lore;
And points with tottering hand the ways,
That lead me to the thorny maze.

There, in a winding close retreat,
Is JUSTICE doomed to fix her seat;
There, fenced by bulwarks of the LAW,
She keeps the wondering world in awe;
And there, from vulgar sight retired,
Like Eastern Queens, is more admired.

O, let me pierce the secret shade
Where dwells the venerable Maid!
There humbly mark, with reverent awe,
The Guardian of Britannia's Law,
Unfold with joy her sacred page,
(Th' united boast of many an age,
Where mixed, yet uniform, appears
The wisdom of a thousand years,)
In that pure spring the bottom view,
Clear, deep, and regularly true,
And other doctrines thence imbibe
Than lurk within the sordid scribe;
Observe how parts with parts unite
In one harmonious rule of right;
See countless wheels distinctly tend,
By various laws, to one great end;
While mighty Alfred's piercing soul
Pervades and regulates the whole.

Then welcome business, welcome strife,
Welcome the cares, the thorns of life;
The visage wan, the purblind sight,
The toil by day, the lamp at night,
The tedious forms, the solemn prate,
The pert dispute, the dull debate,
The drowsy bench, the babbling Hall,
For thee, fair Justice, welcome all!

Thus, though my noon of life be past,
Yet let my setting sun at last
Find out the still, the rural cell,
Where sage Retirement loves to dwell!
There let me taste the home-felt bliss
Of Innocence and inward Peace;
Untainted by the guilty bribe;
Uncursed amid the happy tribe;

No orphan's cry to wound my ear;
My honor and my conscience clear:
Thus may I calmly meet my end,
Thus to the grave in peace descend.

Judging from the specimen of his poetical genius which these lines afford, we think it unquestionable that, even looking at the bare consideration of literary fame, Blackstone acted wisely in dedicating himself to the law. His case presents one of many examples of eminent jurists, who indulged, in early life, in the 'dulce est desipere' of poetry, but left it for occupations, which the result proved to be more congenial to the character of their minds, and at the same time the road to fame, fortune, and happiness. Good sense, a command of language, and harmony of versification, united also with some fancy, are not enough to constitute the true poet. It requires, in addition, a creative and inventive strength of imagination, a power of touching the heart and arousing the passions by felicitous expressions of sentiment, by picturesque combinations of thought, which are not given to all who possess a certain degree of skill and facility in versification. It imparted an apt turn to the compliment, to regret

How sweet an Ovid in a Murray lost;

but had slight foundation in truth. Much of the elegance of language, we doubt not, which characterized Blackstone's riper productions, may be traced to the poetic tendency of his mind, and the practice of versification at the time of life when his style was in the course of formation; and the same circumstance may have contributed to produce the attic terseness and refinement, which are discernible in the judicial language of Mansfield. But the republic of letters, we imagine, has no good cause to lament the diversion of their talents from the culture of poetry. Sir William collected his fugitive pieces in a small volume not designed for publication, and inscribed with the appropriate motto from Horace,—

Nec lusisse pudet, sed non incidere ludum.

As juvenile compositions, they do him no discredit; but probably are superior, in no respect, to the Farewell to his Muse.

Blackstone, having passed three years at the University, was entered in the Middle Temple November 20th, 1741, and betook himself to the diligent study of law. In 1744 he was

admitted a fellow of All Souls College; and from this period divided his time between the University and the Temple. In 1745 he commenced bachelor of law; and in 1746 was called to the bar. During the first years of a counsel's attendance on the courts, it is seldom that he has opportunity for the acquisition of any thing but knowledge, unless he possesses powerful friends to recommend him, or a happy elocution, of which Blackstone could not boast. At the bar, therefore, he made slow progress; but his connexions with the University opened to him such a career of usefulness, and eventually of professional distinction, as an active mind like his required. At Oxford, soon after taking his degree, he was chosen to the office of Bursar, and undertook and accomplished a thoroughly new arrangement of the muniments of the college, which he found in a very confused state. He introduced, also, a reform in the method of keeping accounts, greatly to the advantage of the corporation; and completed the Codrington Library, which had remained an unfinished building for many years. In 1749 he was rewarded for his attention to the interests of the college by being appointed Steward of their manors; and in the same year was elected Recorder of the borough of Wallingford. In 1750 he became doctor of civil law, and a member of convocation, and was thereby enabled to be useful to the University at large. His first publication, an Essay on Collateral Consanguinity, produced for a local occasion, was printed in 1750. About this time, also, he planned the course of lectures on the laws of England, which have immortalized his name.

Blackstone persisted in attending the courts for seven years, that is, until the summer of 1753, when, finding the emoluments of his profession inadequate to the expense, he determined to retire to his fellowship and his academical pursuits at Oxford. In the ensuing Michaelmas term he commenced reading his lectures; and notwithstanding the novelty of the attempt in England, where a knowledge of the laws of the country constituted no part of academical education, he had the satisfaction to find, as he observes in the preface to the Commentaries, 'that his endeavors were encouraged and patronised by those, both in the University and out of it, whose good opinion and esteem he was principally desirous to obtain.' His lectures were attended, from the beginning, by a very crowded class of young men of the greatest respectability, and

formed a new era in the history of university instruction, as their subsequent publication did in that of the profession in general. In 1755 he was appointed one of the Delegates of the Clarendon Press, and displayed his customary industry and discernment, in correcting many abuses in the management of that foundation. In 1757 he was elected into the society of Visiters of Michel's new Foundation of Queen's College, and succeeded in rendering a donation, which had previously been a mere subject of contention, a valuable acquisition to the University.

Dr. Blackstone had continued to read his lectures several years, before the benefaction of Mr. Viner communicated the dignity of a public foundation to the subject of his instructions. Mr. Viner died in 1756, having employed above half a century in amassing materials for his great Abridgment of the Law, and by his will devised the copyright of his work, and other property to a considerable amount, to the University of Oxford, to found a professorship, fellowships, and scholarships of the Common Law. In 1758 Blackstone was unanimously elected first Vinerian Professor, a reward justly due to the talent and enterprise he had displayed in the lectures delivered upon his private responsibility. The introductory chapter of the Commentaries, one of the most perfect compositions in our language, has rendered every one familiar with the objects contemplated in that foundation; and all experience since that time has done justice to the sound and judicious views entertained by Viner and so beautifully expressed by Blackstone. Amid all his complaints against the order of things in Oxford, the historian Gibbon bestows unqualified applause upon the Vinerian professorship. 'This judicious institution,' he says, in his memoirs of himself, 'was coldly entertained by the graver doctors, who complained, (I have heard the complaint,) that it would take the young people from their books; but Mr. Viner's benefaction is not unprofitable, since it has at least produced the excellent Commentaries of Sir William Blackstone.'

Meanwhile, counting upon the reputation as a lawyer, which he justly supposed he had gained by his lectures, in 1759 Blackstone again took chambers in the Temple, and resumed his attendance at Westminster, still continuing to reside a part of the year at Oxford, and to deliver his lectures there. In 1761 he was returned to parliament from the borough of Hindon in Wiltshire, and received a patent of precedence as

king's counsel; and finding that his expectations of professional business had proved well founded, he concluded to settle in life, and married Sarah, daughter of James Clitherow, Esquire, of Boston House in Middlesex, by whom he had nine children, and with whom he passed the remainder of his life in the enjoyment of uninterrupted domestic happiness. His marriage having vacated his fellowship, the Earl of Westmoreland, then Chancellor of Oxford, appointed him Principal of New Inn Hall; by which means he obtained an agreeable residence at Oxford, for the times when the delivery of his lectures required him to be at the University.

In 1762 Blackstone collected and republished, under the title of Law Tracts, a number of pieces originally published by him at various periods, generally with reference to some particular occasion. Individually they are not of great moment, their importance having passed away with the circumstances wherein they originated. To his reputation as a lawyer and a writer, they are also of little consequence, in comparison with his lectures, the publication of which he commenced in 1765, under the title of Commentaries on the Laws of England, and which instantly placed him in the highest rank of English classics. The publication of the lectures, it may be presumed, rendering it improper to read them at the University, and his professional engagements not allowing him to prepare a new course, in 1766 he resigned the Vinerian professorship, and with it the principality of New Inn Hall; and thus became wholly detached from Oxford.

Previous to this, in 1763, he had been appointed Solicitor-General to the Queen. In the parliament of 1768 he was returned from the borough of Westbury in Wiltshire; and ere long he received those offers of professional preferment, which his reputation and ability deserved, and the loyalty of his opinions, as declared in the Commentaries, warranted on the part of the ministry. On the resignation of Mr. Dunning, in January, 1770, the office of Solicitor-General was proffered to him, but refused on account of its complicated duties at the bar and in parliament. A month afterwards, on the resignation of Mr. Justice Clive, he accepted the offer of a place on the bench of the Common Pleas; but Mr. Justice Yates expressing an earnest wish to be transferred from the King's Bench to the Common Pleas, Blackstone consented to the exchange; and for a short time sat as an associate judge with

the Earl of Mansfield; but on the death of Mr. Justice Yates during the same year, he was appointed to his original destination in the Common Pleas.

Having now attained that rank, which formed the highest object of his ambition and expectation, Sir William, although he faithfully discharged the functions of his office, yet had leisure for the private duties and elegant recreations of life. Attendance at the bar had never been wholly to his taste; and his aversion was greater still for the business of parliament, 'where,' according to his own expressions, 'amid the rage of contending parties a man of moderation must expect to meet with no quarter from any side.' He passed the legal vacations in the retirement of his villa, called Priory Place, at Wallingford; and from his long connexion with that town was led to promote every design calculated for its improvement. In London, beside the official duties of his station, he engaged in several objects of public utility. He is entitled to the credit of procuring an act of parliament to provide penitentiaries, or houses of correction for convicts, in place of transportation, and thus introducing so memorable a change in the application of the penal laws. His observations on this point, in a charge on the circuit, deserve to be quoted.

'In these houses the convicts are to be separately confined during the intervals of their labor, debarred from all incentives to debauchery, instructed in religion and morality, and forced to work for the benefit of the public. Imagination cannot figure to itself a species of punishment, in which terror, benevolence, and reformation are more happily blended together. What can be more dreadful to the riotous, the libertine, the voluptuous, the idle delinquent, than solitude, confinement, sobriety, and constant labor? Yet what can be more truly beneficial? Solitude will awaken reflection; confinement will banish temptation; sobriety will restore vigor; and labor will beget a habit of honest industry: while the aid of a religious instructer may implant new principles in his heart, and when the date of his punishment is expired, will conduce to both his temporal and eternal welfare. Such a prospect as this is surely well worth the trouble of an experiment.'

During the last ten years of his life, Sir William Blackstone suffered much from illness, brought on by the practice of unseasonable study in early life, and an aversion to exercise, that was still more injurious, in consequence of which he sustained

repeated attacks of gout, added to complaints arising from corpulency and a plethoric habit of body. These symptoms of the breaking up of his constitution gradually assumed a worse complexion, but without preventing his attention to business until Hilary term 1780, when he was seized with his last illness, and died the 14th of February, in the fifty-seventh year of his age. Agreeably to his own express desire, he was buried in a family vault in the church of St. Peters in Wallingford.

Sir William Blackstone was without reproach in private life, and highly exemplary in the domestic and social relations. Punctuality in all his appointments; a regular and systematic attention to his pecuniary affairs and the distribution of his time and labors; great perseverance and industry in every thing which he undertook; plain dealing, openness, and integrity;—these were the prominent traits of his character in affairs of business. Neither in parliament nor at the bar was he particularly distinguished; for in addition to the great diffidence and moderation of his temper, he was wanting in talents as a public speaker; and acquired his judicial standing by other means. Nor was he very eminent as a judge. Probably during the latter period of his life he relaxed somewhat in his exertions; or at least only so far applied himself to the duties of his office as the conscientious performance of them required, without seeking to augment the reputation he had already gained by renewed efforts.

Although not exclusively applicable to the present case, yet as being in itself curious, and expressed with the characteristic sententiousness of Lord Chancellor Bacon's Essays, we copy a passage from a speech of his in the Common Pleas to Sir Richard Hutton, when raised to a place in that court.

'*The Lines of a Good Judge.*

'1. A judge, in maintaining the laws of the realm, should be rather heartstrong than headstrong.

'2. He should draw his learning out of his books, not out of his brains.

'3. He should mix well the freedom of his own opinion with the reverence of the opinions of his fellows.

'4. He should continue the studying of his books, and not spend upon the old stock.

'5. He should fear no man's face, and yet not turn stoutness into bravery.

'6. He should be truly impartial, and not so as men may see affection through fine carriage.

'7. He should be a light to jurors to open their eyes, but not a guide to lead them by the nose.

'8. He should not affect the opinion of pregnancy and expedition, by an impatient and catching hearing of counsellors at the bar.

'9. He should speak with gravity, as one of the sages of the law; and not be talkative, nor with impertinent flying out, to show learning.

'10. His hands, and the hands of those about him, should be clean, and uncorrupt with gifts, from meddling in titles, and from serving of turns, be they of great ones or small ones.

'11. He should contain the jurisdiction of the court within the ancient mete stones, without removing the mark.

'12. Lastly, he should carry such a hand over his ministers and clerks, as that they may rather be in awe of him, than presume upon him.'

To return to Sir William Blackstone: Shortly after his decease, his executor published a collection of adjudged cases compiled by Sir William at various periods, from Michaelmas term 1746 to the end of the same term in 1779. The series of cases is not continuous, being such only as he occasionally took minutes of in the early periods of his attendance at the bar, and afterwards when he resumed it after the delivery of his lectures at Oxford. The Reports were fully prepared for the press by himself, and were published by his direction; but are not in very high repute. In Hassel vs. Simpson,* a case decided in 1784, three years after the publication of the Reports, Lord Mansfield, in reference to a case cited from them, let fall these significant expressions: 'We must not always rely on the words of reports, though under great names: Mr. Justice Blackstone's Reports are not very accurate.' And such we believe is the opinion of other persons of competent judgment and authority, and of the members of the profession generally.

It is principally, therefore, as the author of the Commentaries on the Laws of England, that Blackstone has claims to the respect of posterity. The great merits of this performance are so universally admitted, that it would be equally idle to

* Cowper's Rep. 93, note.

deny, or attempt to prove, its general excellence. Sir William Jones considered it as 'the most correct and beautiful outline that ever was exhibited of any human science;'* and we are not sure that his praise can justly be pronounced extravagant. Mr. Gibbon's exalted estimation of it may be gathered from the circumstance that he incidentally mentions his third perusal of it, and adds, that a copious and critical abstract of it was his first serious production in his native language.† In short, every one who has carefully perused the work must bear witness to the entire truth of Christian's remark, that 'the beautiful and lucid arrangement, the purity of the language, the classical elegance of the quotations and allusions, the clear and intelligible explanation of every subject, must always yield the reader as much pleasure as improvement.'‡ All this commendation is richly deserved by this admirable performance. Still, as remarked by Lord Redesdale, the Commentaries are not a legal authority in the same sense with the judgments of courts, or the writings of Littleton.‖ They are not a book of original disquisition; nor do they comprise an authoritative promulgation of the law. And to quote one more writer on the subject, Mr. Hargrave: 'Notwithstanding the wonderful merit of that great work, the Commentaries, still they are only elements of our law, only written for students, not designed for profound experienced lawyers, such as are either the fixed ornaments of their country, on the elevated seats of justice, or move as shining, though secondary planets, in our juridical world.'§ If any authorities were necessary to show the true character of the Commentaries in reference to their practical application as a law book, these, we presume, are quite sufficient.

As a work of education, then, as an elementary abridgment of the laws of England for the instruction of students of the law, and for the information of the politician and the general scholar, the Commentaries possess incomparable excellence. How astonishing is the change in the means of legal education since the period when they were composed! Notwithstanding the immense chaotic mass of which the English laws consist, including a vast multiplicity of statutes, adjudged cases, treatises, and abridgments of the law, without any code or legis-

* Jones on Bailments.
† Memoirs of himself.
‡ Commentaries, Christian's pref.
‖ 1 Schoales & Lefroy, 327.
§ Law Tracts, p. xlv.

lative institute to guide the student, yet he now possesses in the Commentaries an introduction to this discordant heap of matter, as clear and as intelligible as the Institutes of Justinian, written in a style which may be safely followed as a model of purity and Ciceronian elegance.

Compare this state of things with what is indicated by the melancholy picture given by Spelman of the law in his day. 'Juris nostri cum vestibulum salutassem, reperissem linguam peregrinam, dialectum barbarum, methodum inconcinnam, molem non ingentem solum, sed perpetuis humeris sustinendam, excedit mihi fateor animus.' Instead of the *lingua peregrina*, the barbarous Norman French, which Spelman met in the vestibule of the law, we have the polished beauty of vernacular English in its most classic form. The *methodus inconcinnus* is succeeded by an arrangement as complete as any branch of science is susceptible of receiving. The *ingens moles*, it is true, remains, *perpetuis humeris sustinenda*, and has swollen beyond the bounds of all reasonable anticipation, in the course of the last hundred years. Partly, however, this augmentation has arisen from that very cause, which facilitates the acquisition of a knowledge of the science. And who can regret the production of the excellent abridgments and law treatises, which illustrate every branch of our law, admitting, if you will, the additional labor which they impose upon the studious jurist? Or the production of the Commentaries, the most perfect performance of its class, and the exemplar of juridical composition? Whatever regret we may experience for want of a code of our law, certain it is that the Commentaries of Blackstone, with the digests of Viner, Comyns, Bacon, and Dane, and the many excellent elementary works of a more limited range, afford powerful topics of consolation to them whose business it is to be particularly conversant with jurisprudence. If Dr. Johnson had a right to pride himself upon the completion of his great Dictionary, that singly he had executed a task, which, in other countries, was deemed sufficient to claim the attention of whole academies,—the English may with equal justice point to Blackstone, as having in like manner reduced our law to a systematic and homogeneous whole, and performed that alone, which elsewhere has repeatedly been committed to a selection of learned men.

Some over-fond admirers of the blackletter learning and erudite confusion of the older lawyers,—laudatores tempo-

ris acti,—have seemed to think that the possession of an elementary treatise of so much excellence, tends to make the profession superficial. Never was there a more mistaken notion. To be sure, it does render it easier to acquire an imperfect knowledge of the science, and does introduce into the profession many sciolists and smatterers, who, by virtue of the diligent perusal of Blackstone and a few other agreeable writers of the same class, fancy themselves to be lawyers. But what then? It by no means follows that the whole profession deserves the same reproach. These are persons, who, but for the publication of Blackstone, would never have known any thing of the subject; and would have abandoned the study in despair, if their only introduction to it had still been the crude, undigested, and repulsive labors, although excellent and necessary learning, of Sir Edward Coke. To those, who look only for so much knowledge of the law, as may adorn the higher walks of life, or complete the general education of the gentleman, assuredly it is invaluable. But to the laborious student, the enthusiastic lover of learning, the jurist animated with laudable ambition to deserve, and, deserving, enjoy, the confidence of those who place their fame or fortune in his custody (and it would be absurd to say that men of this stamp are any less numerous now than in the days of Coke, Hale, Holt, or Mansfield,) the utility of Blackstone is merely a question of time; and the Commentaries are of no more injury to him than any other labor-saving machine is to the all-inventive artist. Blackstone is to the student who really loves learning, what the spinning-jenny has been to Arkwright, the steam-engine to Watt and Fulton, the steel-plate to Perkins. It simply enables him to attain a certain point with more facility, and in less time, than he could before; but when he has arrived at that point, it is a vain imagination to suppose him any less capable of pursuing his progress with ardor and advantage. As well might you contend, that the economy of calculation, attained by means of the application of the higher branches of mathematical analysis to physics, tended to curtail the erudition of such men as Newton, La Place, or Bowditch. It is all a mistaken fallacy, which they only fall into, who neglect to appreciate the spirit of the age.

But while bestowing what we consider well-deserved commendation upon the Commentaries, we should not omit to remark upon their faults. Distinguished, as they are, by a more lucid and comprehensive arrangement than the common law

was before generally thought capable of assuming; by copiousness, purity, polish, and elegance of language, which no compositions in our juridical literature, and few in our politest, surpass,—they have a still stronger hold upon the affections of Englishmen in the flattering and patriotic encomiums upon the laws, government, and institutions of England, wherewith they abound. Their celebrity, therefore, is not *solely and exclusively* the fruit of their absolute merit. Nor should this celebrity induce us to conceal the fact, that its admired arrangement is minutely copied from an obscure tract of Sir Matthew Hale's; and that all its general reasonings and principles are but mere amplifications (elegant ones, it is true,) of the political aphorisms—or shall we say epigrams?—of Montesquieu. Besides, its general plan is defective, as Sir William Jones observed, in that it does not embrace certain branches of the law, which, for a century past, have been most prolific in disputed cases, as well as of the last importance, namely, equity, and the law merchant, maritime, and ecclesiastical.

And what is more especially to be noticed, in this connexion, is the circumstance, that Blackstone is universally the warm apologist, or panegyrist rather, of the institutions of his country, however absurd they may happen to be in theory, however deeply and essentially pernicious in practice. The English may be allowed to please themselves with the idea that their government is the freest, and their laws without exception the most judicious, upon earth; and we blame not any reasonable partiality, which Blackstone may exhibit, for the laws and customs wherein he was educated. But we, who live under a better and wiser dispensation, cannot be expected to pass by such a feature in his work without a severe scrutiny; and such a scrutiny will disclose to us one characteristic of the work, which actually implies a degree of disingenuousness and bad faith in the learned author. We allude to the systematic address, with which the theoretical perfection of many parts of the English institutions is ingeniously brought forward, and highly colored in the description, while the total failure of the same things in practice, or even their practical want of existence, is concealed or only darkly hinted at by the legal commentator. In the writer of academical lectures for the instruction of youth, can this be fairly considered as the best of good faith? We think not; and have always regarded the circumstance as a blot on the fair fame of the Commentaries.

Art. VI.—LIVERMORE'S DISSERTATIONS.

Dissertations on the Questions which arise from the Contrariety of the Positive Laws of different States and Nations. By Samuel Livermore, *Counsellor at Law. No. I. Containing two Dissertations.* New Orleans, 1828.

Mr. Livermore is favorably known to the profession as the author of a work on the law of agents and factors. In the dissertations before us he treats another subject of great and increasing interest in the United States, questions which 'arise from the diversity and contrariety of the positive laws of different states and nations.' He proposes to follow these dissertations by others on the same subject. We do not intend to enter into an elaborate discussion of the various questions which he examines, but merely to give a view of the general character and contents of the work.

One of the consequences of our federal form of government is, that different laws are in operation in neighboring territories which are closely connected with one another by the ties of blood and commerce. As this diversity of laws is a necessary consequence of the several states being independent sovereignties, we must be content, whatever may be its effects. It can, however, hardly be disputed, that such a variety in our legal systems is productive of great inconveniences, and tends, in some degree, to check and cramp the intercourse between the states. Creditors are perplexed, from not knowing the rights which they have over the person and property of their debtors. And the different rules of descent, limitations of action, damages on bills of exchange, the different formalities in the acknowledgment of deeds, the different laws which regard the distribution of the effects of deceased persons among their creditors and representatives, are the occasion of perpetual and indescribable embarrassment to those whose rights are affected by them. But this is not all the evil; a further difficulty often arises, which is to ascertain by the laws of what state a contract is to be regulated, the personal capacity of an individual to be ascertained, or the right to property to be governed.

Questions of this kind are by no means new. They have frequently arisen in the different states of Europe, particularly

Germany, France, and the Netherlands. Mr. Livermore says,—

'In these countries it frequently happened, that the inhabitants of one province intermarried with those of another, that the citizens of Rouen, Rennes, or Bordeaux, entered into contracts with citizens of Paris, Amsterdam, or Brussells, that these contracts were sometimes made in the place of residence of one of the parties, and sometimes of neither, and that the same individual was often the proprietor of lands lying under the jurisdiction of different laws, containing opposite dispositions concerning the acquisition and transmission of such property. There consequently arose frequent collisions between the laws of different countries and provinces, and questions were daily presented to jurisconsults and to courts of justice, in which it became necessary to decide; whether the nature of a contract should be determined, by the law of the place in which it was litigated, by the law of the domicil of one or both of the parties, or by the law of the place where the contract was made; whether the capacity to make a testament should be regulated by the law of the testator's domicil, or by that of the situation of his property; whether the form of his testament should be that prescribed by the law of his domicil, of the situation of his property, or of the place in which the testament was made; whether the power of disposing of property, by act *inter vivos* or *mortis causa*, should be regulated by the laws of the owner's domicil, or by those of the situation of his property; whether his estate should be inherited according to the laws of his domicil, or those of the situation; whether the rights of married persons should be determined, by the laws of the place where the marriage was celebrated, by those of the domicil of the husband, or wife, at that time, or by those of a place, to which they might afterwards remove; and an infinite variety of others.

'These questions have been generally acknowledged to be the most extensive, the most interesting, the most delicate, and the most embarrassing and difficult of any in jurisprudence. But vast as may be the ground they cover, it has not been left unexplored. The Roman laws have indeed decided but few cases; yet the jurisconsults of imperial Rome have established principles, which have served as landmarks to direct the operations of their successors.' pp. 3, 4.

In his first dissertation Mr. Livermore gives an account, in chronological order, of the authors of continental Europe who have treated this subject. Among them are the names of some celebrated civilians. After this enumeration he adds:

'From the foregoing cursory view of the works of the principal writers upon these questions, it will be seen, that much greater

labor has been bestowed upon them, than was generally known to the gentlemen of the legal profession in the United States, or in England. It is not surprising, that we find no dissertations, or treatises, upon the personality, or reality of statutes, among the books of the common law of England. Since the union of the Saxon heptarchy under Egbert, that country has never been divided into independent provinces, governed by separate laws. One system has governed the whole; aliens have not been allowed to hold real estate; and intermarriages with foreigners were quite unfrequent. Questions arising from the collision of opposite laws were therefore rarely presented to the courts of that nation, and did not furnish subjects for discussion. Towards the close of the last century, some few questions, respecting the operation of the laws of different countries upon some contracts, have arisen. These have been decided without much investigation, and principally upon the authority of some rules laid down by Ulricus Huberus, a jurisconsult of Friezland. The same observation applies to the courts of the United States; in which it seems to have been the common opinion, that no other person than this writer had ever touched this matter. This author, in his *Prælectiones juris civilis*, has devoted nine pages to this subject, and has laid down some rules, which have certainly not been generally admitted by civilians. He refers to no other authors, except Rodenburgh and John à Sandé; and indeed I should hardly think that he had read the work of Rodenburgh. On the other hand, I have not found the observations of Huberus, *de conflictu legum*, referred to by any writer of a later period, with one exception of Hertius, who cites his general rules, but not with approbation.' pp. 12, 13.

We think that Mr. Livermore, after making these charges against the profession, should have mentioned some of the exceptions to his remarks. In the very case of Harvey v. Richards,* which he speaks of afterwards in high terms, to mention no others, Judge Story in deciding some questions arising out of the conflict of the laws of different countries, cites passages from several of the civil law writers who are enumerated by Mr. Livermore.

The first dissertation concludes as follows.

'If I do not mistake the matter, it is particularly important, in this country, to have established some fixed and correct principles for the determination of the questions, which may be expected to arise from the various opposing laws of the several states. The common law of England is indeed the common law of nearly all the states; but as each has an independent legisla-

* 1 Mason, 408 & 429.

ture, uniformity of legislation cannot be expected. Further than this, we have one state, of great and increasing importance, in which we find an entire system of laws, of different origin and different nature, from the laws of the other states. Take as instances, the rights of married persons, successions or inheritances, and the power of disposing by will. These are entirely differently regulated, by the laws of Louisiana, and by those of the other states. So also the rules which govern the contract of sale in Louisiana, are, in some respects, essentially different from those established by the laws of other states. It seems therefore to be important, that there should be some settled principles, and that these should be uniformly observed. No such uniformity exists at present; and unless I am greatly deceived we have no cases decided by our various courts, in which we find so much error and confusion, as in those which involve the conflicting laws of different states. It has therefore occurred to me, that my time would not be uselessly employed, in presenting to the profession a view of the principles maintained by the great jurisconsults of Europe, and also stating such considerations, as my own reflections, in the course of a study of these principles, have suggested to me. I may fail in the attempt to establish true and certain principles, for the decision of the various difficult questions growing out of the contrariety of laws; and yet my labor may not have been in vain, as it may tend to excite a spirit of inquiry into a subject but little understood in this country, and may lead to discussions, by others more capable of accomplishing the object desired.' pp. 19, 20.

The second dissertation is entitled, 'Of personal and real statutes, laws and customs, and of the general principles, which serve to distinguish them.' He adds in a note, the following explanation of the word 'statute.'

'The jurisconsults of the continent of Europe use the word statute, to signify the particular municipal law of any state, by way of distinction from the Roman imperial law, which is by them generally styled the common law. In England, the word denotes an Act of Parliament, as distinguished from the common law of England. *Voet, De Statutis*, sec. 4, chap. 1. defines a statute to be *jus particulare, ab alio legislatore quam imperatore constitutum.*' p. 21.

A large part of the second dissertation is occupied by an examination of an opinion thrown out by the Supreme Court of Louisiana, which he thus states:

'Another case, supposed by the same court, is that of a person, who is minor by the laws of his domicil, but major by the laws

of Louisiana, in which state he makes a contract. The court asks: "Would it be permitted that he should in our courts, and to the demand of one of our citizens, plead as a protection against his engagements the laws of a foreign country, of which the people of Louisiana had no knowledge; and that we would tell them that ignorance of foreign laws in relation to a contract made here, was to prevent them enforcing it, though the agreement was binding by those of their own state? Most assuredly we would not."* pp. 32, 33.

This opinion Mr. Livermore controverts with great force of argument and array of authorities. If judges were amenable to criticism, we should say that the English of the passage cited by Mr. Livermore is as questionable as the law. It would be difficult, indeed, to find any where a more obscure or confused sentence.

After critically examining the opinion of various authors with regard to what constitutes the difference between *personal* and *real* statutes, and their effects, he gives his own views on the subject.

'But the result of my system is, that those statutes, which determine the nature and qualities of things, which subject immoveables to certain charges, which dispose directly of immoveables independently of the agency of man, and which regulate, limit, and restrict, the power of the owner, to alienate his immoveable property, or to dispose of it by testament, are real.†

'In the class of personal statutes, I place all those, which fix the general state and condition of persons, which determine their capacity for the performance of personal acts, which regard their personal rights and obligations, and which regulate those things which are attached to the person.

'In the number of personal statutes I put those, which concern the disposition of moveables. These have no fixed situation, but are attached to the person of the owner. From their capacity of being transported from place to place they are styled moveable; and from the circumstance of their destination being always subject to the will of the owner of them, they are considered, by a sort of fiction, to be adherent to his person, and to partake of the same nature with it. They are therefore governed by the same laws, which govern the person, that is to say, by the laws of their owner's domicil. Accordingly, D'Argentré‡, Burgundus,|| and

* Saul v. His Creditors.

† In his quæ concernunt rem, vel onus rei, debet inspici consuetudo loci ubi sita res est. Dumoulin, in antiq. cons. Paris, tit. de fiefs, §. 12, gl. 7, n. 37.

‡ In antiq. cons. Brit. art. 218, gl. 6, n. 3.

|| Tract. 1, n. 2.

Bouhier,* consider these laws to be personal; and, by the common law of England, such property is designated as personal property.' pp. 127, 128.

Mr. Livermore afterwards considers the effect of a sale made in one state, of personal property which is in another, where the property is attached by a creditor of the vendor before possession is taken by the vendee, where the taking possession by the vendee is not necessary in order to transfer the property by the law of the state in which the sale is made, but is necessary in that in which the property lies. He expresses an opinion in favor of the vendee against the attaching creditor, contrary to decisions of the Supreme Court of Louisiana. He rests his opinion on the ground that the effect of the sale must be determined by the law of the domicil of the vendor, and not that of the place where the property is situated. We should think it more correct to say that the effect of the sale must depend on the law of *the place where the contract is made.*

'By the common law of England, the property passes to the vendee, by the contract of sale, and before any delivery be made. The retaining of possession, by the vendor, is considered evidence of fraud, and will avoid the sale, as against creditors and subsequent purchasers. But to this rule there is an exception, where, at the time of the sale, the property is abroad and incapable of delivery; for then the possession of the vendor is considered constructively as the possession of his vendee, who is only bound to use reasonable diligence to obtain actual possession. By the Roman law, on the contrary, the property was alone transferred by delivery; and although, as between the seller and purchaser, a different rule is established by our code, yet as far as the interests of creditors and subsequent purchasers are concerned, the old rule remains in force.' pp. 136, 137.

In Massachusetts a decision similar to those in Louisiana has been made,† to which Mr. Livermore does not refer. An assignment was made by a debtor at Philadelphia, of goods at Boston, to a creditor, as security for a debt; a few hours after, and before it was possible for the creditor to obtain possession, the same goods were attached at Boston by another creditor. It was held that the attachment should hold the goods in preference to the assignment. This decision, however, was not made on the ground that the law of sale in Massachusetts was different from, and would bind the goods in preference to, that of

* Chap. 25, n. 2.

† Lanfear v. Sumner, 17 Mass. R. 110.

Pennsylvania; but on the ground that at common law, though the assignment, without possession taken, might transfer the property as between the parties, it could not have that effect with regard to a subsequent bona fide purchaser for a valuable consideration. Jackson J. in giving the opinion of the court, says,—'The general rule is perfectly well established, that the delivery of possession is necessary in a conveyance of personal chattels, as against every one but the vendor. Where the same goods are sold to two different persons by conveyances equally valid, he who first lawfully acquires the possession will hold against the other.'*

In the latter part of his dissertation, Mr. Livermore examines a question which is very nearly connected with the preceding, whether an assignment by a bankrupt, under a bankrupt law of one country, will pass the bankrupt's effects in another, even against a subsequent attaching creditor, an inhabitant of the latter country. The English authorities are clear in giving effect to these assignments. Chancellor Kent in New York also decided a case that came before him, in favor of the assignees. But 'the weight of American authority,' as Mr. Livermore remarks, 'is entirely against his opinion.' This is candidly admitted by Chancellor Kent, who says, in a passage cited by Mr. Livermore;—'It may now be considered as part of the settled jurisprudence of this country, that a prior assignment in bankruptcy, under a foreign law, will not be permitted to prevail against a subsequent attachment by an *American* creditor of the bankrupt's effects found here; and that our courts will not subject our citizens to the inconvenience of seeking their dividends abroad, when they have the means to satisfy them under their own control.'†

Mr. Livermore expresses himself in favor of the doctrine of the English courts. A recent decision, however, in Massa-

* It would not, perhaps, be proper in this connexion to examine the doctrine laid down by the court in Lanfear v. Sumner, though it has been sometimes questioned. Those who are interested in the discussion will find the distinction between the common law and the civil law on the subject of sales, examined in the most thorough and satisfactory manner by Mr. Brown in the introduction to his Treatise on the Law of Sale. He lays it down as a general principle that at common law the property in goods passes by the completion of the contract of sale without delivery. He also states the exceptions to the rule; none of which apply to the case of a fair assignment of property by a debtor to one creditor to secure a debt, and a subsequent attachment of the same property by another creditor before it is possible for the first to take possession.

† Commentaries on American Law, vol. ii. p. 330.

chusetts, in the case of Blake v. Williams, not yet reported, in favor of the attaching creditor against the assignees, made after a very elaborate argument at the bar, throws an additional weight into the scale of American authorities.

The following remarks, though the doctrine which they contain is not new, are deserving of great consideration:

'It having been at last conceded, that foreign laws must be in some instances respected, it has been fashionable, in this country and in England, to impute this to the comity of nations; a phrase, which is grating to the ear, when it proceeds from a court of justice. Comity between nations is to be exercised by those who administer the supreme power. The duty of judges is to administer justice according to law, and to decide between parties litigant according to their rights. When an action is brought upon a foreign contract, it is not from comity, that they receive evidence of the laws of the country where such contract was made, but in order to ascertain in what manner and to what extent the parties have obligated themselves. Comity implies a right to reject; and the consequence of such rejection would probably be a judgment ordering a party to do that, which he had never obligated himself to do. This phrase has not always been harmless in its effects, for I have not unfrequently seen it inspire judges with so great confidence in their own authority, that arrogating to themselves sovereign power, they have disregarded the foreign law, which ought to have governed their decision, because of some fancied inconvenience, which might result to the citizens of their state.

'Even with sovereigns it is not so clear, that the recognition of foreign laws is merely a matter of comity. They have the power to forbid the admission of the foreign law; but justice would then require, that they should forbid the entertaining of any suit upon the foreign contract. The people of an independent nation, may, if they please, surround their territory with an impassable wall, and totally exclude all intercourse with other nations. But if a desire to promote their own interest induces them to cultivate an intercourse with other people, they must necessarily adopt such principles, as a sense of common utility and of justice will inspire. They cannot pretend to legislate upon the state and condition, the capacity or incapacity, of persons not subject to them. They may refuse to admit such persons to enter their territory; but if they do receive them, they are bound to receive them with that character, which has been imprinted on them, by the laws of the country, to which they are subject. It has not been from comity, but from a sense of mutual utility, that nations have admitted the extension of personal statutes. It has arisen from a sort

of necessity, and from a sense of the inconveniences which would result from a contrary doctrine, by which the state and condition of a man, his capacity or incapacity, would change with every change of abode, for however short a time or transitory purpose. It is upon these considerations, that the jurists of the continent of Europe, where these questions have most frequently arisen, have admitted the extension of personal statutes.' pp. 26—28.

We entirely agree with Mr. Livermore in these positions. The notion that a judge of one of our courts should, out of civility to the king of Portugal or Sweden, compel a man to pay a sum of money, execute a contract, or go to prison, is absurd on the face of it. We give effect to a foreign law because our own laws adopt and ratify it in the particular case. We might as well pretend to have adopted a part of the civil law, out of respect to the memory of Justinian, as to say that we are influenced by a *comity* to the French government, in applying the laws of France to the interpretation of a contract made there. The word *comity* ought to be expunged from the legal phraseology on this subject, and the language used should be accommodated to the truth, or what ought to be the truth of the case, namely, that foreign laws are respected and adopted by our courts, because they do in effect, in certain cases, become, for the occasion, a part of our own laws. Whether they are to be applied in a particular case, or not, is a question of principle, and not to be decided by the arbitrary discretion of the court.

Our readers will perceive, from our cursory notice of this work of Mr. Livermore, that it embraces questions of great interest to the profession, admitting of much learned investigation and profound and elaborate discussion; and it is the more meritorious in Mr. Livermore to have devoted his labors to this subject, as it is in this country, as yet, in a great measure an unexplored, and at the same time a very extensive field. He has brought to the work a great deal of learning which will be new to most of his readers, and has discussed the questions with skill, acuteness, fairness, and sufficient independence. It seems to us, however, that his work is defective in arrangement, and that the divisions are not so clear and complete, and the distinction of one topic from another, not so definitely marked, as they should have been. In some instances the reader is hurried into the midst of a new subject before he is apprized of the transition.

Art. VII.—TESTIMONY OF QUAKERS.

No branch of law presents a wider field for moral and philosophical disquisition than the title of evidence. It involves fewer subtleties and technical peculiarities than other parts of the legal system, and may be considered a fit study for the general student, who has no intention of engaging in the practice of law. It may be strictly considered as coming within the department of moral and intellectual philosophy. Glassford's treatise on evidence, is as properly a philosophical work, as Stuart on the philosophy of the mind. This and every other treatise on the same subject, has for its object to explore the grounds of belief. A question or proposition being stated, as, for example, whether such a man is guilty of treason, murder, or larceny, whether such another committed an assault, or incurred a debt—the inquiry and logical process is the same, as in an experiment in chemistry, or magnetism, or any other chain of inductive reasoning, the object of which is to determine the truth of a given proposition.

In order to answer this question—to determine whether the given proposition, to wit, the guilt, the tort, or the debt, is established,—we must make a philosophical analysis of all the circumstances and facts, discriminating those tending to prove the affirmative, from those having an opposite bearing, and having selected those which are relevant to the question, we next consider their weight and force, as well those opposed to, as those corroborating each other; and if, in this process, we arrive at a moderate preponderance merely,—a faint probability,—it does not constitute a legal demonstration; the result is not the satisfactory conviction of the mind which is recognised by the law as a reasonable and sufficient ground of a judgment. To frame all the rules for the admission of testimony, and settle the principles by which its relevancy is to be determined, and its force estimated, is, then, a work of profound intellectual science, requiring not only a knowledge of human nature in the abstract; of the mind, the passions, prejudices, habits, and foibles of man as a thinking, believing, and acting being;—but also of all the social relations, and conventional rules and institutions, modes of acting, thinking, and speaking, prevalent among the parties and in the society to

which the transaction, making the subject of investigation, has reference. The science of evidence is, in short, the science of human nature as it is constituted by the Deity, and modified by education, the laws, social habitudes, and all those moral and external influences to which the individual, in any particular society, is subjected.

It is not at all surprising that so comprehensive and abstruse a science should not be every where well understood, though it must, of necessity, be every where acted upon and practically applied, and what is more, the safety and wellbeing of every member of every community in the world, depends upon the knowledge and skill with which the principles of this science are applied to his particular case. To illustrate how improbable it is that the principles of this science should be philosophically established and skilfully applied in every community, and we may say, indeed, in any community, let us suppose that the principles of any other science, even less difficult, as that of mechanics, were to be prescribed and applied by the intervention of the same machinery, and the cooperation of the same agents, namely, the legislature, the judges, and the jury, would not, think you, the state of this science be very rude, and the arts depending upon it, but very imperfectly practised? The science of human testimony—of the grounds of conviction and belief—and the application of its principles to the determination of the questions affecting the lives, liberty, and property of men, is certainly not less difficult, and yet it is a science which can be cultivated and improved, in respect to the legal administration, and its practical application determined, only by the combined knowledge, skill, and assent of a legislative body, a court, and a jury. It is a science of which the progress must necessarily be slow, and its practical application always imperfect. We say *always* imperfect, for changes are always taking place in the opinions, habits, and social relations of men, and require corresponding changes in the rules of testimony, since the species of testimony which could not be safely admitted or would not be a satisfactory ground of conviction and belief, in one condition of a community, become justly entitled to admission and credit at another period, and these changes will always be followed *magno intervallo*, if at all, by corresponding modifications in the rules of evidence.

The slow progress of improvement, and the tardy applica-

tion of a remedy, even where the defect is palpable, well known, and generally acknowledged, is illustrated by the subject matter of a recent act of the British parliament, a notice of which is our principal object in the present article. By the statute in question, called Lord Lansdowne's act, being 22 Geo. IV. c. 32, *the affirmation of a Quaker is made admissible in all cases, as well criminal as civil.*

The sect of Quakers, as is well known, took its rise in England, about 1650, when George Fox, an apprentice to a shoemaker and dealer in cattle, of Nottingham, began to promulgate his new doctrines, to which William Penn became a convert some fourteen or fifteen years afterwards. Until the revolution in 1688, Quakers, who refused to take a legal oath in the usual form, were treated as obstinate offenders, and subject to penalties.

The first statute on this subject, 13 & 14 Car. II. c. 1. s. 1, was enacted in 1661, and runs thus:—'Whereas of late times certain persons under the name of Quakers have taken up and maintained sundry dangerous opinions and tenets, and among others, that the taking of an oath in any case whatsoever is unlawful, and contrary to the word of God: and the said persons do daily refuse to take an oath, although lawfully tendered, whereby it often happens that the truth is wholly suppressed, and the administration of justice much obstructed,' &c. 'Therefore, for the redressing,' &c. be it enacted, 'that if any person or persons who maintain that the taking of an oath is unlawful and contrary to the word of God, from and after the 24th day of March, in the present year, 1661, shall, where by the laws of the realm, he or she shall be bound to take the same, wilfully and obstinately refuse and forbear taking the same, or go about to maintain and defend that taking an oath is unlawful, the party so offending shall lose and forfeit, for the first offence, such sum as shall be imposed, not exceeding five pounds; for the second, not exceeding ten pounds; and for want of payment, such parties shall, for the first offence, be committed to the common jail, or house of correction, for three months; and for the second, during six months, and there be kept to hard labor.'

The Quakers suffered much vexation and persecution under this law. 'Some of the judges,' says Clarkson, in his Portraiture of Quakerism, 'indulged a rancor against them unworthy of their high office, which prescribed justice impartially to all.

For when they could not convict them of the offences laid to their charge,' such, for instance, as attending unlawful meetings, 'they tendered to them the oath of allegiance, knowing that they would not take it, and that a confiscation of their property and imprisonment would ensue.'

The whimsical Quaker custom of wearing the hat at all times, gave them some trouble, and caused them some persecution, at first, in the courts of justice. Clarkson says, that when George Fox visited Cromwell, he never pulled off his hat, and the Protector was not angry with him. We have somewhere read an account of Penn's being jocosely reproved for this peculiarity by Charles II. who, observing that Penn sturdily wore his hat in his presence, took off his own. 'Why dost thou uncover thy head, Charles?' said Penn. 'It is not customary here for more than one person to remain covered,' the king replied. The late king George is said to have been very indulgent to this singularity of the Quakers. But the judges seem, at first, to have been a little intolerant of this point of conscience, of which the following instance is related. George Fox and other Quakers being brought out of Lamerston jail to be tried by Chief Justice Glynn, came into court with their hats on. The judge asked them the reason of this, but they remained silent. He then told them that the court ordered them to pull off their hats, to which Fox replied by asking him, 'Where did ever any magistrate, king, or judge, from Moses to Daniel, command any to pull off their hats, when they came before them, either amongst the Jews, who were God's people, or amongst the heathen? And if the law of God doth command any such thing, show me that law, either written or printed.' The Chief Justice upon this grew angry, and replied that he did not carry his law books upon his back. But George still persisted, and said, 'show me where it is written in any statute-book, that I may read it.' To this the judge only made a practical reply by ordering him back to prison, and to be shut up with thieves. He, however, in a short time ordered him up again, and put to him the following question: 'Come,' said he, 'when had they hats from Moses to Daniel? come, answer me!' George replied that he might read, in the third chapter of Daniel, that the children were sent into the fiery furnace by Nebuchadnezzar's order, with their coats, their hose, and their hats. This, says Clarkson, stopped the judge from any further comment.

These hardships were not removed until after the revolution of 1688, when by 1 W. & M. c. 18, s. 13, called the *Toleration Act*, the Quakers were allowed to make a *declaration* of their fidelity to the state, instead of taking the oath of allegiance in the usual form; and also exempted from all pains and penalties, on their making certain other declarations there prescribed. This was one step taken in adapting the law to a change which had occurred in the religious faith and prejudices of a part of the community. But this step was prompted rather by the exigencies of the monarch and the government, than by any broad and general view of the subject. The new monarchs and their adherents were naturally disposed to attract and fix the support and allegiance of their people. Had they been acting, like the judges of a court, between third parties, without any stake of their own, or had thus felt themselves to be sufficiently easy and well established in power to prescribe the forms and terms of allegiance, according to their own prejudices, they might have rigidly adhered to the opinion that a declaration of loyalty ought to be fortified by the strongest asseverations and the most solemn invocations of the vengeance of God in case of its being insincere and false. And they might have continued to inflict upon those refusing the oath in the usual form, all the pains and penalties so liberally accumulated upon non-jurors. There is no saying what strong irrefragable arguments might be urged in support of such a position. But as they were desirous of obtaining the declarations of allegiance, they were naturally solicitous to remove, rather than to aggravate, the obstacles in the way of making them. Accordingly the disability to take the oath, under which the Quakers labored in consequence of their religious prejudices, was immediately removed by accommodating the form of the declaration to their conscientious scruples. It seems singular, however, that the consciences of any sect should make so subtile a distinction as to make the declaration prescribed by the toleration act without scruple, and yet be horror-struck by the usual form of swearing, since the declaration, abjuration, &c. required by 1 W. & M. c. 18, s. 13, is substantially an oath, though the word *swear* is not used; the form being, 'I A. B. do sincerely promise and solemnly declare before God and the world,' &c., which corresponds to the definition of an oath given by Heineccius and commonly adopted, viz. *Religiosa adseveratio per invocationem Dei tan-*

quam vindicis, si juratus sciens fefellerit, an invocation of the vengeance of Deity upon the witness, if he does not declare the truth according to his own knowledge. This invocation is not made literally and in direct terms in the usual form of swearing, but is understood to be implied in the expression, 'so help me,' &c. The transition from this measure to a corresponding modification of the form of solemnizing and sanctioning a statement or declaration in all other cases where an oath is usually required, seems to be so natural, and its expediency so obvious, that it might be expected to take place of course on the very first occasion of public attention being called to the subject; and yet it has required the long period of one hundred and forty years completely to make this transition. The next step, in making it, was taken eight years after the toleration act, in 1696, by 7 & 8 W. III. c. 34, which runs as follows:

'Whereas divers dissenters, commonly called Quakers, refusing to take an oath in courts of justice and other places, are frequently imprisoned and their estates sequestered, by process of contempt issuing out of such courts, to the ruin of themselves and families: For remedy thereof, be it enacted, that every Quaker who shall be required upon any lawful occasion to take an oath, shall, instead of the usual form, be permitted to make solemn affirmation in the words following: "I A. B. do declare, in presence of Almighty God, the witness of the truth of what I say:" Provided, that no Quaker shall, by virtue of this act, be qualified or permitted to give evidence in any criminal case, or serve on any juries, or bear any office or place of profit in the government.'

The form of affirmation prescribed by this statute varies a little from that of the declaration permitted by the toleration act; but still it retains, like that, the essential characteristics of an oath; it is calling God to witness. It is worthy of remark that this law, which breathes a spirit of toleration, and expresses a concern and compassion for the Quakers, should leave them exposed, in criminal cases, to all the penalties and hardships under which they had previously labored in *all* cases where they were called upon to give testimony in courts of justice.

The next statute on the subject is that of 8 Geo. I. c. 6 (1721), which runs thus:—'Whereas the inconveniences to the said people called Quakers and their families, and to others

requiring their testimony, in many cases are not sufficiently avoided, by reason of the difficulty among said Quakers relating to the forms of declaration, affirmation, and abjuration before mentioned, as the same are now prescribed; and whereas it is evident that the said people called Quakers have not abused the liberty and indulgence allowed to them by law, and they have given testimony of their fidelity and affection to his majesty and the settlement of the crown in the protestant line, and it is reasonable to give them further relief, &c.' and then proceeds to prescribe the following form of affirmation, which is, we presume, the same now in use, viz. 'I, A. B. do solemnly, sincerely, and truly declare and affirm.'

Thus stood the law in England until the recent act of parliament, whereby Quakers are permitted to give testimony by affirmation, in criminal prosecutions. These provisions are limited to the sect of Quakers, and not extended to the cases of all persons conscientiously scrupulous of taking an oath in the usual form.

The testimony of Quakers is universally admitted in the United States on solemn affirmation, without any invocation of the Deity, as well in criminal as civil suits, and the constitutions and laws generally provide for a similar form in declarations of allegiance and of fidelity in discharging the duties of any office. This sect seems no where in the country to have been greater objects of antipathy than in Massachusetts. As early as 1656, and accordingly very soon after the origin of the sect, a colony law recites, that 'whereas there is a cursed sect of heretics, lately risen up in the world, commonly called Quakers, who take upon themselves to be immediately sent of God, and infallibly assisted by the spirit, to speak and write blasphemous opinions, despising government and the order of God in church and commonwealth, speaking evil of dignities, reproaching and reviling magistrates and ministers, seeking to turn the people from the faith, and gain proselytes to their pernicious ways; the court, considering the premises, order,' that any master of a vessel bringing any one of the sect into the colony, shall forfeit a hundred pounds, besides giving bonds to carry him out of the jurisdiction.

No provision was as yet thought necessary in relation to their giving testimony, for they were banished the colony, and in the act of 1661, the General Court says,—'This court being desirous to try all means, *with as much lenity as may con-*

sist with our safety, to prevent the intrusion of Quakers, who, besides their blasphemous doctrines, do, like rogues and vagabonds, come in upon us, have ordered that every such vagabond Quaker shall be apprehended, and conveyed before the next magistrate, and not giving civil respect by the usual gestures thereof, or by any other way or means manifesting himself to be a Quaker, shall be stripped naked from the middle upwards, tied to a cart's tail and whipped through the town,' and so from town to town to the limits of the jurisdiction. Divers laws of similar spirit were enacted from 1656 to 1663.

The first law that we notice in favor, or at all tolerant of the Quakers, was not passed until about a hundred years afterwards, viz. in 1757, by which they were exempted from ministerial taxes.

The next year a law was passed providing 'that every Quaker who should be required upon any lawful occasion to take an oath, should, instead of the usual form, be permitted to make affirmation.' Similar provisions are to be found among the early laws of all the states, the statutes of which we have had an opportunity to examine. We do not find any where among them the distinction between civil and criminal suits, so long kept up in England; the provisions of these laws generally extend to *all lawful occasions of taking an oath.* There is, however, another distinction among these laws, of some importance; those, for instance, of New Hampshire, Vermont, New York, Pennsylvania, Virginia, and South Carolina, provide that any person *having conscientious scruples* on the subject of taking an oath, or, as the Pennsylvania law has it, 'who for conscience sake cannot take an oath,' are permitted to affirm, either in a form prescribed by these statutes respectively, or as in Virginia, according to 'the formula observed by the religious society of which he professes to be a member,' but until recently the law of Massachusetts on this subject was limited in its provisions to Quakers, and that of Maryland, being at first limited to this sect, was afterwards extended to Nicolites or New Quakers, Tunkers, and Menonites. The laws of the respective states govern the Circuit Courts of the United States in relation to the sanction of testimony, and, accordingly, in the case of a witness produced in the Circuit Court in the district of Massachusetts, some twelve years ago, who refused to be sworn on the ground of his conscientious scruples, the court, understanding that he was not of the Quaker

sect, ordered him to be committed for contempt. It is not improbable, however, that the court paid less respect to the alleged scruples of the witness, from the known circumstance that he was not restrained 'for conscience sake' from adopting the usual form of swearing 'on occasions which would not be considered, under the statutes, as any lawful occasions of taking an oath.' The laws of that state are, however, now altered so as to conform to those of most, at least, of the others, and extend the permission to affirm, to all persons having scruples of conscience in this respect.

Art. VIII.—MEMOIR OF JUDGE TRIMBLE.

For the following outline of the life and character of the late Judge Trimble, we are indebted to the kindness of an eminent judicial character of Kentucky, who was his schoolfellow and afterwards his neighbor, and has been his intimate friend for a long course of years.

Robert Trimble was the son of William Trimble; and he was born in Augusta County, Virginia, about the year 1777.

His father was honest, respectable, and pious; but never wealthy. He was one of those hardy and enterprising adventurers, who first settled in Kentucky. His object, like that of others, was to improve his fortune by obtaining a grant of land. Before 1779 no titles to land could be acquired in Kentucky, except there were military surveys made under the royal government; and the issuing of patents was suspended by the revolution, under an entire uncertainty as to what the new government might do with these claims,—excepting also what was called Savage's grant, which had been surveyed by General Washington, and protected by the crown. This grant extends over the Big Sandy River, into the then district, now state of Kentucky. Previous to 1779 there were no settlements of farmers in Kentucky, but only a few garrisons, or rather little villages, which were called stations. They were composed of a number of cabins or cottages, in which several families resided and associated for greater security and more ready defence against the savages. In that year the legislature of Virginia not only confirmed the royal military surveys, and directed grants to issue, but provided that every

previous adventurer who had actually settled himself in Kentucky on a tract of land selected by him, or resided one year in the country, or raised a crop of corn thereon, should be entitled to four hundred acres of land, free of any cost or expense, except the surveyor's and register's fees, and also to the right of pre-emption in one thousand acres adjoining. A court of commissioners was erected for the purpose of adjudicating upon and granting these claims. This court sat in the fall of 1779 and spring of 1780, and granted among others a certificate of title in one of these settlements and pre-emptions to William Trimble, as appeared by the records of the court. It follows, therefore, that he must have resided in Kentucky previously to that year. The land was then worth only a trifle; and many such claims were sold or exchanged for a horse or a good rifle, then a necessary article to an inhabitant of Kentucky.

Mr. Trimble being unable to advance the small amount required to pay the fees of the surveyor, chain-carriers, and register, in order to complete the title, adopted an expedient then very common. He gave one half of the whole grant, or seven hundred acres of the land, to a person who undertook to bear all the expenses of the whole claim. To the seven hundred acres saved to himself he soon after removed his family, among whom was his son Robert. At this place he resided till his death, which took place ten or twelve years ago.

To those who have never experienced the wants and hardships of a new settlement, especially in Kentucky, it is not easy to give an adequate idea of the dangers encountered and privations endured by William Trimble and his associate settlers. There was no commerce, and there were not inhabitants enough to carry it on, even if there had been an open market. There was no circulating medium, except the small sums of money which the new comers brought with them. Cattle, hogs, or sheep could not be raised in sufficient number to furnish food or sustenance, on account of the wild beasts. Mr. Trimble and others in his situation were obliged to content themselves with cultivating a small portion of land to raise bread stuffs, and trust to their success in the chase to supply them with deer, elk, or buffalo, for meat. The luxuries of life were entirely beyond their reach. The settlers had no means of improving their fortunes, except by the increase of the value of their lands. But this was slow, and almost imper-

ceptible. To add to the hardship of this situation, they were constantly in danger from the savages, by whom their horses were often stolen, and whole families cruelly murdered. They lived in a state of continual danger, and were obliged by turns to engage in the chase, the scout, and the campaign. This state of things continued, to a greater or less extent, especially in that part of the country where Mr. Trimble resided, until 1794; when the successful campaign, and victorious battle of General Wayne near the lakes, freed the country from further danger.

Such was the situation in which Robert Trimble lived during the first years of his life; a situation well calculated to give independence and hardihood to his character. As he grew up, he became accustomed to engage in hunting game and scouting in search of the Indians. In his youth he was active and athletic beyond his years; and he exhibited both bodily and mental activity above his fellows, and was recognised among them as a leader.

As he grew up he became desirous of obtaining a better education than was afforded by the common schools of Kentucky. In order to acquire the pecuniary means which would be required for a more liberal education, he set up an English school. He succeeded to his wishes, and in the spring of 1795 he found himself able to enter the Bourbon Academy, situated in Caneridge, Bourbon County.* This was then the most flourishing institution of the kind in Kentucky. He continued at this place, making rapid progress in his studies, until the close of the year 1796, when his literary pursuits were interrupted for two or three months by a severe attack of bilious fever. After this he was compelled again to resort to his former employment of teaching, for a short period, in order to recruit his almost exhausted means.

Bourbon Academy began about this time to decline, in consequence of the loss of its principal, and young Trimble quitted this seminary, and entered himself a student in the Kentucky Academy, a chartered institution, reared and supported by the patronage and united efforts of the presbyterian church. It was situated at a place in Woodford county, called Pisgah, then the best literary institution in the state, being the same

* This place was so named from a cane-brake, as it was then called, by which it was surrounded. This consisted of an unusual quantity of cane growing together of more than twelve feet in height.

which has since been united with the Transylvania Seminary to form the present Transylvania University. Here he completed his academical course, and on leaving the school he engaged in the study of the law.

In this place an observation or two should not be omitted. Let it not be supposed that his education must have been exceedingly defective because it was acquired in Kentucky at this early period of its history, and in seminaries so little known abroad. The superintendants of the schools were men of science and learning, and able and skilful instructers, as has been fully proved by the subsequent character and history of those who there passed their youth and acquired their early education. Many of them have turned out to be men who have given powerful aid in forming the character of the state, and held conspicuous places in its councils, as well as in those of the nation, and distinguished themselves in the most important offices and professions, both in Kentucky and other states. It is true the edifices in which they were taught were log-buildings, with chimneys of wood or clay, of which the names were scarcely known beyond the neighboring districts, instead of spacious halls, surmounted with domes and spires, magnificent in architectural splendor, and consecrated by a venerable antiquity. The students were not decorated or distinguished as a class by any peculiar dress or badges; they received no degrees or diplomas, and could produce no other academical testimonials than their intellectual acquirements. Without the classic names or distinctions of learning and science, they progressed steadily from one branch to another, and acquired the substantial and useful parts of education with very little of its forms. Such was the academical course of Robert Trimble.

Immediately after completing this course of preparatory studies, he commenced reading law under the direction of the late George Nicholas, Esq. whose death put an end to that relation long before his pupil had finished his professional education. He completed his course of legal reading under the tuition of the Hon. James Brown, now our resident minister in France. In 1800 he commenced practice at Paris, in Bourbon county, where he continued to reside during the remainder of his life. The assiduity with which he applied himself to the study and business of his profession, procured him an early and a rapid success. Shortly after establishing him-

self at this place, he married, and is now survived by his widow and a numerous family of children.

In 1802 he was elected a member of the house of representatives of Kentucky, and served during the time for which he had been chosen, but declined being again a candidate; not from want of popularity or the confidence of his fellow-citizens, but because he thought it did not comport with his narrow circumstances and the prospects of an increasing family, to abstract any portion of his time from his professional pursuits, for the purpose of devoting it to legislative business. In his practice at the bar, his great candor and fairness secured him the attentive ear of the court; and his sound judgment, which was his most distinguishing characteristic, generally saved his client from being deceived or disappointed. His arguments in court, though less brilliant than those of some others, were sound, logical, forcible, and interesting. As early as 1807 he had acquired so great a reputation in his profession as to be commissioned by Governor Greenup a Judge of the Supreme Court of the state, in which office he served for nearly two years. But the state was at that time too penurious to offer a salary sufficient to secure the talents of its ablest men upon that bench, and Judge Trimble soon found that his compensation afforded him but scanty means of supporting his increasing family, and much less of making any addition to his provision for the future. He accordingly resigned his seat on the bench, and resumed practice.

In 1810 the same reasons for which he had quitted the bench induced him to decline the commission of Chief Justice of Kentucky, which was offered him by Governor Scott. His success in practice still increased, and he was engaged in every important cause in the courts where he appeared. In 1813 he was again offered the commission of a Judge of the Supreme Court by Governor Shelby, and again declined the appointment, for the same reasons that had previously determined him. He continued his practice with unabated assiduity and undiminished success until 1817, when he was commissioned, in January, by President Madison, District Judge of the United States, in the place of Judge Innis, deceased. Although this office was not lucrative, yet as he began to feel the want of some relaxation from his long continued and arduous labors at the bar, he accepted the appointment, and continued to discharge its duties with great credit to himself, and

usefulness to the country, and to the entire satisfaction of the bar, until May 1826, when he was commissioned by President Adams as one of the Associate Justices of the Supreme Court of the United States.

During the time of his having a seat on the bench of the Supreme Court of Kentucky, usually styled the Court of Appeals, he acquitted himself with great honor. That period, to his credit and that of his associates, may be considered as a new era in the history of that court, during which sound law learning was first introduced there; as the previous decisions were by no means remarkable for their perspicuity or legal research and skill. Many of his decisions still exist in print, and will be found in Hardin's Reports, where they remain a monument of his usefulness and sound legal science.

It ought to be mentioned, also, that twice during his life, he was pressed to offer his services as a Senator of the United States with every prospect of success; and on one of those occasions, about 1812, so strong was the wish for his election, that no other candidate offered until it was ascertained that he refused to permit his name to be proposed before the legislature. So strong, indeed, was the disposition to place him there, that some members determined to announce his name and elect him, and it was with some difficulty that he induced them to abandon the design. He was also twice tendered the professorship of law in Transylvania University, and as often declined accepting it. The same reason, his narrow circumstances, and the necessity of saving something to support and educate his numerous family, induced him to decline all these appointments. He might, with better economy, have amassed a greater fortune. Although free from excess and prodigality on the one hand, and avarice on the other, he was truly generous. His fees were reasonable, and never extorted from poverty or distress. So that he has left his numerous family in competent and highly respectable circumstances, but far from being wealthy.

He was, however, always willing to serve the public in appointments which did not require too great a sacrifice and involve a violation of his professional engagements, notwithstanding his many refusals to accept and retain the offices which have been mentioned. During a great part of the time, while he was undeviatingly pursuing his professional duties, he held the office of District Attorney for the Commonwealth,

and during this period the violators of the penal code felt his powers. He conducted the prosecutions with his usual ability, without either straining the law or distorting facts, to the prejudice of the life or liberty of the party accused.

In 1808, 1812, and 1816, he was one of the electors of President of the United States, and in 1814 he was appointed a commissioner on the part of Kentucky, together with Mr. John J. Crittenden, to negociate with commissioners appointed on the part of the state of Tennessee, and to settle the disputed boundary between the two states, which had been a bone of contention for nearly thirty years, and was determined by these commissioners to the entire satisfaction of the parties concerned.

Judge Trimble's integrity as an officer and a man was never called in question; and his conduct and deportment in his social and domestic relations corresponded to and illustrated the amiable traits of his character.

The following character of Judge Trimble was published in the Boston Columbian Centinel of the 17th of September last, which is worth preserving in some more appropriate repository than the newspapers, on account of the ability with which it is written, and the authority to which it is entitled, being written by a gentleman who had the best opportunity of learning the character and talents of its subject.

'The melancholy rumor of the death of Mr. Justice Trimble of the Supreme Court of the United States has at length been confirmed. That excellent man is no more. The nation has sustained a loss of no ordinary magnitude, and Kentucky may now mourn over the departure of another of her brightest ornaments, in the vigor of life and usefulness. It is but a few years since, that Hardin, who deservedly held the foremost rank at her bar, fell an early victim to disease. The death of that worthy and discriminating judge, Mr. Justice Todd, soon followed; and now Trimble is added to complete the sad triumvirate. It is but two years since the latter took his seat on the bench of the Supreme Court, having been elevated to that station from the District Court solely by his uncommon merits. It is not saying too much to assert, that he brought with him to his new office the reputation of being at the head of the profession in his native state. Men might differ with respect to the rank of other lawyers, but all admitted, that no one was superior to Trimble in talents, in learning, in acuteness, in sagacity. All admired him for his integrity, firmness, public spirit, and unconquerable industry. All

saw in him a patience of investigation which never failed, a loftiness of principle which knew no compromise, a glorious love of justice and the law which overcame all obstacles. His judgments were remarkable for clearness, strength, vigor of reasoning, and exactness of conclusion. Without being eloquent in manner, they had the full effect of the best eloquence. They were persuasive and often overwhelming in their influence.

'Such was the reputation which accompanied him to the Supreme Court. Before such a bar as adorns that court, where some of the ablest men in the Union are constantly found engaged in arguments, it is difficult for any man long to sustain a professional character of distinction, unless he has solid acquirements and talents to sustain it. There is little chance there for superficial learning or false pretensions to escape undetected. Neither office, nor influence, nor manners, can there sustain the judicial functions, unless there is a real power to comprehend and illustrate judicial arguments, a deep sense of the value of authority, an untiring zeal, and an ability to expound with living reasons the judgments, which the court is called upon to expound. A new judge, coming there for the first time, may, under such circumstances, well feel some painful anxiety, and some distrustful doubts, lest the bar should search out and weigh his attainments with too nice an inquisition. Mr. Justice Trimble not only sustained his former reputation, but rose rapidly in public favor. Perhaps no man ever on the bench gained so much in so short a period of his judicial career. He was already looked up to as among the first judges in the nation in all the qualifications of office. Unless we are greatly misinformed, he possessed in an eminent degree the confidence of his brethren, and was listened to with a constantly increasing respect. And well did he deserve it; for no man could bestow more thought, more caution, more candor, or more research upon any legal investigation than he did. The judgments pronounced by him in the Supreme Court cannot be read without impressing every professional reader with the strength of his mind, and his various resources to illustrate and unravel intricate subjects. Yet we are persuaded, that if he had lived ten years longer in the discharge of the same high duties, from expansibility of his talents, and his steady devotion to jurisprudence, he would have gained a still higher rank; perhaps as high as any of his most ardent friends could have desired. One might say of him as Cicero said of Lysias,—"Nihil acute inveniri potuit in eis causis quas scripsit, nihil (ut ita dicam) subdole, nihil versute, quod ille non viderit; nihil subtiliter dici, nihil presse, nihil enucleate, quo fieri possit aliquid limatius."

'In private life he was amiable, courteous, frank, and hospitable; warm in his friendships, and a model in his domestic relations.

'In politics he was a firm and undeviating republican; but respectful and conciliatory to those who differed from him. In constitutional law he belonged to that school of which Mr. Chief Justice Marshall (himself a host) is the acknowledged head and expositor. He loved the Union with an unfaultering love, and was ready to make any sacrifice to ensure its perpetuity. He was a patriot in the purest sense. He was—but how vain is it to say what he was—He has gone from us for ever. We have nothing left but to lament his loss, and to cherish his fame.

'Salve æternum mihi, maxime Palla,
'Æternumque vale.'

Art. IX.—LITERARY PROPERTY.

It was not until the commencement of the present century that the intelligence and industry of our countrymen, began to be engaged in the regular employment of book-making. Until then the press was only known as the means of diffusing the news of the day, and the production of a book was a rare departure from the ordinary course. It is since that period that even our reviews and periodical publications have taken their rise. Our law reports, of which we have now an aggregate of more than two hundred volumes, and an annual increase of about twenty, can none of them claim a higher antiquity than twenty-five years.

Literary property then, in America, has hitherto been of very limited extent. Its growth has been so rapid that we were hardly aware of its existence, when it suddenly presents a wide field for litigation, with a promise of all the fruitfulness which darkness, difficulties, and uncertainty can bestow. It rests upon a statute which has yet to be construed and explained by our courts, and which differs sufficiently from the English statute on the same subject to be almost as much embarrassed, as elucidated, by some of the English decisions.

But besides that the terms and provisions of our statute remain yet to be construed, it will always be necessary, in settling questions of literary property, to look beyond the statute, at the natural rights of the author on one side, and of society on the other; rights for which the statute is intended to afford protection; and certainly there are no difficulties more subtle and perplexing than those which grow out of that

species of incorporeal property which men have in the productions of their own inventions. It has no analogy to any other kind of property. It must be differently enjoyed, and differently infringed upon. Unlike other property, it does not, from its nature, admit of a perfect and complete enjoyment. A trespass or infringement on other property is generally so simple as to be comprehended at once by the most untutored intellect; but questions of the violation of the rights of an author are not unfrequently quite as much as learning, experience, and acuteness can master. So long as possession remains exclusively with the proprietor he can have no enjoyment of the right in question, unless it can be called an enjoyment to criticise and read his own productions; and yet, able judges who have admitted and defended an author's property in his works at common law, have gravely denied that he could have any such property in them after their publication.* This instance is perhaps sufficient to show the peculiar character of this species of property; yet others not less illustrative might be easily adduced.

The difficulties which must be experienced in settling the law of literary property in this country will be greatly increased by the paucity of foreign adjudications. Literary property, like its parent, the art of printing, is of modern origin. Very few cases are to be found in the English books on the subject, and such as there are consist principally of gigantic efforts to pass the very threshold. Numerous questions of less magnitude, but of great practical importance, remain yet to be disposed of, which, from present appearances, are likely to arise and be settled here sooner than in England.

It might be expected that a portion of that respect which is paid to learning and genius would be extended to their productions, and that the gratitude which we are all so ready to profess towards the greatest benefactors of mankind, would prevent us from robbing them of the well-merited fruits of their labors. But experience has proved, and proves daily, that no feelings like these, nor even the sense of wrong, nor a dread of censure, are sufficient to guard the rights of an author. From whatever principle it proceeds, whether it be from an obliquity in the moral sense, similar to that which is sometimes evinced by people, otherwise respectable, in the

* Donaldsons v. Becket, 4 Burrow, 2408.

habitual practice of pilfering and shop-lifting, or whether it be owing to an intrinsic difficulty in placing the right to literary property upon a plain and obvious basis, candidates enough are to be found emulous of the distinction of stripping an author of his honors and rewards. Against such trespassers, (to attach no criminality to their offences), the law affords the only protection. It defines what they otherwise could not understand, and presents countervailing motives to their cupidity. Yet with the best legal provisions, literary property, compared with property of any other kind, must receive but very inadequate protection. This arises from the difficulty of reconciling the rights of the author and of the public. The division between these rights can never be established with such clearness and precision, that an author can say, whenever he is injured, Here is an encroachment for which I have a legal cause of action.

When a book is published, the public have a right to use it; and this use is obviously not limited simply to reading it, but must extend also to making extracts and abridgments. Extracts and abridgments may be made which will be of the highest benefit to the public, and yet occasion no injury whatever to the author. The right of the public, therefore, to such a use, is manifest; for they have a right to every use of a book consistent with the rights of the author. But on the other hand, extracts and abridgments might be made which would nearly destroy the value of the original work. The question then is, not whether extracts and abridgments may be made, but of what character they should be. In many cases the design with which they are made must be a principal guide in determining whether they are lawful. But the first thing always to be regarded, in considering questions of this sort, should surely be, whether the author has sustained an injury. This is the only inquiry in cases of trespass to other property, and if not the sole, it ought to be the chief inquiry here. If the author has rights, the public can have none which encroach on his, and wherever that encroachment begins, their rights must cease. It would therefore seem that an author must always have a right of action whenever he has sustained an injury, no matter how desirable or advantageous the trespass may be to the public.

What constitutes a fair abridgment, or how far extracts may be lawfully made, are questions which have never yet been

agitated in our courts. There are several cases with regard to literary piracy in the English books, but they are very unsatisfactory; they do not appear to have been much considered, and are far from settling any general principles by which these questions are to be governed. On the whole, it may be doubted whether they do not serve rather to prevent, than aid the formation of any just views on the subject.

Roworth v. Wilkes,* and Cary v. Kearsley,† are the leading cases at law, but were both disposed of at nisi prius. Although both ruled by Lord Ellenborough, they are not entirely reconcilable with each other. In Roworth v. Wilkes, which was decided in 1807, the facts were, that the plaintiff had published an original treatise on 'The art of defence on foot with the broadsword,' consisting of one hundred and eighteen pages, and a number of plates, at half a guinea a copy. The defendant, in his Encyclopædia Londinensis, which was published in numbers, when he came to the head 'Fencing,' published a number with this title, containing seventy-five pages of the plaintiff's treatise, and three engravings, representing figures in exactly the same attitudes with the plaintiff's, but disguised by a different costume. About two thousand copies of this number, the usual sale of the work, were sold at eight pence a copy. The defendant's counsel insisted that although this would have been piracy, had the publication been made in a single treatise, or a smaller work, yet that, being embodied in a great compilation of literature, it did not meet the plaintiff's work in the market, and was beneficial to the public, &c.— Lord Ellenborough:—'This action is brought for prejudice to a work vested in the plaintiff; and the question is, whether the defendant's publication would serve as a substitute for it? A review will not, in general, serve as a substitute for the book reviewed; and even there, if so much is extracted that it communicates the same knowledge with the original work, it is an actionable violation of literary propertv. *The intention to pirate is not necessary in an action of this sort.* It is enough that the publication complained of is in substance a copy, whereby a work vested in another is prejudiced. A compilation of this kind may differ from a treatise published by itself; but there must be certain limits fixed to its transcripts; it must not be allowed to sweep up all modern works, or an encyclo-

* 1 Camp. R. 94. † 4 Esp. R. 168.

pedia would be a recipe for completely breaking down literary property. Here seventy-five pages have been transcribed out of one hundred and eighteen; and that which the plaintiff sold for half a guinea may be bought of the defendant for eight pence. As to the prints, the question will be, whether the defendant has copied the main design, and whether there be such a similitude and conformity between the prints that the person who executed the one set, must have used the others as a model. In that case, he is a copyist of the main design. But if the similitude can be supposed to have arisen from accident, or necessarily from the nature of the subject, or from the artist's having sketched designs merely from reading the letter-press of the plaintiff's work, the defendant is not answerable. It is remarkable, however, that he has given no evidence to explain the similitude, or to repel the presumption which that necessarily causes.' The jury gave a verdict for the plaintiff.

Cary v. Kearsley, decided in 1802, was an action for pirating the plaintiff's 'Itinerary, or book of roads,' which he had been nine years engaged in making from actual surveys taken by himself. The defendant's book seems to have been of the same description. A great quantity of new matter had been added in the book published by the plaintiff, which had been transcribed into the defendant's book, with additions, and observations had been made on it, and several routes were broken into two. But it appeared that there was no entire particular paragraph transcribed. Lord Ellenborough:—'If I adopt the works of cotemporary writers and embody them into my own, it makes a new work.' Mr. Erskine, counsel for plaintiff:—'Suppose a man took Paley's Philosophy and copied a whole essay, with observations and notes or additions at the end of it; would that be piracy?' Lord Ellenborough:—'That would depend on the facts of whether the publication of that essay was to convey to the public the notes and observations fairly, or only to color the publication of the original essay, and make that a pretext for pirating it; if the latter, it could not be sustained. That part of the work of one author is found in another, is not of itself piracy, or sufficient to support an action: a man may fairly adopt part of the work of another; he may so make use of another's labors for the promotion of science and the benefit of the public. But having done so, the question will be, was the matter so taken used

fairly with that view, and without what I may term the *animus furandi?* such as was the case put by Mr. Erskine of Paley's Philosophy. Look through the book, and find any part that is a transcript of the other;—if there is none such; if the subject of the book is that which is subject to every man's observation; such as the names of the places, and their distances from each other, the places being the same, the distances being the same; if they are correct, one book must be a transcript of the other;—but when in the defendant's book there are additional observations, and in some part of the book I find corrections of misprinting, (his Lordship here pointed out some), while I shall think myself bound to secure every man in the enjoyment of his copyright, one must not put manacles upon science. I think as to great part of the book that I have seen, Mr. Kearsley might fairly avow that he had taken it from Mr. Cary's book. I shall address these observations to the jury, leaving them to say, whether what was taken or supposed to be transmitted from the plaintiff's book was fairly done, with a view of compiling a useful book for the benefit of the public, upon which there has been a totally new arrangement of such matter, or taken colorably, merely with a view to steal the copyright of the plaintiff.' The counsel for the plaintiff consented to be nonsuited.

The observations of his Lordship, contained in these two cases, so far as they are of general applicability, do not stand well together. Probably every friend of literature, and most enlightened lawyers, would readily subscribe to all that he has said in Roworth v. Wilkes. He there considers the protection of the author's rights as of primary importance. The intention to pirate is not necessary; it is sufficient that the publication complained of is in substance a copy, whereby a work vested in another is prejudiced. If this is intelligible, it can only mean, that no matter how good or laudable the motive with which one uses the writings of another, yet if he so uses them as to injure the proprietor, the latter is entitled to a remedy. This we consider the true principle, and his Lordship in saying, that if a review extracts so much that it communicates the same knowledge as the original work, it is an actionable violation of literary property, goes to the full extent of the principle. Reviews are not intended as piracies; they are very different in their uses from the works they review; they are most agreeable to the public, and fill a space in literature

which those works cannot fill; and yet they may be piracies. We think the case supposed by his Lordship an extreme one, and intended by him to test the principle. Cary v. Kearsley was a much earlier case, and his Lordship may have altered his views after deciding it. The color and force of a judge's language, too, at nisi prius, is derived very much from the circumstances of the case—circumstances which it is difficult to communicate fully in a hurried and brief report.

If we were to attempt to account for the disagreement between these two cases as reported, it would be in the following manner. In cases of original works which are the fruits of invention or reflection, or those which are produced by learning and genius, if they are pirated the question of intention can seldom or never occur; because their identity will always be manifest; they bear the author's impress, and will always be at once recognised as his. In such cases it is sufficient to show that the use made of the work is injurious to the author. There can be no pretence that the person committing the piracy has intended to make a work of his own, or has obtained his materials from any other source except the pirated work. Such was the case of Roworth v. Wilkes, so far as the book, without the plates, was concerned. It was a work of art or invention, and his Lordship therefore said that the question of intention had nothing to do with the case. But where the book is one of chronology, of numbers, of plates, distances, maps, localities, times, &c., the production of observation or calculation, the question of intention is very important. On such subjects there must always be many books, which have the same things in common. The composer of a new work may have borrowed not wholly from one, but from all of them, and may yet have produced something exceedingly like the one which he is charged with having violated,—or he may, from his own observation or calculation, have produced such a work. A coincidence between works of this description is very likely to occur, because there is but one way, if the book is accurate, and that is the right way. Such books are not like works of invention and genius, of which there may be endless varieties on the same subject. There is no room for ornament. It may, therefore, be impossible to determine whether there is a violation, until the question of intention is settled. It will be observed that his Lordship, in Roworth v. Wilkes, puts the plates upon this footing, viz. whether the

defendant intended to pirate them, (for they were admitted to be substantially the same as the plaintiff's), or 'whether the similitude could be supposed to have arisen from accident; or necessarily from the nature of the subject; or from the artist's having sketched designs merely from reading the letter-press of the plaintiff's work.' So, the case of Cary v. Kearsley was merely of an itinerary or book of roads made from surveys, which might have been made from the defendant's surveys as well as the plaintiff's.

It is not possible to account for all the observations of his Lordship, in this latter case, upon this hypothesis. What he says about the *animus furandi* was drawn forth by an inappropriate question of the counsel, and was not intended to apply to the case which his Lordship was trying, but to a very different one, supposed by the counsel. It may be remarked, in addition, that where a work of description, observation, or calculation abounds in inaccuracies, where accuracy is all-important; such works being of great practical utility, and often indispensable, courts will probably pay great regard to the intention, where the object of the person charged with violating them has been to furnish the public with a work free from such faults. In such instances, the author cannot be much injured, for his work, being inaccurate, can be of no great value. While, on the other hand, the public acquire what they have a right to expect in practical works, a work practically useful. It was probably with such views that his Lordship declared that he would not put manacles upon science, although he was ready to protect literary property. But we must again remark, that even this kind of intention can seldom be made a question, except in cases of the kind we have been speaking of.

The case of Sayre v. Moore,* which was ruled at nisi prius by Lord Mansfield, was for pirating sea-charts, and probably the same views may be gathered from the case as those we have been endeavoring above to express more at large. The plaintiffs had, at great expense and trouble in obtaining materials, made a set of charts which were a great improvement on any that had appeared before, and the defendant had also made a set of the same kind, in doing which he had used the plaintiffs', so far even as to have parts of his own engraved

* 1 East. 361, in notis.

directly from the plaintiffs'. But it appeared that the plaintiffs' charts were founded upon no principle; that they were neither upon Mercator's plan, nor that of the plain chart, and were therefore useless. This defect the defendant, in his charts, had remedied, and had also corrected many material errors in the plaintiffs' charts. Lord Mansfield:—'The rule of decision, in this case, is a matter of great consequence to the country. In deciding it, we must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merit, and the reward of their ingenuity and labor; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded. The act that secures copyright to authors, guards against the piracy of the words and sentiments; but it does not prohibit writing on the same subject. As in the case of histories and dictionaries: In the first, a man may give a relation of the same facts and in the same order of time; in the latter, an interpretation is given of the identical same words. In all these cases the question of fact to come before a jury, is, whether the alteration be colorable or not? There must be such a similitude as to make it probable and reasonable to suppose that one is a transcript of the other, and nothing more than a transcript. So in the case of prints; no doubt different men may take engravings from the same picture. The same principle holds with regard to charts; whoever has it in his intention to publish a chart, may take advantage of all prior publications. There is no monopoly of the subject here, any more than in the other instances. But upon any question of this nature the jury will judge whether it be a servile imitation or not. If an erroneous chart be made, God forbid that it should not be corrected, even in a small degree, if it thereby become more serviceable and useful for the purposes to which it is applied. But here we are told that there are various and very material alterations. This chart of the plaintiff's is upon a wrong principle, inapplicable to navigation. The defendant, therefore, has been correcting errors, and not servilely copying. If you think so, you will find for the defendant; if you think it is a mere servile imitation, and pirated from the other, you will find for the plaintiffs.' Verdict for the defendant.

The cases before cited have been cases of extracts, and are

the only important ones of that kind. Some cases have arisen in chancery, where it has been attempted to define the limits within which abridgments of copyright books might be made; but they do not fix such limits with any degree of certainty.

In Gyles v. Wilcox,* the oldest case on the subject, Lord Hardwicke makes the following observations: 'The question is, whether this book of the "New Crown Law," which the defendant has published, is the same with Sir Matthew Hale's Histor. Placit. Coronæ, the copy of which is now the property of the plaintiff. Where books are colorably shortened only, they are undoubtedly within the meaning of the act of parliament, and are a mere evasion of the statute, and cannot be called an abridgment. But this must not be carried so far as to restrain persons from making a real and fair abridgment, for abridgments may with propriety be called a new book, because not only the paper and print, but the invention, learning, and judgment of the author is shewn in them, and in many cases are extremely useful, though in some instances prejudicial, by mistaking and curtailing the sense of an author. If I should extend the rule so far as to restrain all abridgments, it would be of mischievous consequence, for the books of the learned, *les Journals des savans*, and several others that might be mentioned, would be brought within the meaning of this act of parliament. In the present case it is merely colorable, some words out of the Historia Placitorum Coronæ are left out only, and translations given instead of the Latin and French quotations, that are dispersed through Sir Matthew Hale's works. But I shall not be able to determine this properly unless both books were read over, and the case fairly stated between the parties;' to do which his Lordship referred the cause to a master.

Dodsley v. Kinnersley,† decided in 1761 by Sir Thomas Clark, Master of the Rolls, was a bill for an injunction to restrain the defendant from publishing in the 'Grand Magazine of Magazines' an abridgment of Johnson's Rasselas, the copyright of which was owned by Dodsley. The Magazine had abstracted only about a tenth part of the first volume, but the complainants proved that the sale of the work was prejudiced by it. The defendant proved that it was usual to print extracts of new books in Magazines without asking leave of the authors,

* 2 Atk. R. 141. † Amb. R. 402.

and that it was often done at the request of the author, as being a means to help the sale of the book. He also proved that the complainants published a larger extract of Rasselas in the Annual Register, and in a newspaper called the Chronicle, in both of which the complainants were proprietors, before the publication in the defendant's magazine; and also that the complainants had published the works of others in their newspaper. The Master of the Rolls:—'It was insisted for the defendant, that what was printed in the magazine was a fair abridgment, and, as such, not a piracy. No certain line can be drawn to distinguish a fair abridgment; but every case must depend on its own circumstances. It was said to be a piracy, and not a fair abridgment, first, from the quantity of it which was printed; second, because it was done in such a way as not to recommend the book, but quite the contrary, by printing only the narrative, and leaving out all the moral and useful reflections. As to the first, the court, upon these occasions, contents itself by looking into the passages marked. In Tonson v. Walker, 25th April 1753, Merchant had added only twenty-eight notes to fifteen hundred, and held evasive. In that case, the court admitted a fair abridgment not to be a piracy, for otherwise every body must buy the whole work. See whether this is an elusory abridgment. The court must take notice of the springs flowing from trade; and though they cannot regard customs of trade as binding, yet will consider the consequences of them. Upon the first objection, it does not appear that one-tenth part of the first volume has been abstracted. Second, with respect to the prejudice,—consider it upon the custom and usage. The nature of annual registers, magazines, &c. is to give an abstract or analysis of authors: and though it was said that the plaintiffs' having printed an abstract of the work does not entitle other persons to do so; and that the proving that the plaintiffs have printed other people's work is only recrimination, and no good defence;—yet it proves the customs and usage. I cannot enter into the goodness or badness of the abstract. It may serve the end of an advertisement. In general, it tends to the advantage of the author, if the composition is good; if not, it cannot be libelled. What I materially rely upon is, that it could not tend to prejudice the plaintiffs, when they had before published an abstract of the work in the London Chronicle. If I was to determine this to be elusory, I must hold every

abridgment to be so; and that, from its extensive consequence, would prejudice the plaintiffs.' Bill dismissed.

This must be considered a very singular case, and as emphatically decided upon its own peculiar circumstances. We are at a loss to understand how many of the considerations which appear to have influenced the Master of the Rolls, could have been allowed to enter into the merits of the case at all.

The next case, in the order of time, was Bell v. Walker,* decided in 1785 by Sir Thomas Sewell, Master of the Rolls. It was a motion for an injunction to restrain the defendants from publishing a book entitled 'Memoirs of the life of Mrs. Bellamy,' which the bill stated to be pirated from a book called 'An apology for the life of George-Ann Bellamy.' The latter work was in five volumes, and sold for fifteen shillings; the former in one volume, and sold for two shillings and sixpence. Passages were read from each to show that the facts, and even the terms in which facts were related in the former, were taken frequently verbatim from the latter work. 'His Honor said, if this was a fair bona fide abridgment of the larger work, several cases in this court had decided an injunction should not be granted. It had been so determined with regard to Dr. Hawkesworth's voyages. He should not, at present, decide whether it was such, or a piracy from the former; but he had heard sufficient read to entitle the plaintiff to an injunction, until answer and further order.'

In Butterworth v. Robinson,† 1801, an injunction was moved for, to restrain the defendant from selling a work, entitled 'An abridgment of cases argued and determined in the courts of law, &c.' In support of the motion, it was stated that this work was by no means a fair abridgment; that except in colorably leaving out some parts of the cases, such as the arguments of counsel, it was a mere copy verbatim of several of the reports of cases in the courts of law, and among them of the Term Reports, of which the plaintiff is proprietor, comprising not a few cases only, but all the cases published in that work; the chronological order of the original work being artfully changed to an alphabetical arrangement, under heads and titles, to give it the appearance of a new work. Lord Chancellor (Loughborough):—'I have looked at one or two cases with which I am pretty well acquainted; and it appears to me

* 1 Brown's Ch. Rep. 451. † 5 Vesey jr. 709.

an extremely illiberal publication. Take the injunction upon the certificate of the bill filed; to give them an opportunity of stating what they can upon it.' It was not brought before the court again.

Wilkins v. Aikin* is perhaps the best reported and most unsatisfactory case upon this subject. It came before Lord Eldon, in 1810, on a motion to dissolve an injunction. The plaintiff's work was called 'The Antiquities of Magna Græcia,' the materials for which were gathered by himself in his travels in Sicily and Greece. It also contained prints taken from drawings made by him at great expense. The defendant's work was 'An Essay on the Doric order of Architecture,' and the bill charged that it was, in a great measure, a copy of the plaintiff's work, both as to several of the pages and prints. The answer stated that it was different in its nature from the plaintiff's work, and could not come into competition with it; that the use the defendant had made of the plaintiff's work was only fair quotation, compilation, and abridgment, as the plaintiff had quoted and referred to preceding authors; that such quotations and abridgments, dispersed through the defendant's work, did not make more than three pages, while the plaintiff's work consisted of seventy-four. The answer admitted that the defendant had in some instances copied from the plaintiff's drawings; but had in all other instances himself drawn from the arithmetical figures of measurement mentioned in the plaintiff's plates, and in the text of his work, and not from the drawings themselves; and insisted that the defendant in so doing had discovered various errors in the plaintiff's delineations, which he had corrected in his work. Lord Chancellor:—'There is no doubt that a man cannot, under the pretence of quotation, publish either the whole, or a part of another's work; though he may use, what it is in all cases very difficult to define, fair quotation. In the case of maps, for instance;—one man publishes the map of a county; another man with the same design, if he has equal skill and opportunity, will by his own labor produce almost a *fac simile;* and has a right to do so: but from his right through that medium, was it ever contended that he might copy the other map? Suppose a publication, professing to be an account of the improvement of maps of the county of Middlesex, com-

* 17 Ves. jr. 422.

piling the history of all the maps of it ever published; pointing out the peculiarities belonging to them, and giving copies of them all; as well those the copyright of which has expired, as those of which it was subsisting: it is not easy to say with certainty what would be the decision upon such a case. If it was a fair history of the maps of the county which had been published, and the publication of the individual map was merely an illustration of that history, that is one way of stating it; but if a jury could perceive the object to make a profit by publishing the map of another man, that would require a different consideration. The slightest circumstances, therefore in these cases, make the most important distinction. So in the case of a book of roads;—there is no doubt that though any man may publish a book of roads that would be precisely the same as Patterson's, yet he cannot take that book and copy it. The fair question, therefore, upon such a compilation as this, is, whether it is competent to the defendant to publish to the world these plates, which it is admitted he could not publish as copies of the plaintiff's. I have no doubt both these parties are actuated by very honorable views. Upon inspection of the different works, I observe a considerable proportion taken from the plaintiff's that is acknowledged; but also much that is not; and determining whether the former is within the doctrine upon this subject, the case must be considered as also presenting the latter circumstance. The question, upon the whole, is, whether this is a legitimate use of the plaintiff's publication, in the fair exercise of a mental operation, deserving the character of an original work. The effect, I have no doubt, is prejudicial: it does not follow, that therefore there is a breach of the legal right; but where that is so, and there is a fair question, the injunction ought not to be dissolved; but according to the usual course, maintaining the injunction, an action should be brought forthwith. The proper course, in this instance, will be to permit this work to be sold in the mean time; the defendant undertaking to account according to the result of the action.'

How forcibly is one reminded, by this opinion, of the doubting character of Lord Eldon. Not satisfied with being unable to decide the case before him, about which he certainly doubts most sensibly, he goes far out of his way to express his doubts about the ideal, and still more difficult case of the maps of Middlesex. As it respects that case, which his Lordship was

pleased to suppose, we can never be satisfied that a man, for the sake of giving a combined and general view of the county of Middlesex, has a right to copy into it the whole of another's map of a part of the county, although he may do it merely for illustration, and not avowedly to make a profit by it. But his Lordship by no means maintains that he would have such a right; he doubts about it; that is, he doubts whether the advancement of science, and pure and disinterested motives, will constitute a justification for using a work to the injury of its author. We hope that the time may come when such a question will not admit of a doubt, and when literary property will not, at all times, be subject to that species of violence, to which other property is exposed only in cases of military occupation; that of being seized and appropriated to the public use; and that, too, without the offer of an equivalent; a measure which a sense of justice usually dictates to civilized invaders.

The cases of Matthewson v. Stockdale,* and Longman v. Winchester,† turned upon different points, but will be found to contain some observations upon this subject.

On reading the foregoing cases, one is not a little surprised that after so much discussion, it should be left in such a state of almost entire doubt and uncertainty what abridgments and extracts are lawful. The courts, in allowing such a use to be made of literary property, have not declared their reasons very explicitly, but it is apparent that they have been governed by the following considerations: First, that an author's interest is sometimes advanced by giving publicity to extracts from his works; or the injury is more than balanced by the advantage: Secondly, that there are certain wants of society which the original work is not qualified to supply so well as a modification of it: And thirdly, and mainly, that custom has established such a use, within certain limits.

To begin with the last of these rules, which probably grew out of the two former, it does not appear, from any of the cases, in what manner it had been customary to abridge an author's writings, nor whether the custom extended to all kinds of books, or only to certain kinds. But it was probably a requisite of this custom, as of all others, that it should be *reasonable;* and hence courts have always spoken of a *fair*

* 12 Ves. jr. 270. † 16 Ves. jr. 269.

abridgment, and rather, as we imagine, with reference to its reasonableness, than to the motives and intentions with which it was made. Indeed the very word *abridgment* is not so fixed in its meaning as to be free from difficulties. When it was first used in relation to literary piracy, it seems to have occupied nearly the place which *digest* now fills. The old law abridgments, such as Rolle, Viner, and others, are not more full than those works which we now term digests. So far as we can judge, from the little light afforded by the cases, as to the fulness of such abridgments as were considered allowable, they appear to have been digests, or, like a general and comprehensive index, intended only to point to original works, and not to supply their place either in a cheaper form or otherwise. Another thing which is quite obscure, is, whether it was customary to abridge a single work, unconnected with others, or to make abridgments, embracing several works. In truth, so little was then, or is now known, in relation to the limits which custom has prescribed to a fair abridgment, (and the limits are every thing), that we must believe that so far as the custom goes, it ought to be considered bad for uncertainty.

The reason for permitting abridgments, &c. because they are demanded by the wants of society, must be controlled, we should presume, by the degree of injury which the author will sustain, the urgency with which they are demanded, and the benefit which the public will derive from them. The nearer the abridgment approaches to a mere index, the less will be the injury to the author. If the abridgment is published in a transient work, belonging to a different class in literature from the original work, and forming a *mélange* of various classes, then the injury is less, not only because it will not be sought for by those who require the original, but because it will soon cease to be much known as containing the abridgment. So also, if the abridgment is but a part of a general abridgment of many works of the same kind, and especially if a new arrangement is adopted, by which the substance of the original is broken up and distributed with other works, the injury is less, because the abridgment cannot be sought for as a *mere* substitute for the work itself, and may be much more expensive.

The urgency, with which the wants of the public require that an author's writings should be used in the manner we are speaking of, will depend on the character of the work itself. The more practical it is; the more it serves to assist us in the

daily and necessary business of life, the greater need will there be that all classes of society should be able to obtain the information which it contains, in a convenient and usual manner, and at a cost within their means. The case of Wilkins v. Aikin will illustrate our meaning. The original book was on the antiquities of Greece, and contained plates of its classical ruins. Such a work was little suited to the wants of those engaged in practical building, and yet contained knowledge important for them to possess. The defendant, in making a book on architecture, took some of his plates from the book on Greece. In this case, even Lord Eldon had embarrassing doubts as to the right. But suppose, instead of a book on architecture, the defendant's had been a book on Greece, or a work of mere taste, or on history generally, would his Lordship then have doubted? We think not. Those who were in need of such a book could well get the original; and if not as well, still they would be under an obligation in seeking for a book of the kind, to pay some respect to the rights of him who produced the original. In large works of learning or taste, the expense of obtaining them would no doubt be a reason for allowing small portions to be extracted into works of a wholly different character, use, and object. There is a different class of books which appear to have been considered as fair abridgments; we mean such as are designed for the same use and for the same class in society as the original work, intended to fill nearly the same place, but in a smaller and sometimes more convenient compass, and at a less cost; of this kind are abridgments of law reports. With regard to this class, we can only say that we know of no case, in which merely reducing the size or contents and cost of the book has been held to be a fair abridgment. We do apprehend that something more than this is requisite; that the profession (to confine ourselves to law books) must receive a greater accommodation from the abridgment, than such a reduction would afford. The want of such a work is not sufficiently urgent to require that the author's rights should be disregarded. There are wants of the profession which the author's work cannot supply, nor even an abridgment of that alone. They require general and comprehensive abridgments, embracing the whole body of law, and so arranged and classified that every part of the system may be sought for on the spot and instantly found. Such books are indispensable, and must, to be of any use, contain the sub-

stance of copyright books, as well as others. Here, then, is an instance where it would seem that an author's rights must bend to those of the public. A similar instance is that of a treatise on a single independent subject, which must needs make extracts from all other books. If we are right in these views, it is pretty obvious that an abridgment of another's work, which had no other character or merit than reducing its size and cost, would be unlawful. And in such a case, we cannot think it very important that there is a change in the language and arrangement, if the thoughts are substantially the same, and evidently borrowed from the original work. For instance, would it have been lawful in England, to give, in different language, the exact facts and substance of Mr. Gibbon's learned history, which it cost him the labor of his life to collect and authenticate, and which it would be impossible to obtain from any other source?

We have thus endeavored to present our readers with the adjudged cases forming the law on this subject, and with our own views. We have done so from an earnest desire to see correct principles diffused through the community, as well as the profession, in the place of those mischievous errors in relation to literary property, which we have too much reason to fear have become quite common among us. We deem the rights of authors as sacred as any rights which the law protects; as more exposed to invasion than any others; and as having as great claims upon society for protection as any others, because they must generally originate in benefits conferred upon the public. At the same time, we have had too many melancholy proofs that literary pursuits are often inconsistent with habits of economy and saving; that authors, eager in the pursuit of fame, and engrossed with some all-absorbing occupation, are too often improvident and thoughtless of their future wants; wants which they have not less sensibility to feel, though perhaps less patience to endure, than their fellow-men. We trust, that while the age is so liberal and generous in its charities to all other classes of the unfortunate, it will not deny simple justice to those who are so much exposed to become the victims of this sort of literary infirmity.

As we have before remarked, the law of literary property has been but little agitated in this country. There are no reported cases, and we do not know that until lately any have been decided. Within the last year two cases involving in-

teresting questions have been ruled by his Honor Mr. Justice Thompson, in the U. S. second circuit. The first of them, Blunt v. Patten,* was for pirating the plaintiff's chart containing Nantucket shoals, which had been made under peculiar circumstances. The plaintiff had fitted out a vessel at his own expense, and the Navy Department had also provided a vessel of the United States, to make a joint survey of that part of the coast; but it was understood that Mr. Blunt should have the benefit of the sale of the chart when completed. Mr. Blunt made a chart from the surveys, a copy of which was deposited in the Navy Department, and from this copy the defendant had obtained his delineation of Nantucket shoals, contained in his chart. The court held that the plaintiff was entitled to a copyright, and that the copy deposited in the Navy Department was not such a public record, that it could be used to injure the plaintiff's property.

The case of Clayton v. Stone,† lately decided in the same court, is entirely novel. The point settled, is, that a newspaper cannot be the subject of copyright. We give this case with the greater satisfaction, not only because it has not yet been reported, but because its clearness and precision contrast so favorably with the doubt and obscurity, which characterize those English cases which we have been noticing. It was an action qui tam, under the statute, for abridging an article published in a number of a semi-weekly newspaper, of which the plaintiffs were proprietors, called the 'Price Current.' The plaintiffs had never secured their copyright in any number of their paper except the one now in question. At the trial the jury for the purpose of bringing the questions of law before the court for revision, were directed to find a nominal verdict for the plaintiffs. The court delivered their opinion upon the case which had been argued, in substance nearly as follows. Mr. Justice Thompson :—'I am inclined to think the Price Current cannot be considered a book within the sense and meaning of the act of Congress. The literary property intended to be protected by the act is not to be determined by the size, form, or shape in which it makes its appearance; but by the subject matter of the work. Nor is this question to be determined by reference to lexicographers to ascertain the origin and meaning of the word "book." It will be more satis-

* 2 Paine's Rep. † 2 Paine's Rep.

factory to inquire into the general scope and object of the legislature, for the purpose of ascertaining the sense in which the word "book" was intended to be used in the statute.

'It seems to be well settled in England that a literary production, to be entitled to the protection of the statutes on copyrights, need not be a book in the common acceptation of the word,—a volume written or printed, made up of several sheets and bound up together. It may be printed on only one sheet, as the words of a song, or the music accompanying it.* It is true that the English statute of 8 Anne, in the preamble, speaks of *books and other writings*. But the body of the act speaks only of books, the same as in the act of Congress: and a learned commentator upon American Law† seems to think the English decisions on this subject‡ have been given upon the body of the statute of Anne, without laying any stress upon the words other writings in the preamble.

'In determining the true construction to be given to the act of Congress, it is proper to look at the constitution of the United States to aid us in ascertaining the nature of the property intended to be protected. "Congress shall have power to promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries."‖ The act in question was passed in execution of the power here given, and the object, therefore, was the promotion of science. It would certainly be a pretty extraordinary view of the sciences, to consider a daily or weekly publication of the state of the market as falling within any class of the sciences. They are of a more fixed, permanent, and durable character. The term science cannot, with any propriety, be applied to a work of so fluctuating and fugitive a form as that of a newspaper or price-current, the subject matter of which is daily changing, and is of mere temporary use. Although great praise may be due to the plaintiffs for their industry and enterprise in publishing this paper, yet the law does not contemplate their being rewarded in this way. It must seek patronage and protection from its utility to the public, and not as a work of science.

'The title of the act of Congress is, "for the encouragement of learning,"§ and was not intended for the encouragement of

---

* 11 East. 244, n.; 2 Cowp. 623.

† 2 Kent's Com. 311.

‡ Cowp. 623; 11 East. 244, n.

‖ Art. 1, s. 8.

§ 2 L. U. S. 104.

mere industry, unconnected with learning and the sciences. The preliminary steps required by the law to secure the copyright, cannot reasonably be applied to a work of so ephemeral a character as that of a newspaper. The author is required to deposite a printed copy of the title of his book in the Clerk's Office of the District Court, and the clerk is required to record the same; a copy of which record must be published for four weeks in one or more newspapers, within two months from the date thereof: and a copy of the book is to be delivered to the secretary of state within six months from the publication, to be preserved in his office: and all this would have to be done for every newspaper. The right cannot be secured for any given time, for the series of papers published from day to day, or from week to week. And it is so improbable that any publisher of a newspaper would go through the form for every paper, that it cannot reasonably be presumed that Congress intended to include newspapers under the term "book." That no such pretence has ever before been set up, either in England or in this country, affords a pretty strong argument that such publications never were considered as falling under the protection of the copyright laws. We are accordingly of opinion that the paper in question is not a book, the copyright to which can be secured under the act of Congress. Judgment must accordingly be entered for the defendants.'

Art. X.—PETERS's REPORTS.

Reports of Cases Argued and Adjudged in the Supreme Court of the United States, January Term, 1828. By Richard Peters, Jr. *Counsellor at Law, and Reporter of the Decisions of the Supreme Court of the United States.* 8vo. Philadelphia. P. H. Nicklin.

It is not our present intention to say any thing of the high character of the court which gives the decisions reported in this volume, or to examine any of the cases; but to present a few remarks on the manner in which the new reporter has performed his duties. We think he has improved on his predecessor, Mr. Wheaton, in forbearing to insert at length instruments and documents, which Mr. Wheaton sometimes did in cases where short abstracts or extracts only were necessary.

Thus in the case of Cohens v. Virginia, Mr. Wheaton gives the statute for incorporating the city of Washington and the act supplementary to it at full length, filling up twenty pages, where as many lines would have been sufficient. The effect of this process was not merely to increase the size and cost of the volume, by the insertion of unimportant matter, but also to increase the labor of the reader in ascertaining, amid such a flood of words, the questions really in controversy,—a labor which he ought to be spared by the reporter. We are far from being insensible to the extensive research and erudition of Mr. Wheaton, or to his skill and industry in collecting authorities on interesting subjects; but the profession, we believe, were hardly satisfied with the high price of his volumes, or with the materials used to swell their dimensions.

The statements of facts in the volume before us are usually clear and comprehensive, without being swelled out by superfluous matter. The reports of the arguments of counsel, though very much condensed, give the points raised with accuracy and precision. We are not, however, entirely pleased with the mode which Mr. Peters sometimes adopts, of referring to the opinion of the court for the statement of facts, thus requiring the reader to look forward to the opinion, and then turn back again to the argument of the counsel. This mode is certainly better than that which some reporters have used, of giving the facts at length twice over, once before the argument, and again in the opinion. We are glad that Mr. Peters has avoided this error. Yet we think his reports would be rendered more convenient by his transferring at once the full statement of the facts from the opinion of the court, and placing it before the argument. If he uses the statement prepared by the judge, there would be no difficulty in giving him due credit for his labors. We do not, however, mean that the reporter is, as a matter of course, to adopt the statement of the court; for if the court does not state the facts fully and accurately, the reporter should prepare a statement himself.

The mode in which Mr. Peters makes out the abstracts (marginal they cannot be called) of the cases is liable to some objection. The object of the abstract should be to present briefly and accurately the points of the case decided by the court, and sometimes the dicta or suggestions which fall from them in the course of the opinion. If this course is followed the reader can see at a glance all the important principles

which have been decided or discussed. Mr. Peters, however, is not content with doing this, but heaps into his abstracts incidental observations, reflections, and reasonings of the court, until the note is sometimes made to fill one or two octavo pages of small type. The mass of matter thus thrown together serves to bewilder, rather than to assist the reader, so that it sometimes requires almost as great a labor to ascertain the points from the note, as from the whole case. As instances of this fault, we have selected sentences from two of these abstracts, which are not at all distinguished by *surplusage* from many others.

'When the defendants sever in their pleadings, a *nolle prosequi* ought to be allowed against one defendant. It is a practice which violates no rules of pleading, and will generally subserve the public convenience. In the administration of justice, matters of form, not absolutely subjected to authority, may well yield to the substantial purposes of justice.' p. 47.

The two last sentences of this extract are mere general remarks made by the court in argument, and do not contain any decision of any point, or opinion on any specific question. Again :—

'Some countenance has lately been given in England to the practice of sending a notice by a special messenger in extraordinary cases, by allowing the holder to recover of the endorser the expenses of serving the notice in this manner. The holder is not bound to use the mail for the purpose of sending the notice. He *may* employ a special messenger if he pleases, but it has not been decided that he *must*. To compel the holder to the expense of a special messenger would be unreasonable.' p. 578.

Perhaps the last extract contains matter of which it would have been proper for the reporter to have given a note. But this might have been done in a couple of lines. If notes of cases are to be made in this way, it will be necessary for the reporter to add an abstract of the abstract.

The error into which Mr. Peters has fallen, probably arises from his aiming to follow closely the words of the court, without discriminating very accurately the matter proper for an abstract. It is no doubt in many cases safer for the reporter, as well as more satisfactory for the reader, to have the expressions of the judge used in the abstract, where they give within a reasonable compass a direct and precise answer to any question in controversy. But it not unfrequently happens that no single

sentence of the court will contain the decision of any point, or even a dictum, or a quære. The conclusions of the judge are, often, so connected with the reasonings which lead to them, and the observations which accompany them, that no extract can be made from the opinion, as a note of the case, which will not contain matter unsuitable for the purpose. In such cases the reporter should search out the principles established or discussed, as well as he can, by a careful examination of the facts and the opinion.

QUARTERLY LIST OF LAW PUBLICATIONS.

AMERICAN.

Reports of Cases Argued and Adjudged in the Supreme Judicial Court of Massachusetts. By Octavius Pickering. Volume V. Nos. 1 & 2. Royal 8vo. Boston. Hilliard, Gray, & Co.

A Treatise on the Pleadings and Practice in Real Actions. By Charles Jackson. 1 vol. Royal 8vo. Boston. Wells & Lilly.

A Practical Treatise upon the Authority and Duty of Justices of the Peace in Criminal Prosecutions. To which are now added Precedents of Declarations and Pleadings in Civil Actions. By Daniel Davis, Solicitor-General of Massachusetts. Second Edition. 8vo. Boston. Hilliard, Gray, & Co.

This work is well adapted for the purpose for which it is intended, that of a manual for practising magistrates. It is, therefore, obvious that its utility is not limited to professional readers, because a very large portion of the practising justices of the peace, at least in the New England states, have not been educated to the legal profession. It is to this class of readers that it will be found especially serviceable, as they are neither disposed, nor probably would most of them feel competent, to search out and arrange for themselves a system of practice, in doing which they would be obliged to encounter the voluminous and complicated English publications on the subject, appalling even to the professional student. The plan of this work is the natural, and perhaps the only proper one for treatises of the kind; it begins at the commencement of the prosecution, and follows it through its several stages to its conclusion. To the criminal department is added a short collection of the most common and useful forms of pleading in civil cases, of usual occurrence before justices, with occasional brief remarks, tending to simplify and explain the course of practice. The work is more particularly calculated for the New England states, but will be found useful in many of the other states, which have forms of justice proceedings not entirely dissimilar. We notice some typographical errors, which we regret to meet with in a work of legal practice and forms; but the general character of the mechanical execution is that of accuracy.

Dissertations on the Questions which arise from the Contrariety of the Laws of different States and Nations. By Samuel Livermore, Counsellor at Law. No. I. Containing two Dissertations. 8vo. New Orleans. B. Levy.

Forms of Practice, or American Precedents, in Actions Personal and Real. Interspersed with Annotations. By Benjamin L. Oliver, Jr. Royal 8vo. Boston. Hilliard, Gray, & Co.

Reports of Cases Argued and Adjudged in the Supreme Court of the United States, January Term, 1828. By Richard Peters, Jr. 8vo. Philadelphia. P. H. Nicklin.

Reports of Cases Adjudged in the Court of Appeals of Virginia. By Peyton Randolph. Vol. V.

Reports of Cases Argued and Determined in the Supreme Judicial Court of the Commonwealth of Massachusetts. By Dudley Atkins Tyng, Esq. Vol. IX. Third Edition. With Notes and References to American and English Cases: By Benjamin Rand, Counsellor at Law. Boston. Hilliard, Gray, & Co.

This new edition of the ninth volume of the Massachusetts Reports, is, we understand, to be followed by other volumes, under the care of the same editor. From the well-known industry and learning of Mr. Rand, we are confident that he will add much to the value of the work. Republications of this kind must always be received with pleasure by the profession, as they are a great assistance to the labors of the lawyer, by pointing out to him the places in which the learning and decisions on particular subjects are to be found.

We have looked over Mr. Rand's volume very hastily. He appears to have collected a large number of authorities, adding notes of greater or less extent and importance to a majority of the cases, and in many of them controverting the decisions or dicta of the court, which he does with great freedom and acuteness. If it had been consistent with the editor's plan, and the limits of the work, we should have been glad to have had a more full and thorough investigation of the decisions which he thinks questionable, instead of a few brief remarks, and a reference to a host of authorities. His comments on expressions used by the court, in some instances, may perhaps be thought to verge upon the hypercritical.

We notice, with pleasure, that to the unsatisfactory marginal notes, 'Of the rights of parties to a mortgage,' and 'Of stoppage in transitu,' Mr. Rand has added abstracts of the points decided in the cases.

As the greatest accuracy in printing law books is very important, we regret to observe that the typographical errors in this volume are very numerous.

Commentaries on American Law. By James Kent. Vol. III. New York. O. Halsted.

Reports of Cases Argued and Determined in the Supreme Judicial Court of the State of Maine. By Simon Greenleaf, Counsellor at Law. Vol. IV. Portland. James Adams, Jr.

A Statement, shewing some of the Evils and Absurdities of the English Common Law, as adopted in several of the United States. By a Lover of Improvement. New York.

Laws of the United States and other Documents relating to Public Lands. Washington. Gales & Seaton.

Reports of Cases Adjudged in the Supreme Court of Pennsylvania. By Thomas Sergeant and William Rawle, Jr. Vol. XV. Philadelphia. McCarty & Davis.

The American Chancery Digest; being a Digested Index of all the reported Decisions in Equity, in the United States Courts, and in the Courts of the several States. By John D. Campbell and Stephen Cambreleng, of the New York Bar. New York. Gould & Banks.

Review of the Speech of Henry Brougham, Esq. upon the State of the Law. By David Paul Brown. Philadelphia. J. Dobson, No. 108 Chestnut Street.

AMERICAN EDITIONS OF FOREIGN WORKS.

The Practice of the Court of King's Bench and Common Pleas in Personal Actions. By William Tidd, Esq. With Notes, and some recent English and American Cases: By F. J. Troubat. 2 vols. 8vo. Philadelphia. Towar & Hogan.

A Practical Treatise of the Law of Evidence, and Digest of Proofs, in Civil and Criminal Proceedings. By Thomas Starkie, Esq. With References to American Decisions: By Theron Metcalf. Second American Edition. Additional Notes. By Edward D. Ingraham. 3 vols. Boston. Wells & Lilly.

A Treatise on the Law of Mortgages. By J. J. Powell, Esq. Reprinted from the sixth English edition; much enlarged and improved; with copious Notes, by Thomas Coventry, Esq. With Notes and References to American Cases, by Benjamin Rand, Esq. 3 vols. Boston. Wells & Lilly.

A Supplement to Vesey Junior's Reports of Cases in Chancery; containing Notes occasionally illustrated by Cases decided by Lords Hardwicke, King, &c. from the MSS. of Mr. Forrester. By John Erskyn Hovenden, Esq. 2 vols. Philadelphia. P. H. Nicklin.

The Forms of Indictment, with the Evidence necessary to support them, including the Statutes, which make many valuable regulations relative to Criminal Proceedings. Containing also a Table, showing those Statutes which have been repealed. By John Frederic Archbold, Esq. New York. Treadway & Bogert.

A Treatise of the Rights, Duties, and Liabilities of Husband and Wife, at Law and in Equity. By James Clancey, Esq. New York. Treadway & Bogert.

An Analytical Digest of the Reported Cases in the Courts of Equity, and the High Court of Parliament, from the earliest authentic period to the present time; to which are added, the Decisions of the Courts of Equity and Parliament in Ireland, with a Repertorium of the Cases, doubly arranged. By Richard Whalley Bridgman, Esq. First American, from the third and last London edition: By R. O. Bridgman, Esq. of Lincoln's Inn, Barrister at Law. 3 vols. 8vo. New York. O. Halsted. 1828.

A Treatise on Pleading, with a Collection of Practical Precedents, and Notes thereon, in 3 vols. By Joseph Chitty, Esq. of the Middle Temple, Barrister at Law. Fifth American, from the fourth London edition. Corrected and enlarged; with Notes and Additions: By John A. Dunlap, Esq., and additional Notes, and References to later Decisions, by E. D. Ingraham, Esq. Philadelphia. Carey, Lee, & Cary.

A Treatise of the Law relative to Merchant Ships and Seamen:

in four Parts; 1. Of the owners of Merchant Ships; 2. Of the Persons employed in the Navigation thereof; 3. Of the Carriage of Goods therein; 4. Of the Wages of Merchant Seamen. By Charles Abbott, now Lord Tenterden, Chief Justice of England. Fourth American from the fifth London edition. Edited, with permission of the Author, by John Henry Abbott, of the Inner Temple, Barrister at Law. With Annotations containing the principal American Authorities: By Joseph Story, one of the Justices of the Supreme Court of the United States. And an Appendix containing the American Acts respecting the Registry and Navigation of Ships, Salvage, the Regulation of Seamen, &c. &c. Boston. Hilliard, Gray, & Co.

WORKS IN THE PRESS.

HILLIARD, GRAY, & CO. BOSTON,—HAVE IN PRESS,

Hobart's Reports, with Notes, References, and Annotations. By Judge Williams.

Vol. X. of Tyng's Massachusetts Reports. With Notes and References to American and English Cases. By Benjamin Rand, Counsellor at Law.

No. III. of Vol. V. Pickering's Reports. This will complete the volume.

Vol. IV. Mason's Circuit Court Reports.

Angell on the Statutes of Limitations.

TREADWAY & BOGERT, NEW YORK,—HAVE IN PRESS,

A Practical and Elementary Abridgment of the Cases Argued and Determined in the Courts of King's Bench, Common Pleas, Exchequer, and at Nisi Prius, from the Restoration in 1660 to Michaelmas Term, 4 George IV. By Charles Petersdorf, Esq.

THE AMERICAN JURIST.

No. II.

APRIL, 1829.

Art. I.—JACKSON ON REAL ACTIONS.

A Treatise on the Pleadings and Practice in Real Actions; with Precedents of Pleadings. By Charles Jackson. Boston. Wells & Lilly. 1828. pp. 396.

An inquiry into the state of the law in England at the time when this country was first settled, is one of peculiar interest to an American jurist. Many of the states have, by a constitutional provision, or by statute, adopted the whole, or a great part of it, until altered by special legislative enactment. Upon the establishment of courts of justice, the forms of proceeding then used in England, were extensively adopted. This subject at large would open an interesting, but a wide field. Our observations, at present, will be confined to remedies to recover real estate, and the various methods in which titles were decided.

Fixing upon the time between the years 1606 and 1650, for we are not aware of any material change during that period, we will endeavor very briefly to give a statement of the practice and law on these subjects. At a very early period of English history, some say in the times of the Saxons, writs of entry and writs of right were the usual remedies for ouster of real estate.* The remedy by writ of assize was introduced during the reign of Henry II., probably about the year 1157. This proceeding, being much less expensive and dilatory, was

* Gilb. Ten. 47.

generally pursued; and for several centuries in a great degree superseded writs of entry. During the reigns of Henry VI. and Edward IV. titles were frequently tried by the personal actions of replevin, trespass, and the statute process of forcible entry and detainer. In the time of Henry VII. it had been held that in ejectment, which was originally an action for a lessee for years to recover damages, the term itself might be recovered. But it seems, from the Year Book of that reign, that resort was still had to real actions, and the aforementioned personal remedies; and that ejectment was but rarely adopted. From the end of the reign of Henry VII. to the year 1650, ejectment and other personal actions were almost exclusively the remedies pursued. There were, indeed, a few instances of real actions; but principally writs of right. Actions of entry had become nearly obsolete, and assize was but very rarely resorted to. By reference to the reporters of that period, this will be manifest. A writ of ejectment was the common method of trying titles to real estate when the Atlantic colonies were settled. But it is worthy of particular notice, that this action was not then carried on by a series of fictions. It was very different from what it is now. A person claiming land, entered upon it, and sealed a lease for years. The lessee took actual possession, and if he was interrupted by the tenant, or any other person, he sued out a writ of ejectment against him that had ejected him. If the action were not brought against the tenant in possession, by a rule of court he was notified of the suit; and, if he chose, was permitted to appear and defend the action. The plaintiff was obliged to prove the material facts in his declaration, and the defendant frequently pleaded a special plea. The feigned lease, entry, and ouster, and the rule for confessing them, were after inventions of Rolle, Chief Justice of the Upper Bench, some time between the years 1648 and 1660. The various kinds of real actions were, however, still legal remedies, though in practice they had become quite obsolete. This state of things in England left the first emigrants at liberty to select such of the actions as were best adapted to their situation. Most of the colonies which were settled prior to the year 1650, did not, however, adopt the ejectment even as it then stood. This action was not in use in New England, nor in Virginia. Of New York the English had not possession till after that time.

We have no particular information of the grounds of rejecting

this action. Probably even then, there were appendages to it, which the stern integrity and simplicity of the puritans did not relish. The lease declared on, was not a *bona fide* conveyance. A person's going upon the land by a preconcerted plan, and thus becoming the casual ejector, savored too much of collusion. The writ itself demanded damages merely, while the land was recovered, and, above all, the liberty which the losing party had as soon as one action was decided of bringing another, were incidents which induced them to reject it. The same considerations might, in a great degree, operate in the other colonies. On the other hand, the whole artillery of real actions presented a most formidable array. The great delays, the extreme nicety of pleading, and the various turnings and twistings in them, the first emigrants, with their habits and feelings, could not endure. Their course was direct and downright; looking rather to the end, the speedy attainment of substantial justice, than to the means, the forms of proceeding. In New England a simple real action was adopted. It was not exactly like any one which had been used in England; though it more nearly resembled assize than any other. It was, indeed, generally styled an action of the case; but it contained a demand of real estate, and usually a fee-simple. It wanted the essentials of a writ of entry, for that, in all its forms, alleges a seizin of a freehold estate at least, and that the tenant entered into it, and acquired a freehold, either immediately or mediately by wrong. The assize, also, alleges a *disseisin*, but does not expressly aver a *seizin;* but, instead of that, prays a recognition. On the other hand, a writ of right expressly alleges a seizin, but is silent as to a disseisin by the tenant. Ejectment, which is a personal action, asserts that a lease was made to the plaintiff, and an ejectment by the defendant, and in that action only a term is recovered. As new exigencies arose, other remedies of the same character, suited to the case, were adopted. In the other colonies, it is highly probable a similar course was pursued. In many of the states, real actions are still in general use. Some have supposed this was evidence of a state of semi-barbarism, or, at least, the result of an absurd predilection for an antiquated, obsolete proceeding, invented in the dark ages. In consequence of this, it has been proposed that these actions should be entirely abolished. The examples of England, New York, and Pennsylvania, may be urged in favor of this measure. As to England, the reasons alleged

for the change were, the great delay by the prescribed forms, before coming to trial, and the necessity of so great precision and particularity in selecting the action, and in declaring and pleading, that a small mistake might defeat the action or defence. These were the ostensible and avowed reasons; but other and very different causes have been suggested. Real actions were confined to one court, were final, and could not be repeated. Ejectment might be brought in all three of the courts of common law, and might be repeated as long, and as often, as parties were able and willing to litigate. These have, by many respectable English writers, been assigned as the true reasons for the very extraordinary change—a change brought about by the courts and lawyers, without any legislative provision. Lord Coke, who from his situation had better means of judging correctly of the merits of the two systems, in English practice, than any one can have at this distant period, feelingly laments the change. He asserts that the right to commence a new suit gives a rich and malicious man opportunity to vex his poor neighbor, who hath right, and compel him to yield it up; that it produced various and contradictory verdicts on the same title; and it exceedingly prolonged litigation, sometimes to twenty, thirty, and forty years.*

Even in England, the absurd delays and multiplied forms in real actions could not have been the true reason for the change. After understanding what changes the courts made in regard to ejectment, how they have entirely changed its nature, and the course of proceeding in it, no one can doubt but that, if seriously disposed, they could with perfect ease lop off the dry and useless limbs, and bend the whole to the present state of society. As an abstract question, perhaps, it might not be very easy to decide, whether a general declaration and general plea, or a particular statement of the ground of claim and defence, be most eligible. It must be admitted, that the course now pursued in assumpsit and trover, which are comparatively recent alterations, is in favor of general pleading. These actions came into general use, in their present shape, not long after ejectment was adopted; but there are advantages in favor of a more specific notice of the ground of claim and defence, in regard to real estate, and in placing upon the record precisely what has been decided, which more than counterbalance

* 6 Coke, 9.

the supposed advantages of a general action of ejectment. We have a high respect for the judges and lawyers in New York and Pennsylvania, as well as for those in England; but if the question is between real actions according to New England practice, and the English ejectment, we cannot hesitate to give our decided preference to the former. Whatever were the reasons for abolishing real actions in England, they had no foundation in America. The English system has been greatly improved, and probably is susceptible of still further amendments.* In candor, we are bound to say, that we see no reason why most, if not all, that is offensive in ejectment may not be expunged. In Kentucky, where both real actions and ejectment are used, it is provided by statute that the action may be brought by the claimant himself against the person in possession, who may either plead not guilty, or any special plea, suited to his case. We know of no good reason why a full and fair trial in this action should not be as conclusive as in others. We have no affection for John Doe and Richard Roe, those men of straw, who are forever at war in the English courts of justice. We may again revert to the question between general and special pleading.

Owing to various causes, pleadings in real actions, which, while in general use in England, were most precise and exact, have in American practice been generally loose, and, in some degree, irregular. One cause of this has been, that from non-user the learning of real actions has been almost entirely lost in England. This is apparent, as well from the frequent mistakes and erroneous statements made by judges and counsellors, as from the declaration of the most eminent writers. Professor Sullivan, speaking on this subject, in 1775, says, 'The *higher* actions are so much out of use, that I question whether there is a lawyer living who would be able, without a great deal of study, to conduct a cause in one of those antiquated real actions.'† This is no disparagement to judges or lawyers, if they would acknowledge their ignorance. It was then almost three centuries since the common real actions were disused. There is no English treatise which can be implicitly relied on. All the modern books are replete with gross errors. The old reports and treatises have generally been long out of print, and

* The late Chief Justice Parsons, the last year he was a member of the Legislature of Massachusetts, brought forward a bill on this subject, which, we believe, passed the House, but was never definitely acted upon in the Senate.

† Sall. Lect. 507.

are very rarely to be found in the United States. In the early period of the country, very few of the judges or counsellors could have acquired this ancient lore. Other objects than studying the Register, the Year Books, or Fitzherbert's Abridgment, demanded all their time and attention. Questions of law and fact were intermixed. The tribunals of justice were scattered over a great extent of country, and were, in a great degree, independent. These causes operated universally; but there were others equally powerful, though more local in their effects.

In Massachusetts, for example, from the earliest period, county courts were established and continued till long after the American revolution. Each court, in its own county, had exclusive original cognizance of real actions, and all questions of title to real estate. They were entirely independent of each other. According to the New England policy, appeals might be taken to the superior courts, but by far the greater number of actions were finished in the inferior tribunals. When appeals were claimed, if no question had been made, as to the method of proceeding, previous to the appeal, it was in many cases too late to take exceptions, and as the usual object of an appeal was to have a new trial of the facts, very frequently, even in the superior courts, irregularities in the actions or defence would not become a subject of question. This cause operated generally through New England, and probably in other colonies.

But another circumstance operated powerfully in Massachusetts. The revolution displaced almost all of the judges of the superior and inferior courts. By it also many of the most eminent counsellors were induced to retire from the bar. Many of the judges and most eminent lawyers, left the state, so that the knowledge of the previous course of proceeding, was necessarily very limited.

After the close of the revolutionary war, the Supreme Court went the circuits of the state: but were obliged to decide questions of law, as they arose in a jury trial, and were required to make their decisions while riding post. No reports of judicial determinations were published till the year 1805. Any person who has had occasion to examine the records and processes of courts, will be abundantly satisfied that many of the rules of pleading have been disregarded. At the present day a careful examination of declarations and pleas would

shew that there is still great diversity and much laxity of practice in conducting them.

Confusion and uncertainty exist in the several states in regard to the course of proceeding in each other. This has been especially the case in regard to real actions. Some have supposed that in Massachusetts and the other states where the practice has been like hers, the whole system of real actions had been adopted.

We congratulate the profession, that these evils will now in a good degree be removed, by the publication of the work at the head of this article, and of that of Professor Stearns, on the same subject. This elaborate treatise on real actions, is worthy of the careful study of all who have any concern in conducting them. It has been composed with care. The learned author has given abundant evidence that he has been conversant with writings that to most lawyers are hidden mysteries. No treatise, ancient or modern, appears to have escaped his perusal. Mistakes not a few, he has detected and exposed. This treatise is a very complete and luminous exposition of the law of real actions, as it was when in full vigor at the close of the reign of Edward III., adapted, as the learned author supposes, to the practice in Massachusetts. It is professedly a treatise adapted to that Commonwealth, and although a great part of it is of a general nature, and may be extensively useful elsewhere, yet it is peculiarly applicable to Massachusetts, and as such will be considered in our remarks upon it. If the author is correct in his positions, and all that he has delivered is law in that state, it is certain that this work is indispensable for all lawyers, and may we not add, for most judges? Many of the precedents given could be found in but very few libraries. In the scarcity of them, and the difficulty which many of the profession would experience, either in finding or reading them, if the books containing them lay at their elbow, every conductor of real actions would need this book.

It is, however, certain, that some parts of the system contained in this volume have not been generally considered as a part of the law of Massachusetts. It becomes, therefore, highly important to examine whether all that is there laid down as law, is, in truth, a part of that system. A complete discussion of that subject would lead far beyond the limits of a review. A few observations only can now be made.

So far as it has had a legal sanction, we are decidedly in

favor of its being continued. We believe a better one could not be found; but if great technical nicety is to be introduced where it is not necessary to preserve the rights of parties, and promote justice and consistency in legal proceedings, it is very sure that the whole will be swept away, and perhaps it ought to occasion no regret whenever it takes place.

The Constitution of Massachusetts declares, that 'all the laws which have heretofore been adopted, used, and approved in the province, colony, or state of Massachusetts Bay, and usually practised on in the courts of law, shall still remain and be in full force, until altered or repealed by the legislature; such parts only excepted as are repugnant to the rights and liberties contained in this constitution.'*

This is a plain and positive provision. It substantially declares, that the laws then in force should still remain, until altered by legislative authority. On the subject of our inquiries it must, therefore, be important to ascertain how much of the system of real actions had been previously adopted and sanctioned by courts of justice. No statute provision had been made except in regard to dower. It is laid down in this treatise, and must be admitted on all hands, that a part, and only a part, had been received and practised upon. The great difficulty is, correctly to draw the line of separation. To define it clearly an examination ought to be made of all the acts and doings of the General Court of Massachusetts and of Plymouth Colony.

It is very much to be desired, that the Legislature of Massachusetts would follow the example of Virginia, and publish one complete copy of all acts and resolves, so far as they can now be found. In addition to this, a well digested history of the practice in the courts, from the earliest times, formed from authentic documents, is greatly needed. For this end, a search of the records of the General Court, as a judicial tribunal, and of the Court of Assistants and Superior Court, would be indispensable. To ascertain the law in many points of practice, and especially as to forms, and the course of proceedings, the records and files of more than one of the inferior courts ought also to be examined.

In the absence of much of this evidence, it must remain in no small degree uncertain how much is included in this constitutional provision. The difficulty is very much increased

* C. 6, s 6.

by the facts already mentioned as to the situation of the judiciary and of the profession at the commencement of the revolution. It is unquestionably the province of the courts of justice to decide how the law stood when the constitution was adopted; but they have no more authority to alter that law than to abrogate a statute enacted the last year. How little has been done by direct decision upon points of pleading in real actions, will appear by the small number of reports on them in the course of twenty-four years. It is also as strikingly manifested by the scarcity of references to the reports in this work, and still more by the great number and variety of instances in which Judge Jackson, on his own responsibility, proposes a particular course of proceeding.

We have asserted that the judicial courts could not alter the law, and we have never heard that such a power has been claimed or exercised. On this subject their only authority is to establish rules as to the modes of trial, and the conducting of business not repugnant to law.* As to real actions, it is certain that most of their ancient appendages and trappings have found no place in the system in Massachusetts. There is no *attachment for non appearance*, no *distress*, *grand cape*, *saver default*, *view by a party*, *essoin*, *petit cape*, *process of pone*, *re. fa. lo.* and *id genus omne*. These all, it is agreed, are discarded, and were never adopted; but a view by a jury, aidprayer, and voucher, were, at least to some extent, in use. Several kinds of real actions, it must be conceded, were adopted under the provincial government. Some of the writs of entry, writs of right, formedon, waste, and dower, had the sanction of courts of justice. None of them, except the last, were prescribed by statute; and it is nearly demonstrable, that they gained admission by slow degrees. Under the colonial government, perhaps, there is very little evidence of the adoption of any of the old common law real actions. Very few, if any, traces of resemblance can be found. Their actions at the beginning of the last century were like the action commonly brought in Connecticut to try title to real estate, described by Judge Swift in his Digest.† It is very simple, alleging the seizin of the plaintiff, and a disseisin by the defendant. It is probable this was copied from Massachusetts. Being at first emigrants from that colony, the settlers of Con-

* Stat. 1782, c. 9. † 2 vol. 435.

necticut carried with them her laws, and, in many instances, enacted them in precisely the same words. This action is there of very ancient date. Perhaps their laws and customs have come down with fewer alterations than those of any other state in the Union.

We have not ascertained the precise time when writs of entry were first introduced into Massachusetts; but should fix the time between the years 1700 and 1720. But while it is admitted that writs of entry, in some of their forms, were in common use, it by no means follows, that the whole family of them had been naturalized. Booth enumerates no less than twelve of these writs, each of them to be brought against the wrong-doer, and most of them in the *per, per and cui*, and in the *post:* and many of them to be brought as well by the heir or successor, as the person who had himself been ousted. So that in writs of entry alone, we fairly make out nearly a hundred forms of declaring. In every case the appropriate writ must be selected. The forms of this writ actually given by Judge Jackson are not quite so numerous; but there is nothing indicating that they may not be extended at least as far as Booth has gone. We firmly believe that not one half of them were ever used in the courts of Massachusetts, or had their sanction. But we do not find that the learned author has reprobated any of them. By the forms he has given in his text, and by his observations, we should infer that he meant to be understood, that they were all occasionally to be used. Before the adoption of such a host of writs in practice, it ought clearly to be shown, that they have had the approbation of the courts of justice, and are necessary and important to produce correct decisions.

It is with great regret that we feel constrained to differ from one so well qualified to judge what the law is, and what it ought to be. But we see no advantage in making the law so nice that a deviation of a hair's breadth will defeat an action. Writs of entry upon disseisin, abatement, and intrusion, had, without question, been used in practice before the adoption of the constitution. Search has been carefully made through this treatise, in the hope that the learned author, while he stated the various real actions, and the course of proceeding in them, had given some intimation, that many of them had never been used, or had become obsolete, or, at least, that other and more common remedies might be pursued;—but

this has been in vain. The writs of entry *ad communem legem, in casu proviso, in consimili casu, cui in vita, sur cui in vita, cui ante divortium, sur cui ante divortium, dum fuit infra ætatem, dum non fuit compos mentis*, are each introduced, treated of, and precedents of them inserted in the text, as if they ought to be resorted to as much as a writ of right, or any other action. There is, indeed, an observation introduced near the beginning of the work not connected with these writs. It is there said, (p. 11) speaking of writs of entry, that a great part of them 'will *very seldom* come into use in our practice:' and again, 'Many of the ancient writs of entry have fallen into disuse, not only because the kind of estates and conveyances which gave rise to them are less common than formerly, but also because their place is often supplied by the more simple action on the demandant's own seizin.' It certainly cannot be fairly inferred from what is here said, that recourse might not be had to them at pleasure. Besides it is no where stated which of them were out of use, and which of them necessarily retained. Our position is, that they are not now, and never were, any part of the legal remedies, in the words of the constitution, used and approved, and *usually practised on in the courts of law.* With the exception of the writ *ad terminum qui præteriit*, and *sine assensu parochiæ*, the whole of the work, from page 223 to 274 may be considered as giving the law and the forms in a very correct style as a part of the old English system, but cannot be taken as a part of the law of Massachusetts.

Having expressed our sentiments on the number of writs, we proceed to some more particular observations on the execution of this work. Writs of entry have been supposed by Gilbert and Blackstone, and some others, to have been the most ancient of possessory actions. In their form they are extremely simple and concise. In general, the several species of writs of entry upon disseisin are in this treatise well described, and the form of the writ and count correctly given. This, it is agreed, is in practice by far the most common real action. Aside, therefore, from those which we suppose are not in use, the writ of entry deservedly occupies a large part of this work. Resort ought always to be had to the simple writ of entry *in the quibus*, and no other adopted, unless the necessity for it is most urgent. In a great portion of the cases in which another remedy is prescribed, by making an actual entry and taking

care to be able to prove it, the use of other actions may be superseded.

In further observing upon this treatise, we shall occasionally take the liberty of comparing it with the work of Professor Stearns on the same subject. In general, both are excellent, and have the same object. That of Professor Stearns is a more scientific treatise, given originally in a course of lectures to students of law, and embracing many principles in regard to real estate not within the scope of a practical treatise on real actions. It has, however, much that relates to practice; and contains an interesting account of the practice in Massachusetts at its earliest period; and has annexed to it, in an appendix, a great variety of practical forms. In some things the Professor's dissertations are very useful. He gives at some length the doctrine of the right of entry, and the cases in which, after actual entry, a person may bring a writ of *quibus* or trespass. It is evident, also, and this we consider as of no small importance, that the Professor regards many of the old writs of entry as never having been adopted, or as having become obsolete, and of no practical utility.

The plan of Judge Jackson is different. His work is designed for lawyers, and is much more minute and critical. He gives in the text of his work the writ and count, and the pleadings subsequent to them, both in abatement and bar, in all supposable cases, whether they occur more frequently or rarely. His authorities for the forms are the old English writers, which are very scarce and rarely to be found. Less reference is made than we could have wished to precedents or practice in our own courts. With his experience and extensive practice, he might more frequently have made valuable suggestions derived from this source.

As to the precedents, we notice that in this work as well as that of Mr. Stearns, there is very little deviation from the approved standard forms. Some very few variances which have occured to us, we shall mention. Among other precedents, is an important one for the minister of a parish as a sole corporation for ministry lands.* After describing the land demanded, it is added, which he claims *as the right* of the said parish. This mode of allegation is adopted in the other precedents, where a minister brings an action.† The same

* No. 2, p. 27. † P. 39, 261, 281.

phraseology is used by Professor Stearns in his appendix.* We have understood the correct practice to be different; and should say 'which he claims as his right as such minister of said parish' or 'in right of his said parish.' The minister is the corporation, and, in many instances, though not in all, the estate never was the property or right of the town or parish. The statute says, 'the ministers of the several protestant churches are and shall be deemed capable of taking in succession any parsonage lands granted to the minister and his successors, or to the use of the ministers,' &c.† In conformity with the obvious meaning of the statute, the court has decided in several cases that it was the right of the minister by virtue of his relation to the parish, though he could not alienate without their consent, and that the fee was not in the town or parish.‡ Does there not seem to be a palpable inconsistency in claiming in the first place as the right of the parish, and afterwards alleging, when a predecessor has conveyed or been disseised, that the right came to the demandant? so in counting on the seizin of the demandant, and claiming it as the right of the parish? This may seem a small variance, but we do not consider it as such. It is clearly established, that the town or parish have not generally the right, but it is vested in the minister and his successors. But if it were a mere matter of form it ought to be correct.

In counting upon the seizin of an ancestor, when the action is brought by a part of the coheirs, as in Nos. 11 and 15, (pp. 33, 36) it cannot be necessary to trace the title or descent to those who do not sue, and from whom the demandants do not claim. This may sometimes be difficult or impossible. The demandants may know their own right, and be able to state it correctly; but may be wholly ignorant of the situation of the other branches of the family. If it be material, it must be stated truly, and be proved as laid; if it be immaterial, it would be well to omit it. There may be good reason in England for tracing the whole genealogy, as there coparceners must all join: but by statute in Massachusetts they may join or sever.

In treating of actions to recover real estate, particular attention was due to those on mortgages. They are much more frequent than other suits for land, and there has been more

* Stearns, Nos. 9 and 15. † 1785, c. 51.
‡ Weston v. Hunt, 1 Mass. Rep. 500. Austin v. Thomas, 14 M. Rep. 333.

loose practice in them than in any other. For this, various reasons may be assigned. The action is commonly brought to obtain possession of real estate as a means of compelling the payment of the debt, or to render the title absolute. In by far the greater number of instances, there is no controversy as to the title. When this is the case, creditors employ such persons to bring the action as they commonly employ to collect their debts. These suits are therefore not always brought by those who are conversant with real actions, but are conducted by those who would not be resorted to in serious disputes about titles. But this is not all; where the object is merely to foreclose the equity of redemption, it is not strange, that in making this entirely new use of a real action, more correct practitioners should have been in some degree confused as to the proper mode of declaring. Particular attention to the subject of actions on mortgages will be found in this treatise, though in some respects it is less complete than we should wish to see it.

It is correctly observed, that they are real actions. They are so called by the Provincial stat. 10 W. 3. c. 13, as well as in that referred to by Judge Jackson. An action on a mortgage is properly styled a special writ of entry.* Different methods of declaring have been in extensive use in Massachusetts: one of which has been like a general writ of entry in the *quibus* against the mortgagor or tenant in possession as a disseizor. An action in this form, after much consultation, was brought, upon which a short time before the reports commenced, it was decided, that upon such a writ, the demandant could not, when the tenant had pleaded the general issue, have judgment as in case of a mortgage, though the jury, by special verdict, found the mortgage and a breach of the condition. This decision was probably referred to by Chief Justice Parsons, in 2 Mass. R. 496. This determination has, however, since been overruled, and the conditional judgment may be rendered.

Another and a very common course has been to allege the seizin of the mortgagor and the conveyance to the mortgagee, with a profert of the mortgage deed, and the seizin of the mortgagee in fee and in mortgage, without setting out the condition or alleging any breach of it. Another method has

* 2 Mass. Rep. 493.

been like the next preceding, except that the deed is declared on as absolute and the seizin alleged to be in fee, a profert being made of the deed. The two latter methods have been determined to be good. The precedents given by Judge Jackson are unquestionably good, but that by mortgagee against mortgagor, is, we think, too long.* It would have been better to have omitted the statement of the condition and the breach. The insertion of more than is necessary in these forms, is the sure road to their rejection altogether. When the action is by assignee, or executor, or administrator, it would be well to have them inserted, and, as far as we have known, this has been usually done. On the subject of actions on mortgages, there is another peculiarity to be noticed. It is said (p. 52) when the action is against any other than the mortgagor it is safer to bring the action in the *per, per and cui, or the post.* We are confident that this mode of declaring has been very rarely, if ever, pursued. If the tenant in possession came in mediately, or immediately, under the mortgagor, the demandant may, at his election, consider and treat him as an original disseizor. If he actually disseised the mortgagor, or any one holding under him, then the possession of the mortgagor and his assigns being that of the mortgagee, the declaration would be good against him as a disseizor. But in almost all cases the possession is under or with the consent of the mortgagor, and, in many cases, it may be almost impossible to trace the possession from one to another. If it be not stated truly, and the action is brought as recommended, it would fail. There may be a case, indeed, where a person having disseised the mortgagor, or tenant under him, should, without the least pretence of title, transfer or convey the possession to a third party, and then, we admit, the action may be in the *per.* But to make the rule general that whenever the action is not against the mortgagor, it had better be in the degrees, is incumbering the practice with unnecessary form and perplexity.

On a recurrence to the forms prescribed by Professor Stearns, we cannot but think they are as much too short as those of Judge Jackson are too long. In Nos. 34, 35, and 36, (pp. 449, 450, 451) after alleging the disseisin, he counts upon a seizin in fee and in mortgage, without stating any way in which that seizin was acquired; and in a note he observes, that this

* P. 50, No. 22.

is good for all purposes. This may be substantially good, but it is questionable whether it would be good on special demurrer.* It would have been better to state the deed, and to make a profert of it. Of late years, the deed has generally been set forth. And this is in accordance with the forms prescribed in American Precedents, a book to the correctness of which in all its parts we do not expect the Professor will subscribe. He has one precedent, however, No. 37, in which the conveyance is alleged, and a profert made of it. This, so far as we can learn, is the form in common use.

As an important point of practice, as well as a matter of juridical curiosity, some examination has been made to ascertain what the course of proceeding has been in different counties in the state. In by far the greatest number of instances, when the conditional judgment was rendered, the count was predicated upon the mortgage deed and a profert made of it. In the early part of the last century, the deed was set out, and the condition, and a breach of it stated. The declarations in other respects were quite incorrect and informal. Immediately before the revolution, the precedents by approved pleaders, and men of the first eminence at the bar, in actions by mortgagee against mortgagor, shew that the deed was declared on and a profert made of it without setting out the condition. When the action was by assignees or executors, the condition was set out, and a breach alleged. In these precedents, though the deed was declared on, the seizin was alleged to be in fee-simple, and the phrase of a seizin in mortgage was not then used, and was probably the invention of a much later period. In these actions there was another variance from Judge Jackson's forms, there was no allegation of a *taking the esplees*, and there is not in those by Stearns. We are surprised in a treatise so complete to find no precedents of pleas appropriate to suits on mortgages. There is not even a plea by the tenant, or a suggestion by the demandant, that the action is grounded on a mortgage. Perhaps it would be too much to require that the course of proceeding should be pointed out, when the mortgagee is in actual possession, and the mortgagor seeks to recover his land back again; but all those proceedings that might occur in practice in an action, ought to have found a place in this book.

* Sed vide Erskine v. Townsend, 2 Mass. Rep. 496. Ideo quære.

The other writs of entry in use in our system are upon *abatement, intrusion, ad terminum qui præteriit,* and *sine assensu parochiæ.* These occur but rarely in practice, and it is still more rare that the better way would not be for the demandant to make an entry on the land, and bring his writ directly against the tenant as a disseizor. It is, however, remarkable that the only two writs of entry reported as brought in Westminster Hall for a century past, are upon abatement and intrusion. That on abatement is reported by Henry Blackstone,* and some of the inaccuracies in it are noticed by Jackson. The action for an intrusion is in 1 Taunton, 174. The pleadings are all given at large by Chitty.† If he has given a faithful transcript, this is by far more incorrect than the other. It is full of gross mistakes and errors.

On examination, it will be found that each of the four kinds of writs of entry above-mentioned had before the revolution in a few instances been instituted and sanctioned by the courts in Massachusetts. These writs of entry, and the counts in them, are in general in this treatise correctly stated, and the same remark will apply to those which we have mentioned as not in use.

We now proceed to make some observations upon the pleadings after the count, which will be applicable not only to those in writs of entry, but to the other actions.

Whoever has examined the general course of things in the administration of justice for a considerable period of time, cannot but be satisfied that there has been a tendency to discourage and discountenance *special pleading.* This has been manifested as well by legislators, as courts of justice and lawyers. Much, very much, has been effected in a century and a half. Whether all the alterations of this nature have in every instance been judicious and real improvements, may, perhaps, be questioned. We pretend not to determine; but the fact is indisputable. This has been the case to a considerable extent in England. The evidence that may now be given under *non-assumpsit* and not guilty, are striking examples. In New York, a general statute authorizes a defendant, upon giving notice, to plead the general issue in all cases, and give any matter in evidence which would be a bar to the action. In Massachusetts, the legislature, in many cases, have rendered

* 2 H. Bl. 444. † 3 Chitt. Plead. 611.

a special plea unnecessary. In practice, in litigated cases, there is very little special pleading.

Pleas in abatement, which, eighty years ago, were almost as invariable an appendage to a suit as the clerk's name, or a seal, are now so much out of use, that neither courts nor lawyers know how to manage them. It must, however, be admitted, that there are some few occasions where they may be useful, and some where they are indispensable. In such circumstances, we were much surprised to see such a host of pleas in abatement set in array against real actions. The author has given his reasons for this course from page 9 to 11 of the book, and has endeavored to show that they are essential and material. He observes, (p. 11) that they 'will be found to occupy a large space in the following pages, and it is hoped that even those which are not of the important character abovementioned, will yet repay the labor of the student, by giving him a more thorough and perfect view of the nature and requisites of the different actions.' We have the same objection here that we had to the insertion of so many kinds of writs, that there is no ear-mark to distinguish those that are for show, and not for use. But besides this, we are not satisfied that there is so much importance in these pleas as the author attaches to them. Pleas in abatement occupy nearly one hundred pages, and pleas in bar to writs of entry on disseisin, only thirty-three pages. Indeed, what is said in regard to special pleading in general, in this work, is by far the most objectionable part of it. So far as we have been able to examine, it must be admitted, that, in most instances, the pleadings are stated according to the doctrines holden by the courts in the time of Edward III.

Whatever may have been the case in England, or elsewhere, special pleading has been very little used in real actions in Massachusetts. In confirmation of this, an appeal is made to the experience of the profession. It is also very much confirmed by so little notice being taken of it in the reports for twenty-four years. Discussions in regard to real actions occupy a considerable portion of every volume of the reports, but little is said of special pleas in them. All previous writers treat them as of rare occurrence. This may be affirmed of Sullivan, Story, and Stearns, and the editor of American Precedents. And we confidently assert, that by reference to the records prior to the date of the reports, and after pleas in

abatement in personal actions were generally proscribed, it will be found that the most eminent counsellors but very seldom had recourse to special pleading. It is admitted, that there are some facts which must be pleaded in abatement, and others specially in bar. If objection is made to the jurisdiction of the court upon some matter not apparent upon the writ, in some cases it must be pleaded in nature of a plea in abatement; though in others it might be the foundation of a nonsuit on trial. Outlawry, of which there have been some few instances, must be pleaded in abatement. *Alienage*, *non-tenure*, and *disclaimer*, must all be specially pleaded, and it has been holden that they may be either in bar or abatement. The author has very correctly laid down the rule for distinguishing between pleas in abatement and bar, (p. 60). Pleas in abatement ought always to give the demandant a better writ; but the plea in bar denies that the plaintiff could recover in any form of action.* He evidently labors to have all pleas which do not give a better writ, pleas in bar. It may, therefore, well be questioned, whether the plea of alien born, in a real action, should not always have been in bar. This observation will also apply to general non-tenure, and disclaimer of the whole land. If several, sole, or entire tenancy be insisted on, they must respectively be pleaded in abatement. But there is ordinarily very little advantage to be gained. At most, they give a very short respite, and many times they do not afford that relief.

But to bring our observations more to the point before us, it may be necessary to examine more particularly the nature and properties of the general issue in some of these actions. In entry on *disseisin*, the general issue is *non disseisivit*; in a writ of *right*, that the tenant has more right to hold than the demandant to claim, in *waste*, no waste done, in *formedon*, *ne dona pas*. It is very evident that in this treatise, there is manifested a predilection for special pleading, and an inclination to narrow the effect of the general issue, in some instances, even beyond the ancient strictness. The nature and design of the general issue was to deny what was alleged in the writ and count, to stand upon the defensive, to put the plaintiff or demandant to prove all the material allegations of his writ. Such is the doctrine of the most approved writers on the subject.

---

* 1 Saund. 284, n. Stephen's Plead. 435.

Chief Baron Gilbert, than whom it would be difficult to find a better authority, says, 'the general issues were contrived in such words as were proper to deny the whole fact in the declaration.'* The same position is maintained by Blackstone. He says 'it traverses, thwarts, and denies at once the whole declaration.'† Probably the correctness of these principles will be admitted. The great question may be, what is it material for the demandant to prove, in order to sustain his action. We know of no better rule than this, to prove such facts as if stricken from the declaration must prevent a recovery. In entry upon disseisin *in the quibus*, the first is the demandant's seizin, within the time alleged, of such an estate as he counts upon; the second is the unlawful entry of the tenant. If the action be grounded on the seizin of an ancestor or predecessor, in addition to the seizin and disseisin; in the one case, the descent, and in the other the succession, being essential to the maintenance of the action, ought to be proved as alleged. The same general principles will apply to all the different writs of entry, be they more or less. In some real actions it may be true that there is no general issue strictly and properly so called. This is true in regard to dower, and as some say also of *formedon*. To such actions the rule does not apply, any more than it does to covenant, or debt on bond. In the writ of right it seems to have been the general doctrine, as old, perhaps, as the action itself, or at least, as old as the trial by the grand assize, that every thing except collateral warranty, might be given in evidence upon the *mise* being joined.‡ In one of Serjeant Williams's notes to Saunders there is this assertion.‖ 'It is said in Bro. Droit 48, that nothing can be pleaded in this action but collateral warranty, and *every thing else may be given in evidence upon the mise joined.* And the C. P. seem to have been of the same opinion in Tyssen v. Clarke.'§ It therefore appears that the ancient practice was to permit the tenant under the general issue to insist that the demandant should prove his case as he had stated it. But the inquiry is not what the course was in the time of Edward III., those days when scholastic subtilties were permitted to conceal and perplex truth and right; but what the rule now is by analogy to other cases

* Hist. Com. Pleas, p. 57. † 3 Comm. 305. ‡ 10 Mass. Rep. 134.
‖ 2 Saund. 45f, n. 4.
§ 3 Wils. 420. 2 W. Bl. 892. Booth on Real Actions, 98, 112, 114.

where the rules of pleading and of evidence are adapted to the advancement of justice.

Even in assumpsit, an action, in which, owing to its late introduction, the rules of pleading were never carried to the ancient strictness, many things were formerly pleaded which now may be given in evidence, and some, which if now pleaded, would be bad as amounting to the general issue.* Formerly it was usual to traverse specially the consideration of the contract, or the contract itself, or the plaintiff's performance of a condition precedent. So matters in discharge were pleaded; but now these are generally to be given in evidence under the general issue.† One great reason for special pleading was a fear to trust the jury with the cause, and there might be good reason for this fear, when many of them could not read or write, and their minds might be confused if more than a simple fact was submitted to them. But there is in this country no shadow of reason for special pleading for this cause.

The respectable author so often quoted already, says that assumpsit and trover 'were so formed that every thing almost might be given in evidence under the general issue.'‡ And whatever theorists might say, no man can doubt that the ends of justice are better attained than they would be by special pleading. Without questioning that the rules in the Year Books are as they are laid down by Judge Jackson, it by no means follows that they ought to govern the modern practice. Still less would it follow that they have been actually adopted in Massachusetts. It seems to be admitted that the practice in the courts there, has not been conformed to the plan marked out. The course of proceeding, when conducted by respectable counsel, would also be good evidence. This almost invariably has been, to plead the general issue, both before and after the revolution. We should be slow to believe that they did not understand their business, or had sacrificed the rights of their clients. An examination of the real actions reported as decided, would corroborate our assertion. The books of practice heretofore published, all speak the same language. We do not cite them as of equal authority, but the authors of them could not but know what the practice had

* Gilbert's Hist. C. P. 64.
† Gilb. Hist. C. P. 60, 61. 1 Chitt. Plead. 467, 471.
‡ Gilb. Hist. C. P. 64.

been.* Story in his Pleadings (p. 334) says, 'Where the defendant claims title, there seems to be no special plea in bar in our real actions. Every thing may be given in evidence under the general issue.' This book is in extensive use, and though it probably is not in every respect such as its author would now make it, yet in the main it is correct. Professor Stearns has not indeed gone this length; but after having considered the pleas in abatement which we have named, he observes, that 'in writs of entry there are but few special pleas which require particular notice; because a large proportion of the trials in this action are had under the general issue.'† He mentions as necessary, non-tenure, disclaimer, and a conveyance to a stranger; after which he observes, 'there are several other pleas which are mentioned in the books,' (particularly referring to Rastel) 'most of which can only be pleaded, giving *color* as it is called. But they are neither necessary nor useful in our practice.' He adopts the position which we have advanced in regard to a writ of right. His manner of treating the subject would lead one to infer that much that is said by Judge Jackson as to the necessity and propriety of many special pleas, was either unknown to the Professor, or considered by him as unimportant.

So far as the practice is settled by adjudged cases, whether in unison with our ideas or opposed to them, we think the evil would be greater to attempt an alteration than to acquiesce in them. There may be a few decisions at war with the general practice, and as far as they go we do not controvert them. One is, that by pleading the general issue the tenant admits himself in possession of a freehold estate.‡ Perhaps this is consistent enough when the question would be, whether he holds or is in possession in any way; as, in such case, he ought to plead non-tenure. But when he claims to hold under the demandant either in fee, or a less estate, it has been determined he might give this in evidence, without pleading it. The ground of the decision first mentioned, that there must be a special plea, is, that the demandant by bringing the action assumes that he is tenant of the freehold. Admitting this to be so, it is the same as if expressly alleged; and upon principle the demandant ought to be holden to prove it as a fact essential to his recovery. But as the demandant may well

* Sullivan on Land Titles, 245, 246. American Precedents by Anthon, 448.
† Real Act. 219, 220. ‡ 4 Mass. R. 443. 5 Mass. R. 344.

presume that he is a disseizor, and holds the freehold, it may be admitted that the tenant, if he holds otherwise, or does not hold at all, should be obliged to show it. Another decision, however, more seriously breaks in upon principle. In an action on disseisin it is said that the tenant, by pleading that he did not disseize, admits that he ousted the demandant, or, as we should say, did disseize him. This, so far as we can learn, was first decided in the case of Stevens v. Winship.* A prior case of Higbee v. Rice,† is there referred to as having been so decided; but, on examining that case as reported, we find that the court expressly waive the decision of that part, and decide the case upon proof of an actual ouster. Both of these cases were by co-tenants for a portion of the estate against a co-tenant. We do not, however, perceive that this makes any difference. No authorities are referred to on this point in either case. This holding that a denial of the disseisin is an admission of the fact of turning out of possession, seems somewhat like the determinations which some have made, that pleading the statute of limitations in assumpsit was an acknowledgment of the debt. If these two points are, however, decided, let them be taken as law, and let the pleadings be governed by them. There are, however, many others open to the tenant to make upon the demandant's title. The demandant must show the seizin which he has stated, and when he claims as heir or successor, must be prepared to prove the fact as laid.

We cannot accede to the propositions laid down and insisted on at large in different parts of this treatise, that the tenant by not excepting by a special plea to a mistake of the *person last seized*, or of the *estate* of the person last seized, or of the *descent*, or the *manner* in which it has been acquired, would lose any important advantage.‡ As to the question of descent, every one conversant with trials knows that, as well in the action of entry as in others, this point has been made under the general issue. In regard to a mistake in alleging the entry of the tenant, there may be more ground for question. This is within the knowledge of the tenant, and the demandant may not know by what title the tenant claims. This, however, has generally been tried on the general issue, and we have never heard of any inconvenience from the practice. The author

* 1 Pick. R. 318. † 5 Mass. R. 344. ‡ Vide pp. 45, 162, 177.

supposes that there have been much confusion and irregularity on the subject of pleading, in the practice in the courts of Massachusetts.* That there has been some irregularity, may be admitted. But we should be very slow to impute such sheer ignorance and carelessness to those who have stood in the foremost ranks in the profession, and acquitted themselves honorably as well on the bench as at the bar, as to suppose that they could proceed for two-thirds of a century, without exception, in trying actions as *they* did upon the general issue, provided they were so grossly mistaken in regard to the effect of pleading it. Some of them had both the ability, and the disposition, to search the remotest and deepest fountains of the law, in regard to real estate and real actions. The practice was not local: it extended through all parts of the state.

It has already been observed, that the real action in most common use resembled a writ of assize; this was not only the case with entry in the *quibus*, which is always said to be in the nature of *assize*, but also of the writ on abatement, which seems to have been adopted from the assize of *mort d'ancestor*; and it is admitted by Jackson, that on this writ the inquiry was not confined to the disseisin, but was extended to the descent.

We have made these observations with reluctance; they have originated in an earnest desire to preserve the system from innovation, and to rescue the profession, if not the courts of justice, from the reproach of ignorance or carelessness. At the same time, it has been our wish, as far as it could consistently be done, to have legal proceedings divested of mystery and captious technical intricacy. It may be true that many of the pleas in abatement and in bar might be lawfully used; but we would caution every one who attempts to use them, to be careful how he wields a two-edged sword. If a party having a defence upon the merits should be induced to plead as directed in page 114, when the demandant counts on his own seizin, that the writ ought to be in the per, &c.; the demandant being able to prove an actual entry, may take issue, on the plea, and have final judgment, and the tenant lose the land, though he had a good defence.

The doctrine in regard to tenants in common, joint-tenants, and coparceners joining and being joined, is extremely well stated. The proceedings proper to be had upon the changes

* Page 162.

that occur after the suit is commenced, are also very well detailed.

The distinction as to pleas after the last continuance, is well laid down. There may be a small inaccuracy in Professor Stearns, in page 215. It is not, of course, that all events happening after the commencement of the suit should, when pleaded, be pleaded as after the last continuance. The plea technically denominated *puis darrein continuance*, is only after plea pleaded.* When a plea has not been filed, it should be as to the further maintenance of the action, as is stated by Judge Jackson.†

Aid prayer is also well described by Jackson. In some few cases it may be expedient to resort to it, especially where the tenant on eviction can have a remedy against the remainder man or reversioner. But ordinarily it is of no substantial benefit.

The observations upon *receipt* are a good and correct exposition of the old English law; but, like many other parts of it, have not been adopted and practised upon in the courts of Massachusetts. But there is another branch of that law which is passed over much too slightly,—that of *voucher*. It is cursorily mentioned in the beginning of the treatise, and no further notice taken of it; and no forms are given. In many cases, proceedings, even if obsolete, are given in the appendix. From the first introduction of real actions in Massachusetts, *voucher* has been in common use. For a great length of time vouchers were made the foundation of one continuance at least, and not unfrequently of many more. The doctrine and use of voucher is well explained by Serjeant Williams in a note to 2 Saund. 32. It seems to be treated by Jackson as a mere notice to the warrantor of the pendency of an action.

An examination of the records of the courts for twenty years before 1774, will furnish many instances of voucher, and a number where the vouchee entered into the warranty, and some where the demandant recovered against the tenant, and he over in value against the vouchee. This was done when suits were prosecuted and defended by persons as conversant with the law and practice of the state in real actions as any have been from its first settlement. Within the last forty years there has been much irregularity and confusion in the

* 1 Chitt. 634, 635. † Jacks. 146.

manner of proceeding. In a few instances leave has been obtained for the warrantor to defend with the tenant. This is more like the proceeding in ejectment, where the landlord comes in and is made a co-defendant, than a part of the system of real actions. It was frequently the practice, also, when a person was sued, and had a warranty of the land demanded, for him to vouch the warrantor, without any reference to the allegations in the writ. As a process of voucher, this was undoubtedly very irregular. If the action was brought against one as having committed a disseisin himself, there could be no voucher, for if the action was rightly commenced there could have been no regular warranty; and if the action was not right, other measures must be resorted to. So if the action were in the degrees, no voucher could be had which was out of the *lien*, as it is termed, or out of the degrees. This rule, also, was continually disregarded. Where the writ is in the *post*, we know of no rule limiting the number of vouchers. We have known instances where the vouchers were extended to a great length, and we have heard of one case where vouching over was continued twenty times. So far as we have known, for some years past, voucher has been used merely as a legal notice to the warrantor; but in this view it is important that the proceeding should be correct. It would have been well to have given the form of the proper entry, and of a *summoneas ad warrantizandum*, and to have distinctly stated in what cases the tenant had a right to this process and where he had not. If the tenant cannot of right claim this process, the court in their discretion may refuse a continuance for the purpose. When it is a matter of right, the tenant may insist upon it. It is indeed important to the tenant in all cases to have such a summons when he relies upon his warrantor to respond to him in case he is ousted. If a summons be not taken and served, and returned and entered, it has been disputed whether the warrantor would be concluded by the judgment. He might be able to prove that there had been no breach of his covenant, though there had been a recovery; and in such cases the tenant would be without remedy. It is on these accounts suggested that the doctrine of voucher ought to have found a place in this work. It is treated more at large by Professor Stearns, and he has given a form of the summons.

The chapter on writs of right is useful and very important. This action at one time had fallen into disuse in England.

Many efforts have been made to revive it there; but the courts at Westminster Hall seem to have set themselves against it, holding it to be, as they say, *strictissimi juris*, giving a demandant no indulgence, and keeping him to every *iota* of legal form. In some instances they have been so strenuous that palpable injustice has been done. All their judges, however, have not felt thus. Eyre, chief justice, who was a great lawyer and judge, said, 'if these writs of right could be prosecuted without the delays in process, *essoins*, &c. with which they are burthened, it would be much for the benefit of suitors that more of them should be introduced into practice.'*

In the practice in Massachusetts, as Judge Jackson well observes, this action is as simple as any other. There are no greater delays or costs attending it than other suits for land. Trial is had in the same way, by a common jury, selected, as is believed, in a manner as nearly perfect as any one could be. The trial by the grand assize, which is adopted into the New York practice, must be attended with additional delay and expense. A jury of twelve is better for this purpose than a larger number.

The observations upon the propriety of selecting this action are such as might have been expected from such a source.

'A writ of right may be maintained by any one who has the right of property in fee-simple, although he has also the right of possession and even a right of entry; he may sometimes find it better to resort at once to this action, the judgment in which is final and conclusive, than to adopt either of the other remedies. But he may, on the other hand, fail in this action, when he might have recovered in a writ of entry, and even when he might have lawfully ousted his adversary by an entry *in pais*, and have held the land forever against him. Littleton, sect. 478, states a case of that kind, to which Lord Coke has added some others. These, however, are not so likely to occur as a mistake of the opposite kind, that is, an entry by one who has the right of property or possession, but whose right of entry is tolled.' pp. 281, 282.

The author then proceeds to illustrate both positions by suitable examples.

Of the same excellent character are his remarks upon the effect of a decision in a writ of entry upon a trial in a writ of right. The passage is too long to be quoted at large. We

* 1 Bos. & Pull. 524.

select, however, the following. Speaking of a writ of right, he says,—

'As it lies after a judgment in a writ of entry, it is said to be of a *higher nature*, and Lord Coke speaks of it as if the matter decided in the former action should be tried and determined again in the writ of right. This language may tend to mislead the student into the belief that the *same title* or question of right which was the subject of the former trial and judgment, is to be tried in the second action; but this is not true.'* p. 283.

This he enforces and illustrates, and concludes with the following remark.

'The writ of right is indeed of a higher nature than the others, because the judgment upon it includes all that is involved in the other actions, and settles definitively the whole right to the land, *of possession* as well as *of property;* but it is of a *different*, as well as of a *higher nature;* and may therefore be maintained by either party after a judgment in any of the other actions, without violating that principle of the common law which forbids a second action between the same parties for the same cause of action.' pp. 284, 285.

Perhaps some of the observations made by the author might serve to explain and limit the generally received axiom, that a writ of trespass and ejectment may be repeated as often as parties choose.

In regard to the course of proceeding in a writ of right, there has been a question as to the meaning and reason of the language in the defence. Booth, who was one of the latest writers on real actions, is stumbled at the idea of a tenant's coming and *defending* the *demandant's*, not the *tenant's* right.† Blackstone explains it by giving a technical signification to the word *defend*, making it equivalent to a denial.‡ In the writ of right it most clearly has that meaning. Blackstone supposes that it has the same in all actions. He mentions that in the writ of entry there is a small grammatical inaccuracy in stating it as '*jus suum*,' instead of '*jus ejus*.' These expressions were, however, thus used at least as far back as the Latin language was adopted in legal proceedings.‖ If Blackstone be correct, and his explanation appears to be well founded, the pleadings in all real actions should be made accordingly. Some few transgressions of this rule will be found in the forms

* 3 East, 346. † Booth on Real Actions, 94, 112, 148. ‡ 3 Com. 296.
‖ Stephen's Plead. n. 81 to p. 434, and reference to Plac. Abbrev.

in this treatise, (p. 74, 78, 87). The tenants come and defend *their* right, when it ought to be *his*, that is, the demandant's.

A more important difficulty occurs as to the general issue, and the manner of framing it. It is true, that in the trial by the grand assize there is strictly no issue as commonly defined. It is merely a prayer of inquisition, without a direct assertion of the right of the tenant. Writs of right were but rarely brought in Massachusetts before the revolution. In some instances the plea was *not guilty*, in others probably the *mise* was joined according to the English form. It is laid down that the *mise* is joined without any replication by the demandant.* The precedent in Blackstone's appendix has nothing of a replication; but in giving a precedent in the *wager of battle*, he inserts a special replication.† Rastell, when there is a trial by the grand assize, has a special replication.‡ The case of Tyssen v. Clarke‖ has merely a general *similiter* by the demandant; and there is one case in Coke which is in the same form.§ As it is more in conformity with the general practice in Massachusetts, the addition of the similiter by the demandant would be proper. There is, however, another point more important. It is stated in this treatise, (p. 289) that when the seizin alleged in the writ is to be disputed, it must be by an additional suggestion after joining the mise, otherwise the seizin is confessed. The practice in Massachusetts has generally been different; that upon the mise being joined, all the material facts are to be tried. In England the practice has not been uniform as to the right and duty of the parties to open and close. By their forms a seizin was alleged in the reign of a particular king, and in order to have that made a subject of inquiry, the tenant paid a demi-mark. In the precedent in Blackstone the seizin is so alleged, but nothing said of the seizin within sixty years;¶ but in Wilson, the latter is alleged, but no inquiry as to the seizin is stated.** It probably, therefore, in England was confined to the fact of seizin in the reign of the king, and not to seizin generally. It is hardly credible that it should so often have been asserted by all the standard writers that every thing is put in issue by joining the mise, and yet no notice be taken of so important an exception to that rule as that of the demandant's seizin. It has very

* Booth 95 to Ent. 1816. Com. D. Droit 6. † 3 Bl. Com. App. No. I, § 5 & 6.
‡ Rastell, 241,b. ‖ 3 Wils. 562. § Co. Ent. 183a. ¶ 3 Bl. Com. Ap.
** 3 Wils. 561.

recently been determined in England that even after the tender of the demi-mark the tenant must begin and close.* This is contrary to former precedents and the authority of Littleton. In a note by Professor Stearns to his treatise, he remarks that Hotham Baron ruled that the tenant should begin on the trial of Luke and Harris.

Though there are authorities to the contrary, the practice is well established in England that the tenant may traverse specially the seizin of the demandant or his ancestor, and in such case the demandant must maintain his suit and have the burden upon himself.† But we are not satisfied that any other pleading should be deemed necessary than the general issue or *mise.* A case recently decided in the state of New York confirms our opinion. When the tenant in a writ of right after putting himself on the grand assize by joining the mise added a prayer that they might also inquire of the seizin within the statute period, to which there was special demurrer, because it was included in the mise; it was holden bad.‡ The court further observes that a special plea could not be pleaded with the mise, because of the different trial, by grand assize, and common jury.

The courts in England appear to be less unreasonable in their treatment of this action than they have been. The objections they mention to it, on the ground of the limitation being so much longer than that in incorporeal rights, and the great delays in the process, can neither of them apply to the action in Massachusetts. Still it may be well for the legislature, to consider whether the limitation is not now too long. It is much beyond that of the neighboring states, and that of the greater part of the Union.‖

The chapter upon dower is quite important, as the action is one of very frequent occurrence. Although the action is not entirely disused in England, yet the remedy there is in chancery. In Massachusetts there is no chancery jurisdiction on this subject. The form of the writ has in Massachusetts been

* 3 Bing. 446. 2 Carr. & Payne, 271.

† 2 Saund. 45f. Dyer, 247b. Booth 118.

‡ Ten Eyck v. Waterbury, 7 Cowen 51, 1827.

‖ There is no subject on which there is less uniformity than in the law of limitation of actions for real estate. As stated in Griffith's Law Register the limitation in two of the states is fifty years, in one forty, in four thirty, in one twenty-five, in two twenty-one, in six twenty, in two fifteen, in four seven years, and two unknown, if there be any. There are savings in case of disability, but very unlike both as to the subjects and the length of time.

prescribed by statute for more than a century past, and as early as the year 1641, a writ of dowry was given, but no method of suing pointed out. The form given by Judge Jackson is too short. In that contained in the provincial statute the seizin of the husband during the coverture is stated.* The revised statute does not indeed prescribe the form of the count; but a blank is left to have it inserted.† The statute form is as follows: 'in a plea of dower for that—(*here the declaration*)'. Here it would be proper to add, the seizin of the husband, during the coverture, of the estate in which dower is demanded; the request to have dower assigned, and the refusal thus to do. By the statute the writ is given upon such request, and a refusal and neglect for one month. The same is the language of the provincial statute above cited. The form given by Professor Stearns and those in American Precedents allege the seizin and the demand, and although Stearns observes, that it is unnecessary, yet he says it is commonly inserted.‡ The old maxim *via trita est via tuta* applies as forcibly to pleading as to any other subject. It may be here observed, that neither of the three authors pursue the precise phraseology of the statute, '*In a plea of dower for that;*' but this form is strictly analogous to those prescribed in writs generally for more than a century past. We hold the allegation of a demand to be necessary, at any rate it would be imprudent to omit it. The pleadings in this action are in general correctly stated. There is no general issue in it. But the plea given as No. 11, (p. 324) is, for the reasons already assigned, bad for duplicity. This is admitted by the author, if the want of alleging a demand, be a bar to the action. The suggestion made as to a bar by a separate deed of the feme, that it should be by the husband as well as the wife, if he be living, is of great moment. The precise point has not been decided by the state courts; but it was so holden by Judge Story in the Circuit Court.‖ There are indeed some expressions used by Judge Parsons in the state reports, which might have raised a question whether the husband's previous warranty deed, did not imply his assent to have the title perfected.

The only other action particularly treated of in this book is that of *waste*. It is sometimes, but very rarely, brought in England. Either an application is made to the court of chan-

* 13 W. 3 c. 9. † Stat. 1783, c. 40. ‡ Stearns 473, Am. Preced. 396, 397.
‖ 3 Mason, 347.

cery, or an action on the case is prosecuted. It will undoubtedly lie in Massachusetts; but it is rarely brought, and very few cases have proceeded to final judgment. It will in future probably be less used than it has hitherto been. For a late statute has given the Supreme Judicial Court jurisdiction in equity not only to punish waste but also to restrain it.*

The statutes in Massachusetts recognise this action in some of its forms. One directs that, among others, *in actions of waste co-heirs* may sue jointly and severally.† By another an action of waste is given against tenant in dower, and the penalty of a forfeiture of the place wasted and damages are given.‡ Under the latter, some forfeitures have been sustained; but the meaning of the statute was not brought into question. The principle of English law is altered, by giving the action to him who has the next immediate estate of freehold, where there is a subsequent life estate, rather than to the reversioner in fee. But we see not why it is not an improvement, though the learned author seems to hold otherwise. If the estate is forfeited, it is certain that it ought to go to the next in interest. As to damages, if they are assessed beyond the interest of the tenant for life, he may be accountable to the reversioner of the fee.

The form of the writ and count are correct, and so is the plea of no waste done. But in stating the effect of this plea, the same preference for special pleading which runs through the treatise, manifests itself. It is said that this plea does not put in issue the title of the plaintiff; and that if this is to be questioned, it should be specially traversed. This is however admitted to be contrary to the opinion of Serjeant Williams in his note to 2d Saund. 238, note 5. To confirm his opinion, Williams cites a case in Lutwyche in which the reporter was counsel.‖ Williams might be mistaken, but his known accuracy is against this. Lutwyche might also mistake the decision of the court: but this is very improbable in a case in which he himself was concerned. Comyns makes the same assertion which Williams does, and cites the same authority.§ According to Lord Kenyon, 'The opinion alone of so able a lawyer' as Comyns, 'is of great authority.'¶ Buller says, 'the plaintiff must prove his title as laid.'** In opposition to all these author-

* Stat. 1827, c. 86. † Stat. 1785, c. 62. ‡ Stat. 1783, c. 40.
‖ 2 Lutw. 1547. § Com. Dig. Plead. 3 O. 7. ¶ 3 Term Rep. 631.
** Buller N. P. 169.

ities, and many more might be cited, Judge Jackson says, there are in the old books precedents of a special traverse of the title. But it may be replied, that this by no means proves that it might not then have been given in evidence under the general issue. There is in many cases an option to plead either way. In addition to this, it is certain that many things which were formerly to be pleaded specially may be taken advantage of under the general issue. In conformity with the general practice in Massachusetts we can see no objection to this action taking the usual course.

There is at the end of this head a note in which surprise is expressed that Mr. Dane should have asserted that the statute of Gloucester was not in all its parts adopted in Massachusetts; and that the only case in which the action of waste lay to remove the thing wasted, was in case of dower where simple damages were recovered. This opinion is controverted and the authority of Judge Parsons is quoted as against it.* On referring to the place cited, it appears that the opinions expressed were not the decision of the court; but were the argument and illustrations of a respectable judge and great lawyer. No authority was referred to for this opinion, and no judicial decision is now alleged to prove the adoption of the statute. Judge Parsons was in practice a few years before the revolution and was older than Mr. Dane. Their practice, however, was in the same circuit. Considering the extraordinary care and industry of Mr. Dane, it is probable that he had never known or heard of a decision in Massachusetts in which triple damages had been given in waste. Whether Judge Parsons himself had ever known of any such determination, must be left to conjecture. The adoption of a statute so highly penal ought not above all others to be admitted without plenary evidence. If the remedy on the statute of Gloucester had not been used and approved as a part of the system before the adoption of the constitution, we again repeat that if such a penalty is necessary it is for the legislature alone to provide it. So far as our examination, which has been but limited, has gone, we find no trace of an action of waste except against tenant in dower or her assigns; and no judgment in case of dower except under the local statute. The common course in Massachusetts, under all forms of its government, has been

* 4 Mass. Rep. 559, 565.

not to adopt a penal statute; but if necessary to have it re-enacted. Sometimes the prohibitory clauses on the positive enactments were adopted as a part of the common law of the state, and the penal part of a statute rejected.

We have gone through this examination more in detail, because it has been impossible otherwise clearly to show what we approve, and to what part we object. This work will, we have no doubt, be very extensively used in Massachusetts, and in the other states whose laws and practice are in a good degree like those of that state; and the precedents in it will be relied on. It will be of great practical use wherever real actions are brought. Our objections to some parts of it have been stated. The excellencies of it have not been dwelt upon; they occur too often to be specially noticed. In Massachusetts, this treatise will not merely be highly useful, but, with the exceptions we have made to it, will be indispensable. In general the forms are good and expressed in clear, terse law language. Rastell and Coke could not complain that they are not well translated. There are however a few spots, in addition to those already mentioned, which show more distinctly on account of the general excellency of the work.

The first we notice is the slovenly semi-barbarous expression, '*in a plea of land.*' This seems to have been advisedly adopted both by Jackson and Stearns.* We most sincerely wish that they had unitedly attempted to drive this phrase out of court. When and where it originated we know not: but it does not owe its origin to either of these respectable authors. We have no doubt that this phrase would be as grating to the ears of an English jurist, as to hear the action of assumpsit entitled a *plea of money.* This expression has not as yet spread itself through the commonwealth. There was a time when Lowell, and Parsons, and Pynchon, and Auchmuty, and their contemporaries did not use it. In this place it has no meaning, and is decidedly at variance with the precise definite expressions in the old real actions.

The denomination of actions that concern real estate has in Massachusetts been very singularly varied. At first it was styled *in a plea of the case*, and this has been thought to be evidence of great ignorance and barbarism; but in fact it was only adopting the statute provisions for the writs *in casu pro-*

* Jackson, 26. Stearns, 149.

viso and *in casu consimili;* and if any thing was meant it was that each man's claim should stand on his own case. After the establishment of courts under the provincial charter the style was *a plea of trespass and ejectment*, which was the name given the action by the provincial statute.* In far the greater number of instances in the last half of the last century, the style of the action was *a plea of ejectment.* Some began, *in a plea wherein he demands, &c.* Some actions before the revolution, and more afterwards, had the appropriate name of the action, 'a plea of entry,' &c. This method of declaring has been extensively prevalent to the present time. It must at the same time be admitted that before the revolution, some few declarations might be found beginning '*in a plea of land.*' This form, or rather want of form, can be accounted for only by supposing that as doubts were raised whether the action used in Massachusetts were ejectment or a real action, to avoid any difficulty on this account, some cautious attorney resorted to this course and invented the plea of land. If the form prescribed by the statute prevents the declaration from beginning, *in a plea wherein he demands;* it is certainly easy to call the action by its appropriate name, which is more in conformity with the general practice in other actions. But if the principles of the decision in Cook v. Gibbs† are followed up, there can be no difficulty in pursuing the English forms.

The expression in the English forms, '*in a time of peace,*' is omitted, because it is said it is not adapted to the present state of society. There is ground for thanks that such is the case, and we hope it will long continue; but the statute of limitations, with its common savings, will run back to a very different state of things. From the year 1774 to the year 1790, right and justice could not be administered freely and fully in many parts of the state. The war, for some time, and the insurgent spirit prevalent, for a much longer period, prevented many persons from seeking remedies at law. Especially, not a few were prevented from entering upon and claiming real estate. The memory of man will run back to a considerable term of time when *silent leges inter arma* must with truth be asserted. We therefore cannot approve of this omission.

In tracing a descent to an heir not a lineal descendant, as

* 1 Geo. 2, c. 2.

† 3 Mass. R. 193.

well in entry as in formedon and right, it is in this treatise stated how the demandant is heir, e.g. in No. 14, p. 35, 'for that he died without any heir of his body lawfully issuing, the right, &c. descended to the said D, as cousin and heir.' This method is good, and we think indispensable. We find, however, it is not so stated by Professor Stearns. He says, for example, from the person last seized the right descended to the said D as brother and heir, without stating how he is heir, except by expressing the relation.* The method proposed by Judge Jackson is certainly the safest and best.

In writs of entry in the *per* and *per and cui*, &c. the mode of expression in these forms is, 'has *no* entry.' It ought to be, 'has *not* entry,' *ingressum non habet*, as in the register. This is translated by Judge Blackstone, 'has *not* entry.' Such was also the form used by the sages of the law, as well in adversary suits as in common recoveries, in our own country. There is another expression found immediately after the above, 'has no entry but by *one* S.' The pithy briefs of olden time had no such word interlarded in them. It was, 'has not entry but *by S*,' '*non habet ingressum nisi per Hugo Hunt*.' Such was the invariable method in the writs of entry. We know that there are precedents where, in tracing a long descent, in pleading, an estate is stated to have descended '*cuidam* R, &c.' These ancients, however, appear most venerable in their own proper simple dress.

In page 62 of this work, the mode of expression implies a doubt as to the proper form of beginning a replication to a plea of alienage, it is said, 'ought not to be prevented (*or* repelled, *or* precluded,) from having an answer, (*or* being answered).' Surely the *precludi non* might without hesitation be translated, 'ought not to be barred,' which is the form in Chitty. In 3d Instructor Clericalis, page 16, the common replication is made '*precludi non debet*.'

In the first form which is given in this work, in the description of the estate demanded, it is said, containing '*about* fifty acres;' this is not in accordance with the preciseness required in real actions. We have discovered no other precedent open to this objection. Little is said in this treatise of the description of the estate demanded; but it is generally observed that it ought to be as particular as in any common conveyance,

* Stearns, 441.

(p. 13). But surely it would not do to say in the writ, 'wherein he demands *about* twenty acres of land, *more or less*.' This precedent being entry in the *quibus*, will probably be used more than any other.

The old nicety as to the name and order by which things should be demanded, ought not to be required; but in a book of practice it would have been well to have given some direction as to the proper form of demanding and describing the estate and its abuttals, and shown how far the proof should comport therewith. A doubt is suggested, page 173, whether one who pleads a deed to a third person under whom he claims, is not holden to produce it. A question is also raised as to the propriety of a *profert* in the plea: if a *profert* be made, it is clear that the party making it is bound to produce the deed. But in regard to a *profert*, the practice has not been uniform. The title deeds are not delivered over, and by analogy to the present practice in England, an averment that the deed is recorded in the registry of deeds, and is not in the power of the party pleading, must be sufficient. According to the general practice in Massachusetts, copies of deeds from the registry not made to the parties in the suit, are constantly given in evidence.

The counts '*in casu proviso*' and '*in consimili casu*' are framed upon the English statute: thus in the first it is alleged to be '*contrary to the form of the statute in that case provided*,' and in the second it is stated, that the estate ought to revert, '*according to the form of the statute in the like case provided*.' This is a very unusual course. When an English statute makes a part of the law of Massachusetts, it is not *proprio vigore*; it is a part of the common, not of the statute law of the state. In declarations on notes, negotiable by the statute of Anne, the allegation is not as in England, that the liability is by statute.

There are two or three statute remedies which it might have been well to have introduced into this treatise, though not strictly real actions. The first is the process of forcible entry and detainer. This is an ancient and frequently a useful proceeding. The statute of 1784, c. 8, re-enacts the province law, and is very much like the English statute. When a defendant is very obstinate, and re-enters after a judgment against him has been executed, this process, as affording a cheap and speedy remedy, may profitably be pursued.

There is another process giving a summary remedy to a

landlord when his tenant holds over, by complaint before a justice of the peace, on which judgment may be rendered, and a writ of *habere facias possessionem* be issued.* Such a power as this has very rarely, if ever, been given to a single magistrate in Massachusetts.

A provision is also made by statute, giving a course of proceeding, for removing and abating nuisances, which nearly resembles the process of forcible entry and detainer, and also the old assize of nuisance.† The principal object of the act might be to abate common nuisances: but there is nothing in the statute to limit it to indictable offences, but rather the contrary appears; for costs are to be taxed to *parties* and witnesses, and the defendant if he prevail recovers costs of the complainant.

In this collection, *ejectment*, not the modern action of Goodright v. Bad-title, but such as it was before the fictions with which it abounds were invented, is wholly passed over. This is, without question, a valid subsisting remedy for a lessee for years to recover his term, either from his lessor or a stranger who has turned him out of possession. In the American Precedents two forms are given under very respectable names: one is by Read, and the other by Trowbridge.‡

We have now gone through this work, and the more we have examined it the more we have been struck with the great learning and industry of the author. On two important points we cannot but think he is mistaken, and have attempted fairly, but fully, to state our objections. The other exceptions, which are principally to the forms, are of minor importance. Indeed, considering the number and variety of these forms, it is remarkable that they are open to so few objections. This treatise, in addition to its value as a book of practical forms, must rank very high as a clear and profound exposition of the ancient law of real actions, and such as few men in England or the United States could have produced.

---

* Stat. 1825, c. 89. † Stat. 1801, c. 16. ‡ Am. Preced. 381.

Art. II.—PROSECUTIONS AGAINST ANIMALS.

[We have translated two articles on the subject of prosecutions against animals, from the *Themis*, a law journal published at Paris. The first may be found in vol. 1st. p. 194; the second in vol. 8, p. 45. The facts related are very curious, and worth preserving, as a part of the history of superstition. They will probably be new to most of our readers.]

We doubted for a long time whether, in the middle ages, those prosecutions against animals, which have been mentioned by some ancient chroniclers, were ever in fact instituted. Even the ignorance and superstition of the times did not seem to us a sufficient reason to render their relations credible.

How is it possible to conceive, especially if it be admitted that brutes are mere machines, that any one should ever have thought of bringing actions against them, since an action requires two parties, one that attacks and the other that defends, at least by the intervention of attorneys and proctors, and assuredly animals cannot have such representatives. Nevertheless historians of more enlightened days, historians too of great reputation, give in detail, as we shall see, accounts of some of these prosecutions.

In a sort of introduction to the History of the massacre of the Vaudois of Merindol and Cabriere, the President De Thou* relates that these sectaries had enjoyed some security while Barthelemi Chassaneé was first president of the parliament of Provence, and he attributes the cause of the silent protection which Chassaneé yielded them, to his being reminded of his conduct, while yet merely an advocate, in a prosecution in which he had been appointed defender of the rats of the bishopric of Autun.

These animals, from 1522 to 1530, had multiplied to such an extent that they had ravaged the plains, and a famine was apprehended. Human remedies appearing insufficient, application was made to the official (or ecclesiastical judge) of the diocese, to excommunicate them. But the sentence in which the spiritual thunderbolts were launched would not have been

---

* Hist. ad Ann. 1550.

thought sufficiently efficacious, if the proceedings against those whom they were intended to annihilate had not been regular. In consequence, the prosecutor brought a bill in form against the rats. The official directed that they should be summoned to appear before him. The time limited having expired without any appearance on their behalf, the prosecutor obtained a first judgment against them by default, and requested the court to proceed to final judgment; (several judgments at that time were necessary before a definitive condemnation of the party in default). The official, thinking that the accused ought at least to be defended, appointed Chassaneé as their advocate. He, perceiving the bad repute into which his singular clients had fallen, made use of various dilatory exceptions to give time for this prejudice to dissipate. He contended that the rats, being dispersed through a large number of villages, one simple summons could not be enough to notify them all. He therefore requested and obtained that a second summons should be served on them by a publication at public worship in every parish.

At the termination of the interval of delay which he obtained by this exception, he excused the new default of his clients by enlarging on the length and difficulty of the journey, on the dangers to which it exposed them from the cats, their mortal enemies, who lay in wait for them at every corner, &c. &c. After these dilatory pleas were exhausted, he rested his defence on considerations of humanity and policy. 'What can be more unjust than these general proscriptions, which overwhelm whole families in one common ruin, which visit the crime of the parents on the children, which destroy indiscriminately those whom tender years or infirmity render equally incapable of offending?' &c. &c.

We are not informed what judgment the official rendered. De Thou merely observes, that this cause was the foundation of Chassaneé's reputation, and eventually raised him to the highest employments of the magistracy. He adds, that when the persecution against the Vaudois commenced, one of their protectors asked Chassaneé, why he who had required the most scrupulous observance of judicial formalities in favor of vile vermin, should not think it necessary to use them towards these unfortunate heretics? This remark, according to his account, restrained the advocate, who had then become first president. But the effect ascribed to this observation has

rendered us distrustful of the whole narrative of our great historian; the story appears to us to originate, in a measure, in the desire to exhibit forcibly the unheard of severity which was practised against the Vaudois.

Other considerations have given us an equally unfavorable impression with regard to a story told by Nicholas Chorier.*

'This year, says he, (speaking of the year 1584) was remarkable for continual rains; the number of caterpillars was infinite; the same marks of corruption re-appeared in 1585. An extraordinary mode of procedure was adopted against these insects, which had multiplied prodigiously. The walls, the windows, and the chimneys of the houses were covered with them, even in the cities: it was a lively and hideous representation of the plague of Egypt by locusts. The grand vicar of Valence cited the caterpillars before him; he appointed a proctor to defend them. The cause was solemnly argued, and he sentenced them to quit the diocese. But they did not obey; human justice has no command over the instruments of the justice of the Deity. It was discussed whether to proceed against these animals by anathema and imprecation, and, as it was expressed, by malediction and excommunication. But two jurists and two theologians having been consulted, changed the opinions of the grand vicar; so that afterwards nothing was made use of but adjuration, prayers, and sprinkling holy water. The life of these animals is short, and these ceremonies having continued several months, received the credit of having miraculously exterminated them.'

The satirical remarks with which Chorier has garnished his story, had increased our skepticism still more, especially as neither he nor De Thou were cotemporaries of the authors of these anecdotes, and as they do not state precisely the sources from which they have drawn them; but other authorities that we shall mention, have dispersed our doubts, and we are compelled to admit the reality of these prosecutions, which had seemed to us incredible.

1st. Gui-Pape relates that in going to Châlons (this must have been about the middle of the fifteenth century) to pay his respects to the king, he saw, on a gibbet, a hog that had been hung for killing a child.†

* Histoire Générale du Dauphiné, tom ii. p. 712.
† See Id. quest. 238, edit. 1667, in folio.

2d. According to Ranchin, a commentator on Gui-Pape, a man was burnt with his mule, in 1565, who had been surprised in the very act of committing with the mule a crime which cannot be mentioned.

3d. On the 22d of September, 1543, in an assembly held by the municipal council of the city of Grenoble, one of the members represented that the snails and caterpillars were causing terrible destruction. He ended by requesting, 'that Monsieur, the official, should be requested to excommunicate the said beasts, [bêtes] and to proceed against them by censures, to obviate the injury which they were daily committing or might commit in future,' and the council passed an order in conformity with this request.*

4th. Lastly, we have found a work, and, what is more remarkable, a work published in the middle of the seventeenth century, in which prosecutions against animals are treated *ex professo*, and in great detail. The author, Gaspard Bailly, an advocate in the Senate of Savoy, gives with scrupulous precision forms of the pleadings which may be used both by the inhabitants who are plaintiffs, and the counsel who are appointed for the accused animals, the allegations of the prosecutor, the sentence of the official, &c. &c.†

BERRIAT-SAINT-PRIX,
Professor of *Procédure* in the Law School of Paris.

Paris, Jan. 12, 1820.

Letter addressed to the Editors of the Themis on the Prosecution of Animals.

Gentlemen :—Having been your subscriber for a short time only, I have but just obtained the first volumes of your valuable collection. I have read several articles, as interesting as they are full of erudition, furnished by a distinguished professor, whose pupil I have the honor to be. In that which you have inserted in the first vol. p. 184, M. Berriat-Saint-Prix relates facts sufficiently numerous to leave no room for doubt that it was formerly customary to institute prosecutions against animals.

---

* See the manuscript records of this council, for that year, fol. 179, in the Archives of the city.

† See his Traité des Monitoires, Lyons, 1668, in quarto ; in the public library of Grenoble, No. 6322, the article on the Excellence des Monitoires, page 27 and the following.

What he says, following the historian De Thou, of the prosecution of the rats of the bishopric of Autun, and to whom Chassanée* had been appointed counsel, has led me to examine the works of that jurist. If I have not been convinced by them that Chassanée had ever undertaken the defence of these animals, I have, at least, found new evidence of the remarkable fact, that formerly animals were the object of judicial prosecutions.

Chassanée gave the public a collection of his *consultations*. This collection was first printed at Lyons in 1531, under this title: 'Consilia D. Bartholomaei à Chassaneo,' &c. Several editions followed, which do not appear to differ from the first, except in leaving out the preface which is found in that.

The first of these *consultations* is entitled: 'De Excommunicatione Animalium Insectorum.' It is there stated that the territory of Beaune is infested by a prodigious quantity of insects, larger than flies, called *hurebers* by the inhabitants, and which make terrible havoc among the vineyards: that to stop this scourge, the Beaunois, following an ancient custom, demand of the authorities of Autun, who never refuse it, an injunction upon the insects to cease their ravages, or to leave the places in which they are committing them; and lastly in case they disregard this first order, they proceed against them by way of malediction and anathema.

Chassanée examines the question whether such a process is proper, and conformable to the principles of law, and lastly what is the proper course to pursue. He divides the subject into five parts, in each of which he permits no occasion to escape him, for a vast but misplaced erudition. This however is not a fault with which our author is particularly chargeable, since it was common to most of the writers of his age.

The first part is devoted to an inquiry into the name by which the Latin authors designated the insects of which he is treating. Chassanée does not seem to be satisfied whether they should be called *locustæ*, *erucæ*, &c; but he remarks, and he supports himself by the best authorities, that if these animals are comprised under the denomination of *locustæ*, the Beaunois had a very easy means in their power of getting rid of them, which was to pay their tithes with exactness.

* This is the name which is usually given him. His true name was Barthelemy de Chasseneuz. See his life in the *Histoire des Commentateurs de la Coutume de Bourgogne*, p. 19 of the preface of vol. 1, of the works of the President Bouheir. (Dijon, 1787, 3 vols. folio.)

If these animals belong to the class of caterpillars, *(erucæ)* they might with equal confidence have had recourse to the remedy mentioned by Pliny, who pretends that the presence of a sick woman will destroy these insects.

I now come to the second part of the discussion. It is on the question whether it is right to summon these animals before courts of justice. The author maintains that they are not in a situation to be amenable to law. He supports himself by very convincing arguments, especially the following, that, 'neque ex contractu obligati sunt, neque ex quasi contractu, neque ex stipulatione, neque ex pacto,' nor even 'ex delicto;' though indeed he proves the very reverse. But out of regard to the customs of the country, he concludes that these insects may be summoned into court; which he proves by fourteen very long arguments.

In the third part, Chassanèe examines whether animals ought to be summoned *personaliter*, and if it is enough for them to appear by attorney. Every delinquent ought to be cited personally. On principle he cannot appear by attorney. But is the act charged on the insects of Beaune, a crime? Yes, since the inhabitants suffer reproach for it, being prevented from drinking wine, which, according to David, rejoices the heart of God and man, and the excellence of which is proved by the provisions of the canon law, which refuses ordination to every one that does not love wine.

Nevertheless our author dwells for an instant, 1. On the impossibility of the animals regarding an invitation which their faculties are not able to comprehend. 2. On the inconvenience of having counsel appointed for them by the judge without their knowledge. But he is again constrained by the respect which he owes to the customs of the court of Autun; and his conclusion is, that a third person may appear, and in the name of the absent animals, offer all sorts of pleas, both formal and substantial.

In the fourth part he discusses the question of jurisdiction. Many pages are devoted to a statement of the arguments to show that the subject belongs to the lay judges; but Chassanée in the end refutes these arguments at great length, and concludes by deciding that the cognizance of the offence belongs to the ecclesiastical tribunals.

In the fifth part, Chassanée defines anathema and malediction. After which he maintains that animals cannot be excommunicated. Ten or twelve pages are devoted to a labored

argument to establish this position, which could not have appeared at all doubtful; but the chief reason of this opinion, and which is very much insisted on, is, that the sins of men have excited the anger of God, and that they ought not to punish the animals who are the instruments of his vengeance. In this connexion he makes an enumeration of the crimes committed by judges, advocates, notaries, ecclesiastics, women, the young, and the old. He concludes by an ecclamation borrowed from the Psalmist: 'non est qui faciat bonum, usque ad unum!' But there is one sin with which he especially reproaches the Burgundians; and he produces many examples to show the horror which God feels for blasphemy; I shall cite but one. A Burgundian priest, amply provided with benefices, assisted at a mass, in which the extract from the Gospel contained these divine words: 'qui se humiliaverit exaltabitur.' He dared to turn them into ridicule, declaring that if he had followed this precept, he could never have obtained his rich and numerous benefices. This blasphemy had scarcely been uttered, when an arrow from heaven entered his mouth and stretched him dead on the spot.

Chassanée adverts to the grievous inconveniences which would arise from excommunications preventing animals from injuring men, and thus fulfilling their heavenly commission. It would evidently produce a conflict between God and his church.

Let us, however, look at the reverse of the medal. The author proceeds to exert all his force in combating and overthrowing the proposition which he had proved with so much care. He contends that animals can be excommunicated. He developes his new arguments at great length. I shall only attempt a slight sketch of them.

1st. It is lawful to cut down and burn a tree which bears no fruit; the reason is still stronger for destroying that which does mischief;

2d. God wishes every one to enjoy the product of his labors;

3d. All creatures are subject to God, the author of the canon law; animals, therefore, are subject to the provisions of this law;

4th. All that exists has been created for man; to tolerate noxious animals would be to mistake the object of the creation;

5th. Nature inspires man with the care of his preservation;

she makes it his duty to get rid of every thing which is an obstacle to his wellbeing;

6th. It is true, that, according to Saint Thomas, the excommunication of irrational animals is unlawful; but between two sins equally inevitable, it is proper to choose the least; to permit the harvest to be destroyed with impunity, would be to make one's self guilty of homicide; now homicide is a much greater sin than the anathema launched against animals in contempt of the holy canons;

7th. It is proper to punish even the innocent, when he is pursued by public clamor; the anathemas fulminated even to this day against animals who ravage the vineyards, have had the effect of destroying them, or driving them out of the territory which they laid waste: we should consider all the inconveniences and all the scandal which would arise from the loss of the crops, if such a consequence followed from the refusal to fulminate new excommunications;

8th. What Saint Thomas says against cursing beings destitute of reason, can only be understood to apply to an attempt by this means to punish a crime already committed; it is far otherwise, when, as in the actual case, the object is to prevent the commission of a crime;

9th. It is permitted to punish an animal, even to condemn it to be burnt, on account of a crime committed by a man; with still greater reason is it punishable for its own offence: the enormity of the crime of the insects of Auxois would of itself be sufficient to justify any severity towards them, even in contempt of the laws, if there were any which opposed their excommunication;

10th. Three verses of the Georgics of Virgil state, that religion permits the setting of snares for animals; now the best of all snares is undoubtedly the thunderbolt of the anathema;

11th. It would be contrary to the interests of religion to weaken the confidence that the poor villagers have in this process;

12th. It is lawful, for the preservation of the crops, to do even what is prohibited by law; thus enchantments and witchcraft, prohibited by law, are permitted whenever their object is to preserve the fruits of the earth; *a fortiori* then, the anathematizing of insects that devour the fruits should be permitted; for the anathema, far from being prohibited like witchcraft, is, on the contrary, a weapon authorized and employed by the church.

After having fully stated these arguments in support of his assertion, 'that animals may be excommunicated and cursed,' Chassanée seeks still farther to justify it by examples. He finds them:—1st. In Saint Matthew, where it is said, that Jesus cursed the fig-tree: 2d. In Genesis, where it is said, that God cursed the serpent: 3d, 4th, &c. &c. I shall confine myself to two of the most recent.

A priest had an orchard, which produced the finest fruits; but they fell a prey to the youth of the neighborhood, who got into the orchard while the owner was saying mass. He launched an excommunication against his orchard, which thenceforth ceased to bear fruit. The mother of the Duke of Burgundy some time after bought the same orchard. At her request, the curse was taken off, and the trees resumed their original productiveness.

Another example. Eels were formerly so abundant in the lake of Geneva, that the Genevans were not merely sick of them, but absolutely tormented by them. To get rid of them they had recourse to excommunication, after which all the eels disappeared, and since that time the lake has never produced any.

After many similar facts, which he relates on the testimony of others, Chassanée cites what he has seen himself; and he appeals to the jurisprudence of his own age. He says that he has seen many sentences of excommunication pronounced by the official of Autun, and by those of Lyons and Mâcon, as well against the insects of which he is treating, as against other noxious animals, such as rats and snails. He enters into a detail of this sort of process, to show the usual forms. He then copies a petition made by the inhabitants of a village ravaged by rats. He observes, that, on this complaint, an advocate was named, who was to make all the pleas that he could in defence of the animals, his clients. He adds, that notwithstanding this pleading, which is merely formal, the official makes a first adjuration against the noxious animals. If this adjuration proves ineffectual, the judge renders a judgment of malediction and anathema.

The jurisconsult finishes his treatise by transcribing, at length, seven of these sentences, the authenticity of which can scarcely be questioned, since they were all rendered during the age of Chassanée, who gives their date, the place at which they were passed, the name of those who gave them, and the

object for which they were fulminated. Some of them are against rats, others against caterpillars, snails, worms, &c. They differ very little from one another in point of form. The principal difference which is observable, is with regard to the length of time which is given the hurtful animals under pain of anathema in which to cease their ravages, or to quit the place. In one of these sentences no delay is allowed; in another the delay is for three hours; and in a third it is three days; a fourth directs that they shall be regularly summoned three times, *primo*, *secundo*, *tertio*, and, on their refusal to obey, immediately anathematized, &c.

It is probable, though Chassanée does not mention it, that, after seeing his treatise, the official of the bishopric of Autun excommunicated again the animals who ravaged the territory of Beaune. This is rendered certain by attending to the preface at the beginning of the first edition of the *Consilia* of Chassanée, in which it is stated, that care was taken not to insert any treatise in the collection which had not been followed by a decree in conformity with it; '*consilia multa*,' it says, '*in hoc collegio sunt recepta secundum quæ a summis illis Galliæ tribunalibus judicatum non fuerit.*'

After reading the work of which I have given but a very imperfect analysis, one is astonished at the bitterness with which the illustrious President Bouhier* refutes what is advanced by many historians, particularly De Thou, with regard to the part which Chassanée played in one of the prosecutions brought against the rats of the diocese of Autun. It is by no means certain, though the President Bouhier asserts it, that what he calls a fable originated in the subject of this very treatise; and my doubt arises, from two circumstances—1st. That this essay was written on account of the ravages committed, not by the rats, but by a species of large flies: 2d. That this work has for its object to pronounce, not the absolution, but the anathema of these insects. But there is nothing improbable in the fact attributed to Chassanée, by the historians, who say that he was once entrusted with the defence of the rats. On the one side, the President Bouhier cannot deny, that rats at one time infested the Burgundian territory. One of the complaints presented to the official contains a description of them in these words: 'Animalia immunda, in

* Vie de Chassanée, loco jam citato.

formâ murium urbanorum existentia grisci coloris, a nemoribus circumvicinis exeuntia,' &c. On the other side, it was natural that the judge, being obliged to appoint counsel for them, should select Chassanée, who, in his treatise, had shown himself so well acquainted with the subject.

Whatever may be the case with regard to this unimportant circumstance, it is unquestionable that in many provinces of France it was formerly the custom to proceed by way of excommunication against destructive animals.* The rust of the middle ages had eaten into every thing, even the most august ceremonies of religion. And why might not judges have been found so unenlightened as to pronounce the strange judgments of which I have just spoken, when advocates were found such enemies of good sense as to bring arguments to defend them so ridiculous as those of Chassanée? Besides, if the ecclesiastical judges were ridiculous for excommunicating animals, the lay judges were still more so, when they sentenced them to be burnt or hanged.

The case cited by M. Berriat-Saint-Prix, from Gui-Pape, is not unique. Saint-Foix, in his *Essais Historiques sur Paris*,† relates that the judges of the count of Valois brought a prosecution against a bull which had killed a man by goring him with his horn; and, on the testimony of witnesses, condemned him to be hung. This sentence was confirmed by a decree of the parliament, the 7th of February, 1314.

It would be easy to multiply citations, if it were worth while to take the trouble of examination. It was, in fact, formerly

* In Switzerland criminal prosecutions were brought against the worms called *juger*, in the same manner as against the greatest criminals. The inhabitants of Constance and of Coire also instituted prosecutions against the worms called by them *lauffkaffer*. See what the jesuit Martin Delrio says on this subject Disquis. Magicar. lib. 3, p. 2, q. 4, sect. 8. He relates that a bishop of Lausanne excommunicated the leeches that infected with their poison the fish of the lake, especially the salmon; but he did not pronounce this terrible sentence until after having fulfilled all the preparatory formalities, such as the citation, the appointment of a proctor, &c. Fr. Alvarez, a Portuguese, relates in his history of Ethiopia, that he freed this latter country from the locusts that ravaged it, by using the same process employed by the Bishop of Lausanne. To be satisfied that this custom has been almost universal in Christendom, it is only necessary to read the censures which are passed on it by the best canonists. One of them, Eveillon, says that animals cannot be excommunicated; that they can be only exorcised or adjured in the terms, and following the ceremonies prescribed, without any superstitious observances, and without using, as formerly, a ridiculous procedure, followed by a sentence of anathema and malediction.—*Traité des Excommunications, chap.* 39.

† See his Œuvres Completes, p. 423. Paris, 1778.

a custom to inflict on animals punishments proportioned to the offences of which they were convicted. The prevalence of this system, which was chiefly derived from the sacred books,* is attested not only by Gui-Pape, in the passage cited by M. Berriat-Saint-Prix, but also by other writers, such as Jean Duret,† Julius Clarus,‡ Bouchel,‖ &c.

Jean Duret writes thus:—'If beasts not only wound, but slay or eat, as experience has shown with regard to little children devoured by swine, they are liable to be capitally punished, and are condemned to be hung and strangled as if they had reason, in order to destroy the recollection of the enormity of the act.'

If Julius Clarus disapproves this practice, Bouchel defends it. I shall say nothing of the examples which he seeks from ancient history; but in speaking of the customs of his own times, he uses these expressions: 'If we still see a swine hung and strangled on the gibbet, for having devoured an infant in the cradle, (a punishment with which we are familiar,) it is to admonish us, fathers, mothers, nurses, domestics, not to leave infants entirely alone: or to keep these animals so carefully shut up, that they shall not have it in their power to do any mischief. If we see an ox stoned to death, and his flesh cast to the dogs, for the homicide which he has committed, (as was directed by Moses,) and if we see a hive of bees set on fire for the same act, (the Council held at Worms has so directed,) it is to make us abhor homicide, since it is punished even in brute beasts.'

With regard to the decree cited by M. Berriat-Saint-Prix from Ranchin, who says that he has seen the same thing very often, it is more easy to justify this disposition which is in conformity with the law of Moses;§ the animal was burned merely to prevent any trace from remaining of the horrible crime which it had occasioned: 'quia pecora tali flagitio contaminata indignam refricant facti memoriam.' Such is the reason which the canon law gives.¶ It was not the animal alone that was cast into the flames, the records of the pro-

* Exod. ch. 21, v. 28.

† Traités des pernes and amendes. See Bestes portant dommages.

‡ Pratique criminelle, forming the fifth part of his works, § fin. quest. 99, no. 8.

‖ Bibliothèque ou Trésor du Droit Français, at the word Bestail.

§ Levit. ch. 20, v. 15 and 16.

¶ See Canon. Mulier 4, causa 15, quest. 1.

ceeding were also burned, in order to blot out the recollection of the atrocious act which had occasioned the prosecution. The records of law furnish examples of similar proceedings, unfortunately too numerous.

Boerius* cites two decrees of the Parliament of Bordeaux, in 1528, one in the case of Antoine Dumas, the other in the case of Guiot Vincenot. By each of these decrees, the man convicted of the crime was sentenced to be burned with the animal that had been his accomplice; the animal, however, received the favor which was denied to the principal offender, of being strangled before being led to the stake.

The Court of Toulouse directed a similar execution in a like case, according to Papon.† This reporter relates yet another decision given by the Parliament of Paris, in 1601, and in execution of which a woman named Claude de Culan was hung, with her dog, and after death their bodies were delivered to the flames. Larocheflavin‡ cites a decree of the Parliament of Toulouse, given in 1525, in a case of exactly the same kind. Bouchel‖ cites one of the Parliament of Paris, dated Dec. 22, 1575. It relates to a she-ass, which, after being put to death, was burnt with a certain Jean Legaigneux. Other sentences may be found in Brillon,§ Boniface,¶ Rousseaud de Lacombe.** The last author mentions one passed by the Parliament of Paris, Oct. 12, 1741. The philosophical spirit of the age, however, is apparent, in condemning only the guilty person to the punishment of fire. The animal was put to death, and cast into a ditch, which was afterwards covered with earth, *ne ulla post patrati sceleris punitionem remanerent vestigia.*

I ask pardon of M. Berriat-Saint-Prix, for having attempted to glean after him, and for not having brought forward any thing but what he would certainly have disdained. But I wished to show how much his learned researches had interested me; I wished also to embrace this opportunity to render him the homage of my respect and gratitude.

Accept, yourselves, gentlemen, the assurance of my consideration. V*****

---

* N. Boerii Decisiones Burdegalenses, decisio 316, No. 6.
† Recueil d'Arrêts notables, liv. 22, tit. 7.
‡ Arrêts notables, liv. 3, tit. 2. arr. 1. ‖ Loco jam cit.
§ Dictionnaire des Arrêts. ¶ Recueil d'Arrêts notables, tome v. liv. 4.
** Traité des Matières Criminelles, 1re partie, chap. 2, sect. 1, distinction 8e.

P.S.—It is not astonishing, perhaps, to find prosecutions brought against animals by men who believed that animals had trials among themselves. Leonardus Lessius, a Jesuit,* wishing to exhibit all the enormity of the crime of adultery, maintains that it is held in horror even among animals, and produces as a proof of it the punishment which some storks inflicted on one of their number who was convicted of a breach of conjugal fidelity. He quotes an author who affirms that he was present at this execution:—'Tempore meo (inquit Gulielmus Parisiensis, de Universo, parte 3, cap. 8, de Ciconiis) ciconia tanquam de adulterio convicta per olfactum masculi sui, congregatâ multitudine ciconiarum, nescio qualiter accusante masculo, vel detegente ejus crimen, a totâ illâ multitudine deplumata atque dilacerata est, tanquam consilio aut judicio ominium esset adulterii judicata.'

Note of the Editor of the Themis.

Having communicated M. V.'s letter to M. Berriat-Saint-Prix, at the beginning of last April (1826), he has addressed the following note to us.

'I thank you the more for the communication of M. V.'s interesting letter, because I have within a few days (29th March) made a report to the Royal Society of Antiquaries, on prosecutions and judgments with regard to animals. I shall take advantage, at the second reading of the same report, of many of the researches of M. V*****, whom I shall take care to cite on this subject. I was directed to make this report on account of a communication made to the Society by M. Lejeune, de Meslay le Vidâme, (Eure-et-Loire) of two or three sentences given against animals. I have added a reference to all that the jurists, canonists, &c. have left us on the same subject, and lastly a chronological table of these processes, &c. The table and the report are to be inserted in the 8th volume of the Memoirs of the Society. The result is as follows.

'1st. Prosecutions or judgments to the number of seventeen are pointed out, of which one belongs to the twelfth century, one to the fourteenth, eight to the fifteenth, twelve to the sixteenth, four to the seventeenth, and only one to the eighteenth.

* See his work De Justitia et Jure, cæterisque virtutibus cardinalibus, lib. 4, cap. 3, dubitatio, 10, n. 71.

'2d. The animals to which they relate are—bull, cow, hog, sow, ass, mule, dog, beetle, rat, mole, field-mouse, snail, caterpillar, weevil, worm, bloodsucker.

'Accept, &c. BERRIAT-SAINT-PRIX.

'Paris, April 8, 1826.'

ART. III.—JUDGE STORY'S ARGUMENT.

Outlines prepared for an Argument to be delivered before the Board of Overseers of Harvard College, upon the Discussion of the Memorial of the Professors and Tutors of the College, claiming a right that none but resident Instructers in the College should be chosen or deemed 'Fellows' *of the Corporation; the substance of which was spoken before the Board at their Meeting in January*, 1825. By JOSEPH STORY, *one of the Members of the Board.**

[IT will be at once perceived, that the argument is strictly confined to the mere question of legal right. The author, in

---

* The following statements, on the subject of the claim of the resident Instructers, are chiefly borrowed from a pamphlet published in 1825 entitled, 'Remarks on Changes lately proposed or adopted in Harvard University. By George Ticknor, Smith Professor, &c.'

'The management of the College at Cambridge has been heretofore in the hands of three bodies of men, who hold their authority under an act of the General Court, passed in 1642; a charter given in 1650, with an appendix, dated in 1657; the fifth chapter of the Constitution of the Commonwealth, made in 1780, and revised but not altered in relation to the College, in 1821; and an act passed in February, 1814, by the Legislature of the Commonwealth.

'The first of the bodies, who under the provisions of these acts, or by powers mediately derived from them, have had the management of the College, is, the Faculty or immediate Government, consisting of the President, and a part of the resident Instructers, amounting in all to from ten to thirteen persons, who have the entire discipline of the students in their hands, and have been obliged to meet together as an executive body, to decide on every punishment above a small fine; a body, which, both in Cambridge and in other Colleges, is too large for the prompt, consistent, and efficient discipline of such a collection of young men.

'Over the Faculty is the Corporation, which derives its powers from the charter of 1650, the appendix of 1657, and the Constitution of 1780, and consists of the President, the Treasurer, and five 'Fellows' as they are technically called; and of the gentlemen who now [1825] compose that body, three, namely, Mr. W. Prescott, Judge Jackson, and the Rev. W. E. Channing, re-

opening his speech, expressly disclaimed any intention to inquire into the expediency of such a choice, supposing it not a

---

side in Boston; one, Mr. Justice Story, resides in Salem; and one, Rev. E. Porter, resides in Roxbury. The Corporation have the management of the funds and revenues of the College; appoint its Instructers and other officers, and assign them their duties and pay; make laws for the government of the instructers and the students; and fill vacancies in their own body; but are restricted in their powers, and can do almost nothing without the expressed assent of the Overseers.

'The Overseers are the last and highest body for the government of the College. They hold their power by virtue of the act of 1642, the Constitution of 1780, and the statutes of [1810 &] 1814, and consist of the Governor of the Commonwealth, the Lieutenant Governor, the Council, the Senate, * * and the Speaker of the House of Representatives; in all fifty-three persons; together with the President of the college, and fifteen laymen and fifteen clergymen, elected, and to be elected, from the community at large, by the whole Board; so that out of eighty-four members of the upper Board for the government of the college, fifty-three are annually elected by the people, and, therefore, completely and truly represent the public interest in the institution.' * * * *

'On the second of April, 1824, eleven of the resident Teachers, viz. five Professors engaged in the instruction of undergraduates, two engaged in the instruction of graduates, and four Tutors, offered a memorial to the corporation,' containing certain 'statements and considerations relative to *the mode in which, according to the charter of the institution, the corporation of the same ought of right to be constituted,*' (Memorial, p. 1.) and preferring to the corporation as 'matter of chartered right,' 'the claim of the resident Instructers to be elected to vacancies in the Board of the President and Fellows.' (Mem. p. 31.)

'To this memorial the Corporation returned no formal answer, on the ground, as has been stated by the memorialists, that if the claim were well founded, the members of the Corporation to whom it was sent, not being rightfully 'Fellows' of the college, were not competent to perform any act in its government; and could only resign their seats. On the first of June, nine of the same memorialists presented the same claim and memorial to the Overseers, giving as one reason for presenting it at that particular juncture, that they understood the Overseers were then engaged in considering important measures relative to the organization of the college. This memorial was by the Overseers referred to a committee, and so the matter rested for some months.'—*Remarks, pp.* 11, 12, 13.

'After this memorial had been presented to the Overseers, a report on it was made, January 6, 1825, by Mr. Hill of the Council, on behalf of the committee appointed to consider the subject, in which report it is maintained, that it is *not* necessary, by the charter or otherwise, that the Fellows of Harvard College be either resident in Cambridge, instructers, or stipendiaries. The memorialists desired to be heard in reply. They were so heard on the 4th of February; Professor Everett and Professor Norton appearing on their behalf. The discussion was very interesting, and one of the most thorough ever witnessed among us. It lasted three days. At the end of this time, the following resolutions were *unanimously* adopted at a remarkably full meeting of the Overseers. "Resolved, that it does not appear to this Board, that the resident instructers in Harvard University have any exclusive right to be elected members of the Corporation. Resolved, that it does not appear to the members of this Board, that the members of the Corporation forfeit their offices by not residing at college."

'It may be added to this, that, as a legal question, few have ever been examined among us with more laborious care, or by persons better qualified to decide what is the law. In the corporation, at the time, were Mr. W.

matter of right, considering that to be a topic of a very large and comprehensive nature, and that no case was then before the Board, which required or invited such a discussion.]

Prescott, Mr. H. G. Otis, and Mr. J. Davis, District Judge of the United States. In the Board of Overseers, Mr. Justice Story, of the Supreme Court of the United States, delivered his opinion against the memorial in a long argument. He was succeeded, on the same side, by Chief Justice Parker, of the Supreme Court of Massachusetts, Mr. Justice Jackson, Mr. F. C. Gray, and some other persons of distinguished talent. On the final question, not a voice was raised in the Board, or elsewhere, I believe, in favor of the memorial. The profession, in particular, seemed unanimous on all the points; and many years will probably elapse before any important question will be decided with such a great weight of legal talent and learning, after so long, so patient, and so interesting a discussion.'—*Remarks, pp.* 25, 26.

'The charter of 1650, under which chiefly the corporation hold their powers, and the memorialists make their claim,' (Remarks, p. 13.) commences as follows:—

'Whereas, through the good hand of God, many well devoted persons have been and daily are moved, and stirred up, to give and bestow, sundry gifts, legacies, lands, and revenues, for the advancement of all good literature, arts, and sciences, in Harvard College, in Cambridge, in the County of Middlesex, and to the maintenance of the President and Fellows, and for all accommodations of buildings, and all other necessary provisions, that may conduce to the education of the English and Indian youth of this country, in knowledge and godliness;

'It is therefore ordered and enacted by this Court, and the authority thereof, that for the furthering of so good a work, and for the purpose aforesaid, from henceforth, that the said college in Cambridge, in Middlesex, in New England, shall be a corporation, consisting of seven persons, viz. a President, five Fellows, and a Treasurer or Bursar; and that Henry Dunster shall be the first President, Samuel Mather, Samuel Danford, Masters of Arts, Jonathan Mitchell, Comfort Starr, and Samuel Eaton, shall be the five Fellows, and Thomas Danford to be present Treasurer, all of them being inhabitants in the Bay, and shall be the first seven persons of which the said corporation shall consist; and that the said seven persons or the greater number of them, procuring the presence of the Overseers [rendered unnecessary by the appendix of 1657,] of the College, and by their counsel and consent, shall have power, and are hereby authorized, at any time or times, to elect a new President, Fellows, or Treasurer, so oft and from time to time, as any of the said persons shall die or be removed, which said President and Fellows, for the time being, shall forever hereafter, in name and in fact, be one body politic and corporate in law to all intents and purposes; and shall have perpetual succession; and shall be called by the name of the President and Fellows of Harvard College, and shall from time to time be eligible as aforesaid.'—*Mass. Col. Laws, &c.* 78, 79.

Besides the Memorial, and the Remarks of Mr. Ticknor, several other pamphlets have been published in relation to the claim of the resident Instructers, viz. 'Remarks on a Pamphlet printed by the Professors and Tutors of Harvard University, touching their right to the exclusive government of that Seminary.' 'A Letter to John Lowell, Esq. in reply to a publication entitled, Remarks on a Pamphlet,' &c. This letter is from the Hon. Edward Everett, then a Professor in the college. 'Speech delivered before the Overseers of Harvard College, February 3, 1825, in behalf of the Resident Instructers of the College; with an Introduction. By Andrews Norton.' 'Report of a Committee of the Overseers of Harvard College on the Memorial of the Resident Instructers.' ED. JURIST.

Mr. Story began by expressing his regret that he was compelled, by a sense of duty, to enter upon the discussion of the question presented by the memorial, at the distance of more than a century and a half after the foundation and charter of the college. He entertained a very great respect for the memorialists, some of whom had been the instructers of his youth, while he was a student at the University, and for whom he felt much of filial reverence; others of whom he had the pleasure of being well acquainted with by their literary and scientific acquirements; and others of whom he felt himself at liberty to name among the friends, whom he most honored. He would, under such circumstances, gladly have escaped from the embarrassment and responsibility of a public discussion, in which his judgment required him to dissent from claims, which whatever might be his personal respect for the memorialists, he was convinced were utterly unfounded in law.

Considerations of this nature had pressed upon his feelings; but he had yielded them up to a sense of duty. This Board had a right to demand from the members of it who were bred to the profession of the law, a clear view of their own opinions upon the question as a matter of law; and the suggestions of his friends had led him to believe, that upon such an occasion silence on his part could not be deemed excusable.

But there was another matter of regret which he was bound to acknowledge, and which he trusted would be accepted as an apology for any imperfections and infirmities in his argument. The question was one quite remote from the ordinary occupations and studies of lawyers in this country. It had not, as far as he knew, been stirred here for a century; and unfortunately little or nothing of the grounds of the opinions and reasonings of that distant period could be now gathered up to aid or enlighten the present inquiry. It would have been desirable, on his own part, to have consulted at large the charters, foundations and statutes of the colleges in the English Universities; and to have fortified himself by an intimate study of all the peculiarities, as well of their language and legal construction, as of their usages, so that he might have been better prepared to meet any objections. But the best works on such subjects were not generally within his reach, or within that of his friends. He was obliged, therefore, to rely upon books and authorities, which, though perfectly satisfactory upon the leading principles, were less full and exact in

details than he could have wished. He had in some instances been obliged to gather up fragments of parts, and put them together in order to illustrate positions, which appeared to him in a legal view, absolutely irresistible. Few controversies of a nature like the present, had ever come before the English courts of justice; and where they had been settled by the visiters of a college or their assessors upon legal principles, they were either locked up in works not generally accessible, or left merely upon the manuscript records of the colleges, to which we had no access.

Notwithstanding these disadvantages, he had entire confidence that the conclusions to which he had arrived, were perfectly well founded in point of law. They rested upon principles, which, as a lawyer, he thought either did not admit of serious controversy, or if controverted, could be satisfactorily maintained. And he trusted, in many instances, to establish by suitable illustrations, that they were justified by the highest authority.

He would now, after these prefatory remarks, beg the indulgence of the Board, while he invited their attention, and particularly that of his legal friends, who were members of it, to his argument. Some of its details might be dry and uninteresting; some of them might be thought superfluous; and some of them such as lawyers at the first presentation of them would not deem necessary to be farther expounded. His excuse must be sought in the great deference he felt for the memorialists themselves. He was unwilling to have it thought for a moment, that any thing, which they deemed in any degree important, as bearing upon their case, should not be met and answered with directness and in a spirit of candor, whatever might be the value, which others might attribute to it.

He should have occasion, in the course of the discussion, to allude to a pamphlet containing a vindication of the doctrines of the Memorial, which had been attributed to one of the learned professors, and which he should the more freely allude to, because it purported to invite public discussion, and its authorship was not attempted to be concealed. In so doing he trusted he should not be suspected of feeling towards the learned author anything but respect and friendship.

Mr. Story then proceeded to deliver his argument, of which the following sketch contains only the written minutes or outlines from which he spoke; and is in no just sense a report of more than the heads of his speech.

The object of the memorial is to show that the corporation of Harvard College, as at present organized, is not conformable to the charter of 1650. The proposition maintained, is, that by 'Fellows' in the charter is meant a particular description of persons known in English colleges; and, at the time of the charter existing in Harvard College, having known rights and duties. The memorial then asserts, and endeavors to prove, that 'Fellow imported a person resident at the college, and actually engaged there in carrying on the duties of instruction or government, and receiving a stipend from its revenues.'* In the view of the memorial, each of these facts, *residence*, *instruction*, or *government*, and *receiving a stipend*, constitutes a necessary part of the definition of a Fellow. And it is contended by the memorialists, that this is the meaning attached to the word in the charters of the English colleges; that it was actually applied in Harvard College before 1650; that consequently it is the true and only sense of the term in the charter of 1650. The memorial seems to maintain that no persons, but such as had the necessary qualifications at the time of the choice, are eligible as Fellows.† But if it does not go to this extent, it maintains that, after the choice, the party must be a *resident*, an *instructer* or *governor*, and a *stipendiary*.

My first object will be to ascertain, whether the above definition of Fellow be true and correct, as applied to English colleges; for on this definition the whole argument rests. I shall contend and endeavor to show: 1. That the term 'Fellow,' when used in the charters of English colleges, has no peculiar meaning distinct from its ordinary meaning of *associate*, or *socius*: 2. That the qualifications of Fellows are not the same in all the colleges, but vary according to the requisitions of the charters, and the successive statutes of the particular foundations: 3. That as an enumeration of the particular qualifications of Fellows in the colleges generally, the above definition is incomplete: 4. That the objects of these Fellowships are very various, and generally, if not universally, of a nature wholly distinct from any which the memorial itself supposes to be the principal object of the charter.

I. The *meaning* of the word 'FELLOW.'—This word is by no means confined to college charters. It occurs in charters of a very different description. Thus the Royal Society is

* Page 2. † Pages 2. 4. 7. 30.

incorporated by the name of the 'President and Fellows.' So the College of Physicians. So the American Academy of Arts and Sciences. So the Medical Society of Massachusetts. In these and like cases no person supposes that the word imports anything more than member or associate. Johnson, among his definitions of 'Fellow,' enumerates as one, 'a *member* of a college that shares its revenues, *or of any incorporated society.*' We also speak of the Chief Justice and his Fellows, of a court; of the foreman of the Grand Jury and his Fellows. The oath, says the United States' counsel, your *fellows*,' and your own, you shall keep secret.

In all these cases the word companion, associate, or *confrere*, might be substituted indifferently for fellow. If there be any peculiar force in the term, it is, that it imports *equality* in general rights. Why then should it be supposed to be used in any other sense in a college charter? It cannot be from the nature of the objects to be attained, for these might be attained by persons under any other denomination: nor from any peculiar structure of college institutions, for these exist under very various charters at home and abroad. The corporate name of Dartmouth College is, 'The Trustees of Dartmouth College.' The ends can be obtained as well without Fellows as with; by incorporating a distinct body, as by incorporating the college instructers. Many of the trustees of Dartmouth College, in the original charter, were non-residents, and so described in the charter; many have been so ever since.

The sole ground of the memorialists, must be, that the word has a fixed meaning as to English colleges, and is as it were so appropriated by art, as necessarily to import in a college charter something more than associate. If so, then the word would naturally be used in all English college charters; and 'Fellows' could not exist, where the charter did not create them *eo nomine*. But how is the fact? Let us take a few of the colleges at Oxford.

Brazen Nose College: founded in 1509. Name—'Principal and *Scholars* of King's Hall and Brazen Nose College in Oxford.'* Yet there are in this college twenty *fellows*, thirty-two scholarships, and fifteen exhibitions, *on the foundation.*

Trinity College: founded in 1554, by name of the 'Master,

† Oxford Guide, ed. 1822, p. 67.

Fellows, and *Scholars* of the College, &c. &c.'* There are on the foundation a president, twelve *fellows*, twelve *scholars*, and four *exhibitions*.

St. John's College, 1557. The charter is for a president and fifty *fellows* OR *scholars*.†

Christ Church College, by Cardinal Wolsey and Henry VIII., 1532: a collegiate church. Name—'*Dean* and *Chapter* of the Cathedral Church, &c. in Oxford, &c.'‡ On the foundation are the dean, eight canons, eight chaplains, one organist, eight clerks, one hundred and one students, and a schoolmaster and usher. This a very material case. No Fellows are named. What says the Oxford Guide? In college phrase, 'a *student* is one of the *one hundred and one members* of that name at Christ Church, whose rank is similar to that of '*Fellow*' of other colleges.' 'The number of members on the books is about seven hundred, amongst whom are *three hundred and forty-five members of convocation*.'‖ This college is governed solely by the laws of the *Dean* and *Chapter* of the Cathedral Church.§

Corpus Christi College, 1516. Name—'Collegium Corpus Christi Oxonii.' It originally had on its foundation a president, twenty *scholars*, and two chaplains: it now has a president, twelve *fellows*, twenty *scholars*, four exhibitions, two chaplains.¶

Merton College, 1274. Its name originally, 'Custos et *Scholares* Domus de Merton;'** and also, 'Guardiani et *Scholarium* Domus, sive Collegii *Scholarium* de Merton in Universitate Oxonii.'†† The old colleges sometimes used more than one name. This college has now a *warden*, twenty-four fellows, fourteen *postmasters*, (postrinistæ) four scholars, two chaplains, two clerks.

Peter House College, Cambridge, 1284. Name—'The *Scholars* of the Bishop of Ely.' 'The number of persons on the foundation, being the number mentioned in the statutes, consisted of a master and fourteen *fellows*, sometimes called perpetual scholars, eight poor scholars, and two bibliotists. There had been *other fellowships and scholarships* annexed

---

* Oxf. Guide, 119. 2 Bro. Par. Cas. 221. 1 Ayliffe Hist. Oxf. 40.
† 1 Ayl. 418, 419. ‡ 2 Ayl. 47. Oxf. Guide, 159. ‖ Page 180—179.
§ 1 Ayl. 246. ¶ 1 Ayl. 394. Oxf. Guide, 169.
** 1 Ayl. 273, 275. †† 2 Ayl.

at different times and by different benefactors, *but these had never been considered as conferring on those who held them any privileges as members of the society.*'* The statutes given by Simon de Montacute, Bishop of Ely, 1344, are addressed 'Magistro et *Scholaribus* domus nostrae Sancti Petri. Cantab.;' and he directs that these fourteen '*Scholares* essent *perpetui* et studiosi, &c.'† The statutes constantly designate what are now called 'Fellows' as *scholares.*‡

From these citations it is apparent that there is nothing technical in the word 'Fellow,' as applied to colleges; that it is sometimes not found in the words of the charters, and yet exists in the foundation; that it is sometimes used as synonymous with student (studens), sometimes with scholar (scholaris); while at other times it imports something different, depending upon the usages and statutes of the foundation.

Mr. Kyd views the word exactly in this light. He says, 'In the colleges of the universities there are in general, beside the head of the college,‖ two classes, the *scholars* and the *fellows*, each class having some rights and privileges distinct from the other; and where there are either only *scholars* or only *fellows*, or where the terms *scholars* and *fellows* are *synonymous, which is sometimes the case*, there is generally a distinction between junior and senior *fellows*, and junior and senior *scholars*. Independent members, usually called "*fellow commoners*," are mere *boarders*, and have no corporate rights.'§

In corroboration of these remarks, I may add, that the Universities both of Oxford and Cambridge, which embrace all the colleges, and in convocation all the members of the government of the respective colleges, are incorporated by the name of 'the Chancellor, Masters, and *Scholars* of the University' of Oxford and Cambridge.¶

We may deceive ourselves by affixing to the words used in English colleges the sense in which we are accustomed to use them. Thus *scholar* with us means an undergraduate who is taught: so *student*. But in Oxford, 'scholars' in some few colleges are *probationary fellows;* in others, they are mere *beneficiaries*, having an annual sum allowed towards their edu-

* Rex v. Bishop of Ely, 2 T. R. 290, 291. † Id. 296.
‡ Id. 299, 302—305.
‖ The head has different names in different colleges—dean, rector, provost, warden, president, master, principal.—*Oxf. Guide*, 179.
§ 1 Kyd Corp. 329, 330.
¶ Stat. 13 Eliz. Prynne Animad. 156. 1 Ayl. 197.

cation. The Oxford Guide says, (p. 180) 'Strangers are often perplexed with the terms *scholar* and *student*, and sometimes apply them indiscriminately *to all members* of the University. By a *scholar* of a college is meant the person who holds the rank abovementioned, and that of a *student* is one of the *one hundred and one* members of that name at Christ Church, whose rank is similar to that of *fellow* of other colleges.' It is plain, therefore, that *scholar* and *student* do not import there, as with us, all undergraduates who resort there for education; but fellows and scholars on the foundation.

From the facts which I have stated I derive the conclusion, that for all the purposes of a college charter the terms fellow, scholar, socius, associate, student, may be used, nay, are used, to indicate the same general thing; and that the rights depend not on the name, but *singly* and *solely* on the *government* provided by the *charter* and by the *statutes* of the foundation. If so, the term 'FELLOW' imports no more in a college charter, than in any other act of incorporation. This, however, will be more clear as we advance in our discussion of some other points. Lord Mansfield in Rex v. Dr. Askew, 4 Burr. 2195, says, 'I consider the words *socii*, *communitas*, *collegium*, *societas*, *collega*, and *fellows*, as synonymous; and every socius or collega as a member of the society, or corporation, or college.' So Plowden says, (p. 103) Master and Fellows 'is the usual recital of a corporation.' The case turned on the point.

II. The *qualifications* of FELLOWS are not the same in all the colleges, but vary, being entirely governed by the charter and statutes of the foundation.

The Oxford Guide says, (p. 180) 'The qualifications for fellowships vary in almost every society. The Fellows are according to the statutes of the college elected from *certain public schools*, and admitted on their arrival in Oxford; or they are *young men*, who having studied and distinguished themselves in other colleges, offer themselves as candidates, and are selected by the votes of the Fellows; in some societies they are confined to the *natives* of particular counties, or elected from the scholars; and in others the kindred of the founder have peculiar privileges.' It adds, (p. 180) 'The Fellows, in conjunction with the head of the college, are, *in all cases*, the directors of the internal regulations of their society, and the managers of its property and estates.' In this passage there is a slight mistake; it should be in *most* cases.

Thus, in All Souls College, Oxford, 1437. The college is composed of a warden and forty fellows, two chaplains, six clerks, of kin to the founder, or *born in the province of Canterbury.** New College in 1379, foundation seventy *fellows* from *Winchester College*, ten chaplains, &c.† Wadham College, 1613. The *fellows* are chosen from the *scholars* of the college.‡ Corpus Christi College. The fellowships must be distributed among *natives of different counties.*‖ So the bishop of Durham, in 1403 gave a manor to University College for the maintenance of *three fellows born in York or Durham*, without respect to degrees, and though *undergraduates.*§

It is remarkable that in no instance is *previous residence* required, as a distinct qualification. Though in some instances it may be inferred, in connexion with other qualifications, as where the qualification is that the party to be a Fellow must be elected from the *scholars* of the same college. There are many other qualifications and limitations as to Fellows. These will more properly fall under the subsequent heads.

III. The enumeration of qualifications in the memorial is incorrect and incomplete. It refers to three things.

1. As to *Residence.*—This is often required, not by the terms of the charter, not ex vi termini, but from the statutes of the foundation.

But residence is not universally required. This may be inferred from several authorities. Thus in Rex v. Grundon,¶ where a *fellow commoner* was excluded from the college gardens of *Queen's College*, Cambridge, and on indictment, one question was, whether he was legally expelled, it having been done by the Master and less than a majority of the Fellows. The statute was that it should be, 'de consensu Presidentis et majoris partis *sociorum.*' It was said that this had already been considered in construction, as meaning of the Fellows *resident* in the college.** Lord Mansfield and the court thought the construction right. Now the question could not have arisen, if there had not been *non-resident* Fellows.

So Dr. Radcliffe's foundation to University College.†† It is expressly for the support of two persons elected, out of the physic line, for their maintenance for *ten* years in the study of

* Oxf. Guide, p. 58. † Id. 95. ‡ Id. 101.
‖ 1 Ayl. 394. § Id. 152. ¶ Cowper, 315. ** Id, 322.
†† Atty. Gen. v. Stephens, 1 Atk. 358, 360.

physic, and *to travel half the time.* Lord Hardwicke considered these as *fellows* and *members* of the college, though not required to be *residents.*

But what is decisive, as coming from the highest authority, is what Lord Camden says in Hayes v. Long.* It was a case against a non-resident fellow of Christ Church College. It is to be remembered that there are no 'Fellows' eo nomine there, but they are called *students.* The University of Oxford claimed cognizance of the law under its charter. The court denied it, holding that the party being a curate at *Benson* (twelve miles south of Oxford), was a non-resident Fellow; and none but resident Fellows were entitled to the benefit. Lord Camden said, 'Great numbers of persons remain on the books long *after they have left* the University *on purpose to vote for members,* &c.; many who are *Fellows* of colleges *never go thither at all.* I myself was *one* for a long time, *and never went there at all.*' So Sir William Jones (Oxford),† Mr. Justice Blackstone (All Souls College),‡ were fellows long after they ceased to reside at college; Mr. Blackstone from 1743 to 1761; Sir William Jones from 1766 to 1783. Johnson, in his Lives of the Poets, states that Prior, the poet, at fifty-three years of age had no resource but his Fellowship, (p. 340) yet Prior was not a resident. It is clear, therefore, that *residence* is not a universal qualification of a Fellow, though probably by the statutes of a particular college it very often is.

2. As to *Instruction.*—I have no doubt that the Fellows are not ipso facto required to be Instructers or Tutors. In none of the statutes or charters (summarily stated) that I have seen is such a qualification spoken of as attaching to *Fellows* necessarily. Can the *one hundred and one* Fellows of Christ Church College be all Tutors in that college, when the greatest number of members of all sorts are not more than seven hundred, half of whom are not residents? I think I shall, by and by, show, that as Fellows they never or rarely are Tutors.

It is stated in the Oxford Guide generally, 'that the *Tutors* (not the Fellows) undertake the direction of the classical, mathematical, and other studies of the *junior members* (i.e. of the college). Many of the *undergraduates* have also *private*

* 2 Wils. 310.

† See Lord Teignmouth's Life, 36. 93. 113. 142. 221.

‡ Preface to W. Blackstone's Rep. 7. 9. 10. 13. 16.

tutors.' (p. 180) This paragraph occurs in a general description of the officers, &c. and after the description of Fellows as a distinct class.

Trinity College, or Hall, Cambridge, has a foundation of a Master and twelve Fellows. 'Ten of the Fellows were usually laymen; and *two* were in holy orders, who performed the duty in the chapel, and *were usually the college tutors.*'* This shews that the other ten were not.

Ayliffe, in his History of Oxford, says, that *scholars* in every college are to have their *tutors* till promoted to a degree; and no one may be a *tutor*, unless a *graduate* of some faculty, of learning and probity and religion, to *be approved of by the head* of the house wherein he lives.† How can this be if the Fellows are ex officio 'Tutors'?

The very case cited in third page of the memorial as to Dr. E. Calamy as *Tanquam Socius* of Pembroke Hall, is in our favor. He was entitled to the society of the Fellows, and had additional privileges, one of which was *pupillos, leave to take pupils.* From which I should infer that this was a peculiar privilege of some, instead of a common duty of all, *Fellows.*

3. As to the *government* of the college.—This, probably, more generally than any other thing, attaches to the Fellows; but it attaches to them not as Fellows, but as *corporators*, where the charter gives the authority.

But all Fellows do not participate in the powers or authorities of the college. It is manifest that whether they do or not, must depend upon the charter and statutes of the founder. So Ayliffe says.‡

The Oxford Guide says, 'The members of the University may be divided into two classes; those on the foundation, commonly called *dependent members*, and those not on the foundation, termed *independent members.*'

'*The independent members* consist of such persons as repair to the University for their education and degrees; but who, as they have *no claim on the estate* of the *society* to which they belong, so they possess no *voice* or *authority* in its management; and during their residence in a college or hall, they are supported at their own expense.'||

* Ex parte Wrangham, 2 Ves. jr. 609. † 2 Ayliffe 115. ‡ Id. 29.
|| Oxf. Guide, p. 179.

'The *dependent members*, or members on the foundation, are as follows:—The head of the college, the *fellows* (called students at Christ Church), the *scholars* (called *demies** at Magdalene), *chaplains*, and *Bible* clerks.'

'The *dependent members* derive emolument from the revenues of their societies; and *on some of them the management and discipline of the whole body devolve.*'†

'The independent members are *noblemen*, *gentlemen-commoners* (at Worcester called *fellow-commoners*), and *commoners.*'‡

In Christ Church College we have already seen that there are 'Fellows' on the foundation; but the government of the college belongs exclusively to the *Dean* and *Chapter.*‖

In many of the colleges the original foundation provided for a limited number of fellowships only. If the charter admitted of an increase without violating its provisions, new fellowships have from time to time been ingrafted on the college; and in such case the new ingrafted Fellows enjoy the same privileges as the old, the corporators being only increased.

The doctrine of law is, that if the charter does not restrict the number of Fellows, all new ones partake of the original privileges and duties. Thus in St. John's College v. Todington,§ so held. So in Attorney General v. Talbot, 1 Ves. 78, 475: S. C. 3, Atk. 662.

But where the charter restricts the Fellows to a particular number, there, though there may be new ingrafted fellowships, yet *the latter have no privileges in the government like the old*, but only partake of the bounty of their own founder. They are no part of the collegiate body. It is so said by the Attorney General, in Attorney General v. Talbot, 3 Atk. 662, 670, and admitted by the court, id. 674. So in Rex v. Bishop of Ely, 2 Term Rep. 290.

Therefore, in Peter House College, where the number of Fellows is by the statutes of foundation restricted to fourteen, and other fellowships have been since ingrafted; these latter, though called *Fellows*, have no *corporate rights* or *authorities.*¶

It seems clear from the foregoing statements that in English

---

* So called originally on account of their being entitled to *half* commons only.

† Oxf. Guide, 179. ‡ Id. 183. ‖ 1 Ayliffe, 240.

§ 1 Burr, 158. ¶ 2 T. R. 291.

colleges the Fellows are not necessarily either *residents*, *tutors*, or *governors*. I imagine the only thing common to all (and that I only conjecture) is, that they are all *stipendiaries*, or members on the foundation. And here I might advert to some other circumstance respecting English *Fellows*, which will show that other adjuncts as well as residence, &c. attach to them. But I reserve them for the fourth head.

IV. The original intention and objects of the English fellowship are very materially different from those, which the memorial supposes the main objects of the office in our college.

I need not advert to the known fact, that all colleges are eleemosynary corporations. Lord Holt says, 'There is no difference between a college and an hospital, except only in degree. A hospital is for those that are poor, and mean, and low, and sickly. A college is for another sort of indigent persons; but it hath *another intent, to study in, and breed up persons in the world, that have not otherwise to live.*'* What I mean to assert is, that the sole scope and design of the English colleges was to provide maintenance and funds to *educate persons;* that the *Fellows* (and *scholars* and *students*, called as they might be,) were not intended to be *instructers*, but to be themselves *instructed;* that the object was to enable the *Fellows* to go to the colleges to *learn*, and not to give learning to others. If this be established, how will it be possible to affirm, that the charter of 1650 could intend the same sort of persons? The whole memorial disavows it.

Colleges were founded ad orandum et studendum, says Ayliffe,† for prayer and study. This is true; but it is also true that the *Fellows* were to *pray* and to *study*.

Let us recur to some of the foundations of the principal colleges.

In All Souls College, the statutes of the founder direct that *twenty-four* of the *Fellows* (the whole number being forty) shall apply themselves to the *study* of *philosophy* and *divinity*, and *sixteen* to the science of the civil and canon law. The latter are called *lawyers*, the former *artists*.‡

In Magdalene College, some of the fellows are expressly to be of a particular diocese, and *educated* in the study of divinity only, as Mr. Ingledon's. The original foundation was for *poor* and *indigent clerks* in the University *studying* the arts and sciences.‖

* Phillips v. Bury, 2 T. R. 353. † 2 Ayl. 3. ‡ 1 Ayl. 338. ‖ Id. 347.

In Brazen Nose College, the original statutes confine the Fellows to the study of divinity and philosophy. 'For a principal and sixty scholars *to receive an education in philosophy and divinity here.*'*

In University College, the Bishop of Durham founded three fellowships, for the maintenance of three *Fellows*, though *undergraduates.*†

In New College, the founder divided his fellows into *artists* and *lawyers*, viz. ten civil law, ten canon law, and the remaining fifty *to study* the arts and divinity.‡

In Exeter College the original statutes direct that the persons to live on this charity shall not exceed thirteen, viz. one student in divinity, one in law, the others in philosophy.‖

In Trinity College (Oxford), the original statutes direct the college to be for *poor and indigent scholars* in the University: *twelve* are styled *Fellows, to be educated* in the study of philosophy and divinity; eight called *scholars*, to be educated in logic, rhetoric, &c.§

In St. John's College, the charter is for a president, and fifty fellows or scholars—twelve to be lawyers, three chaplain priests, three lay clerks, to live unmarried, and sixty choristers.¶

In Pembroke College, seven of the fourteen Fellows are *to be in holy orders.*

In Christ Church College, originally of the one hundred students or *Fellows*, forty were required to be *grammar scholars;* and Queen Elizabeth converted these forty into *students.***

And I believe it will be found that the object uniformly was to *educate the Fellows*, so as to fit them for the learned professions, and principally for the church. In 4 Mod. 84, counsel arguendo say, 'a *fellowship* of a college is for a private design only, *to study.*'

Dr. Radcliffe's fellowships, already referred to, were of this nature. They were for the maintenance for *ten years* in the *study of physic*, to travel half the time.††

This leads me to another topic, the *duration of Fellowships.*—The English fellowships are not *perpetual*, that is, during life, if the party behaves well. Some undoubtedly are, as in Peter House, Cambridge, for the statutes of the foundation are that they shall be scholares *perpetui* et studiosi *insistentes*

* 1 Ayl. 378. † Id. 152. ‡ Id. 315, 319. ‖ Id. 207. § Id. 412.
¶ Id. 418, 419. ** Id. 440. †† 1 Atk. R. 358.

*studio literarum.** But this is far from being universal. We see Dr. Radcliffe's are only for *ten years.*

In Wadham College, 1613, by the statutes the Fellows are *superannuated,* and resign their fellowships, on the completion of eighteen years from the expiration of their regency.†

In Balliol College, 1263, at first each *Fellow* received only 8d. per week, and were under an obligation of leaving the college *as soon as they had taken a master's degree.*‡

Probably most fellowships were not looked upon as permanencies, but merely as places before preferment. I observe that Mr. Brown in arguing in 3 Atk. R. 669, says, that the fellowships in the universities one with another are not of great value, perhaps not above £24 or £25 a year.

I believe it is agreed on all sides that the Fellows of Harvard College under the charter of 1650 hold during good behavior. So Mr. Everett agrees in his pamphlet.

There are some other circumstances attached to fellowships in England which deserve notice.

Ayliffe says, the founders of the colleges have *generally* provided not only that the heads should be divines, but that the *Fellows also should in* a competent time *enter into holy orders.* This shows that *Fellows* were there to *learn* and to *qualify* themselves for the church.

So 'the Fellows cannot marry, nor succeed to a *college living,* nor indeed to another, beyond a certain value, without relinquishing their fellowships.'‖

Probably there are many other peculiarities attached to them, which a minute inspection of the charters and statutes (which I regret are not within my reach) would exhibit.

Summary of the preceding remarks.—From these remarks we perceive that it cannot be maintained for a moment, that the term FELLOW necessarily imports a resident, an instructer, or governor of a college, or a corporator, in England. Nor is their any identity in the *rights, duties, powers, privileges, tenure of office,* or *qualifications* of *English Fellows.* The name itself is often away, when the party is still *deemed,* though not *styled,* a *Fellow.* How then can it be correctly said that a Fellow means in the charter of 1650 a certain personage whose duties and qualifications are well known and fixed?

---

* 2 T. R. 296, 297. † 1 Ayl. 434. ‡ Id. 263, 268.
‖ Oxf. Guide, 190.

Can it be said, that he must be a *resident?* Many of the *English Fellows* are *non-residents.*

If it is said, that he must be an instructer: many, I presume *most*, of the *English Fellows* are not instructers. So far from *it*, that the object in the original creation of most, if not all, the foundations was charity—to support the Fellows in their own studies and not in teaching others. They may now teach; but it is a distinct business from their fellowships, for which, I doubt not, they receive a distinct compensation.

If it is said they must be *corporators*, or members of the corporation, entitled to exercise the government, and conduct the revenues of the government; there are many English *Fellows* who have no such authority, and are not corporators. Even a part of the body named in the charter may not have a title to such government. Some colleges are incorporated as *Master, Fellows*, and *Scholars*. Now, though 'scholars,' as here used, does not mean, what we call 'scholars,' but beneficiaries of a certain grade; yet I do not doubt that in some cases the 'scholars' are altogether excluded from the government by the statutes or charters. Traces are to be found in our books leading to this conjecture; but I affirm nothing positively, because I have not yet seen a direct case. Where 'scholars' are, or may be *undergraduates*, or *grammar scholars*, (as some foundations are) it is presumable that they are not *governors*. Certain it is, that such statutes may be made, and such charters granted.

So, many English Fellows are required to study particular branches—divinity, law, philosophy, the civil law, the canon law—to be clerks, to be artists, to be medical students, to be poor and indigent, to be in holy orders.

Many *English Fellows* hold their places for life, some for *years*, some merely till they *graduate* as *masters*. Acceptance of church livings, or possession of church livings of a certain value, vacate some and constitute ineligibility. Livings of a less value constitute no vacancy or ineligibility.

Absence for *six months* vacates some fellowships.* Travelling for five years is *indispensable* as a qualification in others, (Dr. Radcliffe's Fellowships).

Some English Fellows are chosen from particular schools; some from particular colleges, counties, dioceses; some from

* 2 Term. Rep. 291.

inferior grades of persons in their own college, as scholars, probationary fellows, some from the University at large; some must be graduates, some undergraduates.

It is said, '*all* are bound not to marry.' Celibacy is, therefore, it seems, a universal qualification.

What qualifications, then, are we to take or reject? Shall we say that all must be residents, because some are? that all must be tutors, though all originally were pupils or students? that all must be corporators, or collegiate governors, when a part only are, or were? Why not take the opposite course, and say that all may be *non-residents*, because some are, &c.?

If universality of qualification be the ground of adoption, then all ought to be in *celibacy*. Who in *America* ever contended for that, from the charter of 1650 downwards?

The truth is, the word 'Fellow' has not, as to colleges, any peculiar meaning. The *students* at Christ Church; the *demies* at Magdalene; the 'scholars' in some other colleges, are *Fellows* in fact, though not in name. Why? Because they are known admitted *members* on the foundation. Ingrafted *Fellows* are not the less *Fellows* because they constitute no part of the original or present college corporation. Why? Because 'Fellow' imports no particular powers, authorities, or duties, but simply socius, associate, member of the foundation, entitled to such privileges and such only as the charter or statutes define or admit.

When, therefore, we construe the charter of 1650, we must construe it upon its own terms, and apply to the persons named such powers and authorities and qualifications as the charter itself provides, and no other. Where the charter is silent we are not at liberty to insert any limitations.

If I am right in this view of the case, the ground proposed by the memorial must be surrendered. If the main argument fail, there is an end of all that follows.

If there be not an identity between our Fellows and the English Fellows, or between the latter as to rights, duties, and privileges, I do not see how any argument can be bottomed on it. Conjectural similarity is of no importance. Until you can definitely affirm, what *ours* are, and *theirs* are, you cannot proceed; for until that is done, we can institute no process of comparison, as to similarity or dissimilarity. In the order of things, therefore, the first point is to ascertain what our *Fellows* are. But I propose to notice some of the auxiliary grounds stated to fortify the principal one.

V. There were persons in the college at the time of the charter, and previously, known by the denomination of 'Fellows.' This I freely admit. The preamble of the charter states it; the form of admission states it; and other college records recognize it. The memorial does not pretend that there is anything in the college *records* before the formula of admitting *Fellows* that recognizes it. When that formula was first adopted is not stated, or exactly known. But it appears in the college records immediately after 'certain orders by the scholars and officers of the college to be observed,' under date of 28th March, 1650. The next preceding entry in the book is the 26th of March, 1650. President Leverett in his Journal states that it was written by the Rev. Jonathan Mitchell, one of the members of the corporation. There is no evidence that it was *ever after* the charter used upon the admission of any 'Fellow' of the corporation under the charter.

There is reason to believe that the word was not used, or the person known in the college, in 1646. There is an entry in the books entitled, 'The laws, liberties, and orders of the college, confirmed by the overseers and president in the years 1642, 1643, 1644, 1645, 1646.' In this collection, consisting of nineteen articles, 'Tutors' are frequently mentioned, 'Fellows' never. Yet in some instances, if they then existed, there would be a propriety of naming them, as in the 7th article, which requires of the scholars, that 'they shall honor, as their parents, magistrates, elders, *tutors* and aged persons.'

In January 13, 1647, there is an agreement on the books of a lease for years to Richard Taylor of a shop in Boston belonging to the college, in which he covenants to leave it in good repair, &c. 'to Harvard College, the President and *Fellows* thereof.'

In an entry on 6th May, 1650, there is an order of the overseers directing that no scholar, 'without the fore acquaintance and leave of the president and his *tutor*, or in the absence of either of them, *two* of the *senior Fellows*' should be present at any public meeting or concourse of people, 'in the time or hours of the college exercise, public or private.' It is added, in the same orders, 'neither shall any scholar exercise himself in any military band, unless of known gravity and of approved sober and virtuous conversation, and that with the leave of the president and his *tutor*.' These orders clearly show, that at this time *Tutor* and '*Fellow*' were not identical in the college; and that there were '*senior Fellows*' who were

not *Tutors*. How then can we say, that Fellows in the charter meant *Instructers?* So in 'Formula admittendi scholares ædiles,' the scholar is in one article to show reverence to the *President* una *cum sociis* singulis, and in the next article to *obey his tutor*.

In so obscure transactions of such an early period, with so few materials to give certainty, I may mistake in the view that I take of these facts. But I feel great confidence in the conjecture that the *Fellows* referred to, were graduates of the college, then resident there and pursuing their studies to qualify them for some profession, and probably beneficiaries. It would be natural that there should not be any there until 1646, because there were so few graduates (the first being only four years before) who were not in fact tutors.

In respect to the words in Taylor's lease, either the word 'Fellows' there used, is loosely used to designate the immediate government of the college, or what is possible, the shop may have been a donation for the benefit of the President and *Fellows;* and so the lease conformed to the words of the grant, however inartificially.

In respect to the Formula.* It does not show who the *socii* were, or what their occupation. The third article requires them to *instruct* all the students committed to their charge. But it does not prove that they were the general tutors. If they were beneficiaries, they might properly be required, in the then infant state of the college, to perform *some duty* there. But the preceding entry shows, that they were not identical with *tutors*, whose duty it was to give general instruction.

The 4th article proves nothing as to these *Fellows* having any particular office or government over the college, or being the actual administrators of its funds. For in another article a similar engagement is required of the *scholars*, in the form entitled 'In *scholaribus* admittendis,' or according to the record in Lib. 3, p. 9, 'Formula admittendi *scholares ædiles*.' The words are in the 4th article, 'Sedulo prospicies ne quid detrimenti collegium capiat quantum in te situm est, sive in ejus *sumptibus*, sive in edificiis et structura, fundis, *proventibus*, fenestris, ceterisque omnibus quæ nunc ad collegium pertinent, aut dum egeris, pertinere possint.'† Besides, the article itself

* Memo. p. 4. † College Records, under date December 10, 1646.

contains but a very imperfect enumeration of the duties of *Fellows of the corporation*. Their duties extend to making laws, elections, removals, investing funds, &c. The words may be construed as merely an engagement to prevent any wanton dilapidations or mischiefs.

It is also perfectly clear that 'FELLOWS' and TUTORS, or general instructers, were not used after the charter as identical terms; because, though there were *five* Fellows, there never were but *two tutors*, until 1703. *One* was added in 1703, and *another* in 1720; and to the year 1800 there were not more than *four tutors*.

But farther. There could not in the English sense of the term 'Fellow,' if by that is to be understood a *collegiate* corporator, be any such persons as Fellows in Harvard College before 1650; for the charter of 1642 did not authorize any such officers to be created. That act (for it is a subsisting part of the chartered authority of the college) gives to the governor, deputy governor, magistrates, and teaching elders of the six neighboring towns, the powers of governing, regulating, and managing the college '*and its members*,' its revenues and concerns; and by implication they are created a corporation, for they are made capable of taking bequests, donations, revenues, &c. that had been, or might be, given to the college; and they were to manage the same 'to the use and behoof of the *college and the members thereof*.

By *members* of the college must have been meant all persons connected with the institution, the president, instructers, and other officers and students. But they could not delegate to other persons their corporate powers. Nor could they make the president and instructers corporators. Nor could the president or instructers, or persons called *Fellows* take in *succession* by any bequest to them as a corporate body. For they were not so incorporated.

The gifts and donations given to the college must have been given in legal construction to the governor and magistrates and elders. *They* must comply with the *wills* of the donors; but *they* only could *take* the donation. If any donor gave to support any poor persons in their studies at the college, or any Fellows in the college, the words could import no more than that persons residing there, and in a sense, members of the college, that is, beneficiaries upon the foundation, should be so maintained. But *tutors* in no exact sense could be con-

sidered as *Fellows*, ipso facto; but as beneficiaries, they might be both tutors and Fellows, that is, members on the foundation.

But I understand that in point of fact the college records do not show, that before the time of the charter of 1650* any donations had in fact been made for the maintenance of persons at the college answering the description of *Fellows* at the English colleges, in the sense of the memorial.† Some indigent students were provided for, and probably also some resident graduates who received stipends. But as to Fellows on *permanent foundations*, I am not aware that there now are, or ever have been, any in Harvard College correspondent to English Fellows. The only persons on permanent foundations are, as I believe, our *professors*. The gifts of Glover, Keyne, and Pennoyer, might have authorized such foundations; but none have been established.

To be sure, in a loose and general sense, almost all persons who are officers of the college might be called *Fellows*, if by that we are to understand, not *English Fellows*, but merely persons 'resident at the college, and actually engaged there in carrying on the duties of instruction *or* government, and receiving a stipend for their services.' Thus, proctors and regents fall within the description, as well as tutors and professors. And the definition would apply as well to any resident graduate at the college, who should be casually intrusted with any instruction or government, however small, as to any tutor or professor. But though such a definition may exemplify what the memorial now means by 'Fellows,' it would in no respect help to an understanding of what the charter meant by 'Fellows;' for that is expressly argued to be, what is meant in *English* colleges by 'Fellows.'

It is incumbent on the memorialists to show, that there were in Harvard College before 1650 fellowships on foundations like the English, before we are called upon to admit that the charter used the word *Fellows* in that sense. They have not shown that by any direct or positive evidence.

But it is said, that the preamble of the charter shows that there were such *Fellows* in the college previously. It may be admitted, that what is recited in the preamble may be assumed as facts at this period. What then are the facts stated in the preamble? It recites that many well devoted

* See as to Tutor's Pasture, post. † Memo. p. 2.

persons, &c. have given sundry gifts, &c. for the advancement of all good literature, arts, and sciences in Harvard College, &c., 'and to the maintenance of the *President* and *Fellows*, and for all accommodations of buildings and all other necessary provisions that may conduce *to the education* of the English and Indian youth of this country in knowledge and godliness.' Now the sole question is, in what sense is the word 'Fellows' here used.

The college charter was doubtless drawn under the direction of the college officers, as I shall show from a document by and by. At that time there were persons known in the college by the name of 'Fellows.' What where they? We are certain they were not 'Fellows' on any foundation like those in English colleges, because none such then existed. We have strong proof that they were not *tutors*, for they are contradistinguished from tutors. They must, therefore, have been some persons residents at the college, and beneficiaries there, or graduates studying for the profession; or the term must have been used in a general sense, as importing the *associates* of the president in the immediate business of the college. It cannot be presumed that the word meant to designate mere beneficiaries, for that would exclude tutors, and yet, I presume, the main grants must have been for *instructers*. I conclude, then, the sense is general, that grants had been for the maintenance of the president and his associates, that is, the other officers in the college, without designating them by any permanent or fixed character,—referring to the fact, and not to any particular quality in the parties.

The charter then declares that 'the said college, &c. shall be a corporation consisting of *seven persons*, to wit: a President, *five Fellows*, and a Treasurer, or Bursar.' Now, pausing here, if the corporation were any other than a college, could there be a doubt what the charter intended? If it had been of the American Academy, or the Royal Academy, or a Bank, or an Insurance Company, could any one doubt that by 'Fellows' was meant a mere designatio personaram as equals and associates and members of the corporation? If the word trustees, or directors, or governors, or members, had been inserted, would not the sense have been complete, and the same?

If the charter meant to incorporate persons, then acting officers, would it not have recited the fact? Were there *five*

Fellows at the college at the time? Was there a Treasurer or Bursar? We know there was a President.

If the charter meant to incorporate certain persons then in office, as the memorial seems in some parts to suppose, there was no need to designate any particular persons by name afterwards.

If it meant to *select* from 'Fellows,' &c. then existing, then it creates the select few a corporation, and ascertains them to be the present incumbents, without providing for the future.

If it is supposed that the *existing collegiate officers* were incorporated, because it is said that 'the college shall be a corporation,' the argument proves too much, for then it means the aggregate of the institution, *scholars* and *pupils*, as well as instructers and officers. But the truth is, that the phrase is a very common one, though not a very exact one. It is only saying that thereafter the college shall be under a corporate government. All Souls College in Oxford, 1437, was incorporated by the name of 'Collegium Animarum omnium defunctorum Oxonii.' No one, however, supposes that the dead were incorporated. We well know that it is under the government of a warden and forty fellows. These were appointed by or after the incorporation.

The charter proceeds to name the persons who shall constitute the first corporation. This shews that they were not incorporated *ex officio*. 'And that Henry Dunster shall be the first President, Samuel Mather, Samuel Danforth, *Masters of Arts*, Jonathan Mitchell, Comfort Starr, and Samuel Eaton, *Bachelors of Arts*, *shall* be the five Fellows, and Thomas Danforth to be present Treasurer, all of them *being inhabitants of the Bay*.' Now why are not these persons designated, instead as Masters and Bachelors of Arts, as existing instructers or *Fellows* of the college? Why is it not said, that they *are* and *shall continue to be Fellows*, instead of *shall be* Fellows? Why are they described as 'all of them being inhabitants of the Bay,' instead of all of them being Fellows of the college?

The corporation are further by the charter 'authorized at any time or times to elect a *new* President, *Fellows*, or Treasurer, so oft from time to time as any of the said persons shall die or be removed.' They are to elect '*new Fellows*'; then they are not Fellows until elected; and there is no restriction as to the persons from whom they shall be chosen. Of course

they may be chosen at large. Even in the English colleges new Fellows may be chosen at large, unless the charter or statutes of the foundation prohibit it.

No duties are prescribed to the Fellows, as distinct from the duties of the corporation itself. It is not said they shall be before or after the choice, residents or instructers. But doubtless they have authority as corporators to regulate the college, because the charter confers it on the corporation.

The charter adds, 'which said President and Fellows for the time being shall forever hereafter in name and in fact, be one body politic and corporate in law, to all intents and purposes, and shall have perpetual succession, and shall be called by the name of *President* and *Fellows* of Harvard College, and shall from time to time be eligible as aforesaid.' As the corporation is designated as President and *Fellows*, the Treasurer, though not so called, is properly and in fact a *Fellow* in the sense of law, but he is also something more, viz. Bursar.

The President and Fellows are further authorized to 'meet and choose such *officers* and servants for the college, and make such allowance to them, &c. and as they shall think fit.' It seems to me clear that this part of the charter contemplates that the *officers* may be different from the corporators. There are other clauses to the same purpose.

There is an order of the General Court in May 1650, a few days only before the grant of the charter, which illustrates this subject. It is in these words: 'In answer to the petition of Henry Dunster, President of Harvard College in Cambridge, with relation to his desire in few particulars, viz. for the grant of a corporation for the well ordering and managing the affairs belonging to the college, the court is ready to grant a corporation to the college, so as meet persons be presented to the court, with a draft of their power and ability, neither *magistrates*, who are to be judges in point of difference, that shall or may fall out, nor *ministers* who are *unwilling* to *accept* thereof, &c.'

Now this appears to me to show, that the legislature did not contemplate that none should be in the corporation except *residents* and *instructers*. Why otherwise should the exception be confined to *magistrates* and to such *ministers* as would not accept? Why not exclude all ministers, not resident in the college? Why not exclude all persons not then in office at the college?

Farther. If there were *Fellows* in the college at the time of the charter, they were then *Fellows of the house*, or *academical Fellows;* but they were certainly not *corporate Fellows*, that is, not Fellows of the existing corporation, for that was by law composed only of the governor, &c. magistrates and elders. If there were more than *five*, then those not appointed of the corporation by the charter, remained simply *academical Fellows*. Whether there were any such, I know not.

The memorial lays stress on the supposed incongruity of saying that '*Fellow*' means only *member* or *associate*, because it is said that then the corporation consists of *seven* and not of *five Fellows*.

To me it is clear, from the words of the charter, that the Treasurer is necessarily a *Fellow*. The Treasurer is declared one of the corporation, the corporate name is 'President and *Fellows*,' and it is said that the 'President and *Fellows*' shall be a corporate body. How can this be, unless under the term 'Fellows' is here included the *Treasurer*. If he is one of the corporation, and yet the corporation is of President and *Fellows*, he must be a Fellow or nothing.

The memorial, too, supposes that it would be absurd to say a *Fellow of the corporation*.

This is an extraordinary assertion. The words of the charter expressly declare, that 'the said college shall be a *corporation* consisting of seven persons, to wit, *a President, five* Fellows, and a Treasurer or Bursar.' Observe, it does not say *the* President, *the* five Fellows, *the* Treasurer, now in office. Now of what were these *five* the *Fellows?*—of the college, says the memorial. The words of the charter are not so, they are Fellows of the *corporation*, for that is what the charter creates them. The President is President of the *corporation;* the Treasurer is Treasurer of the *corporation;* the Fellows are Fellows of the *corporation*. In common parlance we call them President, Fellows, and Treasurer of the college; but strictly they are Fellows of the corporation. The memorial confounds the corporate name of 'President and Fellows of Harvard College,' with the character of the parties as residence members. Nor is there anything unusual or incorrect in the phrase. In the English colleges, there are *Fellows*, who are not *corporators*, in other words who are not 'Fellows of the corporation,' and others who are. Thus in Christ Church College. The *dean* and *chapter* constitute the sole

corporation. The *Fellows* of *the college*, (one hundred and one in number) are not members of the corporation. They are, therefore, strictly never Fellows of the house, or academical Fellows. So in all those colleges where the corporation consists of a limited number of Fellows, by the original statutes, those Fellows and those only are 'Fellows of the *corporation*,' i. e. corporators. And all the ingrafted Fellows, who are very numerous, are not 'Fellows of the house,' or academical Fellows. In St. John's College, Cambridge, there are thirty-two original Fellows and twenty-seven Fellows upon ingrafted foundations.* So in Peter House College, Cambridge, the original Fellows are restricted to fourteen. There are many ingrafted Fellows. The former are '*Fellows of the corporation*,' the latter *Fellows of the house* only. It is a real distinction, and the words are accurate in indicating the thing meant. Nay more, if by 'Fellows' were meant resident instructers or governors, &c. as the memorial asserts, there would now be many Fellows in Harvard College, (supposing the five Fellows were all *resident* instructers,) who would be Fellows of the house, or academical Fellows, and the *five* only would be Fellows of the corporation. There are many traces in the public proceedings in relation to the college, showing this distinction. The pretence of incongruity or absurdity, therefore, vanishes.

There must be some phrase to distinguish *members* on the *foundation* and *corporators*, from resident students, whether graduates or not. In many of the English colleges they are called *commoners*, in some cases *fellow-commoners*, &c.

In this connexion I advert again to the formula for the admission of *Fellows*. I think I have shown what these Fellows were; at all events they were not *corporators*. This formula never was used for the induction of *Fellows after the charter*. It really, therefore, has no bearing to prove what sort of Fellows the corporation was to be composed of.

It is said, however, that this formula has not been repealed, and therefore that it ought still to be considered as a subsisting regulation of the college. But it is a clear rule of law that a statute for the government of a college may be presumed to be repealed from long disuse.† A disuse from the period of the charter would be decisive on this head, that it was then

* 1 Burr R. 202. † Attorney Gen. v. Middleton, 2 Ves. 330.

repealed. But it was in fact repealed by *operation of law* from the time the charter was granted; for as the corporation had the sole power under the charter to make laws and regulations, and the old regulations were not confirmed either by the charter of 1650, or by any subsequent order, they fell, with the old establishment.* This accounts, and satisfactorily, why nothing was done about or under them.

But in point of fact, were the *Fellows* first named all *resident instructers* at the time of the charter? It seems almost incredible that they should all have been so; for the college had not more than thirty scholars, and to have employed *five tutors* at that time or before, would seem utterly inconsistent with the acknowledged poverty of the college. It is probable that Samuel Mather was—Mitchell may have been—Samuel Danforth was probably, an instructer or one of those who were denominated Fellows. Whether Eaton and Starr were, I have no means of knowing. The probability is, they were not. It is asked, why persons so young were selected? The answer is, that at that time the colony was small, the charge burthensome, and the order of the General Court in May 1650, agreeing to give a charter, shows, that there was a difficulty in getting *ministers* to accept. They probably took men, though young, who were disposed to be *zealous* in the college affairs. If they were all Fellows, why were they not so designated in the charter?—it was the peculiar and appropriate name. Why are they designated as *Masters* and *Bachelors*, and *inhabitants of the Bay?*

As to Samuel Danforth, there are some facts worthy of notice. The charter was granted 31st of May, 1650. The Roxbury records under date of 12th May, 1650, have the following clause: 'Samuel Danforth recommended and dismissed from Cambridge church and *admitted here.*' This shows that he either had then removed or contemplated a removal from Cambridge. On 24th September, 1650, Samuel Danforth was ordained pastor of the church in Roxbury. Now, it must be inferred from these facts that his intention to remove from Cambridge and settle at Roxbury was *known* to the college officers. If residence and instruction were indispensable for a Fellow of the corporation, would his name, under

* President Dunster in his letter of 10th June, 1654, resigning his office, states the fact, 'that our former laws and orders by which we have managed our place, be *declared illegal and null.*'—*College Charters, ap.* 17.

the circumstances, have been inserted originally in the charter? He accepted the office. There is no proof that he ever resigned, or was removed. If not, then the legal presumption is that he remained in office until his death, which was on 19th day of the 8th month, 1674 In the charter of 1672, in which Samuel Danforth is named as a corporator, he is described as 'Fellow of the said college,' which certainly was meant to state his present designation, for the present designation of all the other Fellows is given, as Minister of the church, Teacher of the church, Master of Arts, &c. In a note in the college records (No. 3, p. 63) stating his death, it is said, 'this day died Samuel Danforth *senior Fellow of the college.*'

These facts would probably be thought decisive, that notwithstanding Danforth's non-residence he remained a member of the corporation until his death. But there are some circumstances brought to discredit this conclusion by the learned Professor Everett, in the pamphlet alluded to, p. 30 and 34. Thus Dr. Hoar, writing to his nephew in a letter 27th March, 1661, speaking of Richardson's Tables, '1 know no way to recover them but of some that were of *that society in former times*, I suppose *Mr. Danforth*, Mr. Mitchell, and others have them.'*

Now when was this written? Mr. Everett does not give the date; [it was in 1661.] Mr. Danforth had been a student and a *tutor* at the college. What Dr. Hoar refers to is that when Danforth was there as a student or tutor he had them transcribed. But this does not shew that he was not a corporate *Fellow* at the time, but only not then a resident of the *society*. It is common, loose language.

Another circumstance relied on, is what is stated in Johnson's Wonder-working Providence in a passage of a letter in 1651. He writes, 'Also the godly *Mr. Samuel Danforth*, &c. He put forth many almanacs, and is *now* called to the office of a teaching elder in the church of Christ at Roxbury, who *was* one of the *Fellows* of this college.' The only question is what the writer means by 'Fellow.' If he meant a Fellow in the sense of *tutor*, or resident instructer, and as a mere synonyme, there is no difficulty; and if the memorial is right, that the instructers were so called, the writer is correct. But the question is, did he mean to assert that Danforth had then

* Hist. Collect. vi. 103.

resigned his seat as a Fellow in *the corporation*, or only that he had left the college. Surely this language cannot overturn the strong presumption of law arising from the other facts.

But for the purpose of argument, I am willing to concede what has not been proved, that all the persons named in the charter were at the time *Tutors* and *Fellows*, in the sense of the memorial, in the college. What then? It proves that they were *eligible* as Fellows of the corporation, not that ipso facto they were under the charters the corporators. Much less does it prove that they and *they alone* were *eligible* as members of the corporation.

Mr. Everett now surrenders this point. He admits that *any person* may be elected as a Fellow into the corporation, whether resident or non-resident, instructer or not. All he now contends for is, that after election they ought to be residents and assist in the instruction or government of the college. This certainly surrenders much of the original argument, for then the charter did not refer to the existing Fellows. It did not designate them; it did not make it a condition precedent that they should be resident and instructers. But at most, ex vi termini, 'Fellow' imported a subsequent obligation to reside and instruct, &c.

This point has been already fully considered and I leave it, and proceed to notice some other documents introduced by the friends of the memorial.

First. In August, 1652, two years after the charter, a collection was directed to be made for the maintenance of the President and Fellows of the college. The memorial and the argument of Mr. E. suppose that by such a gift *after the charter* the maintenance should be for the individual Fellows of the college. I apprehend in law that such a gift generally would be construed as a mere gift to the *corporation* by its *corporate* name, and the maintenance to be the general maintenance of the institution. The words of this order are for the maintenance of the President, *certain Fellows and poor scholars*, and therefore may be construed justly to apply to individuals. But what does this prove? that all the Fellows were to be maintained? No; '*certain* Fellows' only. At this very time some of the *Fellows* named in the charter were doubtless instructers; all were probably not. This accounts for the distinction.*

* Letter to John Lowell, Esq. p. 62.

The like remarks are generally applicable to the donation of the General Court, in June 1653, 'for the more comfortable maintenance of the President, *Fellows*, and *Students*' of the college.* And the grant is made in terms 'unto the said *society* and *corporation*.' The charter then had existence and the corporation was recognised as a subsisting body governing the college. It might be proper to give stipends even to the *students* at that time.

In August 1653, the General Court ordered that the Cambridge rate should be paid to the college for the discharge of any debt from the country to the college, and if any surplus, it was 'to be and remain for the *college stock* and for further clearing and settling all matters in the college in reference to the *yearly maintenance* of the President, *Fellows*, and necessary officers thereof, and repairing the houses.'† Now this only shows that there were Fellows at the college at that time who needed support. But the document goes further. It shows that a committee were appointed for certain objects of inquiry as to the expenditures of the college, among them to 'consider what number of *Fellows* may be necessary for carrying on the work in the college, and what yearly allowance they shall have, and how to be paid.' Now this shows that the General Court contemplated that all the Fellows would not be required for the purpose. That all might not be resident or maintained; leaving it not on the charter, but as a matter of policy and expediency.

The committee did report. We have not that report. But in August 1653, the General Court passed an order that the continuations should be continued 'to *the care and trust* of the *overseers* of the college;' and the produce was 'to be for the *maintenance* of the President, '*Fellows*,' and other necessary charges of the college, and the several *yearly allowances* of the *President* and *Fellows*, to be proportioned as the said overseers shall determine.'‡ Now this proves no more than the fact that there were then 'Fellows' at the college, who ought to be maintained. Not that *all* the Fellows ought to reside there, or that all were maintained and did reside there.

I observe that in President Dunster's resignation, 10th June, 1654, he speaks not only of new regulations having been imposed on the college, and the former laws annulled; [by

* Letter, p. 62. † Id. 63, 64. ‡ Id. 65.

whom?] but he says, 'that whatever we do is to myself and *the Fellows* unwarrantable, and not secure.' Now he cannot be supposed to speak of himself and the *Fellows* of the corporation; for the charter gave them express warrant to make by-laws, &c., the overseers consenting thereto. He probably, therefore, alludes to the Fellows of the house, who had no authority at all, unless so far as the corporation gave them authority. But if he refers to the Fellows of the corporation, he then alludes solely to the negative of the overseers. It appears to me, therefore, that the charter was really acted upon from its original grant, though feebly.

The grant of Charlestown ferry in 1654, &c. is to the same effect.*

In respect to the Fellows' or Tutors' Lot, I can say but little, as I have not seen the deed, which is said to be in Latin.† I know not the terms of the grant, or the persons to whom granted. It is said by Mr. E. in his Pamphlet, that it was granted in 1645; (five years before the charter) and from the memorial and the pamphlet I gather, that it was given to the 'Fellows' of the college, eo nomine.‡ If so, it was a void grant; for they were not at that time a corporation capable of taking in succession by that or any other name. If given to the existing body or corporation, i. e. the governor, &c., for the use of the Fellows, doubtless it referred to that class of persons known there at that time by the name of Fellows, whether they were instructers or not. We have already seen that in 1650 'Tutors' and 'Fellows' were contradistinguished in the college orders. But I am given to understand by those who are acquainted with the terms of this deed, that they have been totally misconceived by the writer of the pamphlet; and that the deed is a legal grant to the college itself, by its corporate name. I dismiss this point, therefore, as one upon which I am not sufficiently informed to risk an argument.

[Mr. JOHN LOWELL (one of the overseers) here rose, and stated that the pamphlet of Professor E. had totally mistaken the grant of the Tutors' Lot; that it was in fact a grant to the college by its corporate name, and passed a good title to it.]

As to Coggan's grant in 1652, for the use of the President and Fellows of Harvard College,‖ I apprehend it is a grant to the corporation in its corporate character.

* Colony Laws, 1672, p. 30. Letter, p. 66. † Memo. 5.
‡ Letter, 25, 69, 39. ‖ Id. 69.

Glover's legacy in 1653 to Harvard College, 'for and towards the maintenance of a *Fellow* there five pounds forever,'* must be understood as referring, not to the *Fellows of the corporation*, but to a person approaching somewhat to an English Fellow; that is, to be *taught*, and not to *teach*.

So Keyne's legacy of £320 in 1653, 'for *poor* and *hopeful* scholars, and for some addition yearly to the poorer sort of *Fellows*.'† This surely refers to a class of Fellows resident at the college, not of the corporation.

Pennoyer's fund in 1670 is given, 'that *two Fellows* and *two scholars* forever should be *educated, brought up*, and *maintained* in the college at Cambridge.'‡ This answers exactly to the English Fellows—not to preserve *teachers*, but to *educate* persons. It is impossible to believe that the *Fellows* of the *corporation* were to be *educated*, &c.

But that after the charter there were Fellows not receiving salaries, as well as Fellows who did receive them, is apparent from an order of the overseers, anno 1666. 'It is ordered by the overseers that such as are *Fellows of the college and have salaries paid them* out of the treasury, shall have their *constant residence* in the college, and shall lodge therein, and be present with the scholars at all times in the hall, and have their studies in the college; so that they may be better enabled to inspect the manners of the scholars, and prevent all unnecessary damage to the society.'

After the charter of 1672 there is no question that there were *non-resident* Fellows, as well as *resident* Fellows.

The passage cited from Randolph's narrative, addressed to the Privy Council, 12th October 1676, contains this clause:—'The allowance of the President is £100 a year and a good house. There are but *four* fellowships; the *two Seniors* have each £30 per annum; the *two Juniors* £15, but no diet allowed. *These are Tutors to all such* as are admitted students.'‖

Now if Randolph is accurate at all, it is clear that all the *Fellows* of the corporation were *not* residents at that time; for the corporation consists of *five* Fellows. In point of fact we know that *three* of the then existing corporation, to wit, Mr. Shepherd, Mr. Mather, and Mr. Oakes, were not tutors, and two of them were non-residents.

* Letter, 70. † Id. 70. ‡ Id. 170.
‖ Id. 70. Hutch. Collection of Papers, 477. 502.

This leads me to another consideration.

VI. The point of usage.—I agree to the doctrine stated by Lord Mansfield, that where the words of a charter are doubtful, the usage is of great force. 'Not,' as he says, 'that usage can overturn the *clear words* of a charter; but if they are doubtful, the usage under the charter will tend to explain the meaning of them.'*

But what was the case to which his remarks applied? It was respecting the borough of Portsmouth, a corporation by presumption, and also by charter of Charles I. The corporation consisted of a Mayor, twelve Aldermen, and an *indefinite* number of Burgesses. The charter declared that the election of Mayor should be thus, that the Mayor, Aldermen, and Burgesses, *or the major part of them*, should assemble, and should continue till they, *or the major part of them*, should elect a Mayor. The sole question was, whether the charter meant a major part of the *whole corporate body*, or only a *major part* of *those assembled*, were to choose the Mayor. The usage had been for the latter to choose, and that usage was for *one hundred and seventy years*. The court thought it decisive; but they thought it also a right construction of the charter.

But it is material to consider the effect of usage in cases of this nature. A long uninterrupted usage in the affirmative establishes nothing but its being rightful. For instance, in the present case, if there had been a long usage to elect the *tutors*, that would certainly prove that *tutors* were not *ineligible*. But if from the first institution of the college to this time, none but *tutors* had been chosen 'Fellows,' it would not prove that none others were eligible. Why? Because the charter has not in terms confined the choice to *tutors*, and therefore all that can be affirmed is, that there is no pretence to exclude them as a matter of right or duty.

On the other hand, if a tutor had never been elected a Fellow to this day, it could be no proof that the charter excluded them, for it contains no disqualification of tutors; and the exclusion might be merely from policy.

Suppose every president of the college had been to our day a minister of the gospel, there would be no pretence to say that by the charter all other persons were ineligible.

---

* 1 Cowper R. 250.

Why? For the plain reason, that such an appointment is not required by the charter; and the usage could affirm no more than that it was not inconsistent with the charter.

Now take the case in the most favorable view which the memorial states, for the space of twenty-two years (viz. from 1650 to 1672), the Fellows were residents and instructers. A usage for twenty-two years is very short to establish any construction of words of a doubtful nature in a charter. But upon the words of the charter the construction could not be doubtful; for, I repeat it, tutors on our construction are clearly eligible. The usage then establishes only its own correctness.

But the memorial contends that the charter excludes all others, if not from election, at least from acting as Fellows after election, unless they become *residents* and *instructers*. Now what are the admitted facts on this point? That the usage has been without interruption from 1672 to the present time, a period of one hundred and fifty-two years, to have non-resident Fellows, and for a great length of time a majority of the Fellows have been non-residents, and not instructers. Now this usage, if usage is of avail, is a flat negative to the exclusion or qualification. It directly contradicts it. If the words of the charter were doubtful on this point, it would settle it. An early usage for twenty-two years cannot be permitted to prevail against a subsequent usage of one hundred and fifty-two years. If the former asserts an exclusive right in residents; the latter denies it, and proves it founded in mistake, and becomes itself conclusive.

But it may be said, that the very point was contested in 1722. I admit it, and do not mean to enter into any consideration of the respectability, talents, or virtues of the different parties. It is clear that there was a difference of opinion among men of high standing. Upon full argument, after much excitement, the point was settled against the exclusive right of the resident instructers; and for a century past the corporation has remained organized with *non-residents* in the Board. The usage of a century after such a controversy so ended must be decisive, if any can be. If it be not, then surely a short usage not negativing any other right for twenty-two years can be of no weight.

VII. Then the confirmation by the constitution of 1780. It must be deemed to act upon the *known* and *settled* state of things then existing as to the corporation. Four of its Fel-

lows were then non-residents. It declares, 'that the President and *Fellows* of Harvard College in their corporate capacity, and *their successors* in that capacity, &c. shall have, &c. all the powers, &c. *which they now have*, or are entitled to have, &c. and the same are hereby ratified and confirmed unto them the said President and *Fellows* of Harvard College, and to their *successors*, &c. forever.'

Now, for myself, I should be willing to rest the whole case upon this single solemn act or ratification. It is the highest sovereign sanction of the charter and of the corporation de facto then being rightful.

VIII. An argument *now greatly* relied on in behalf of the memorialists, is, that as the college is by the charter required to be *at Cambridge*, the corporation must be local, and the corporators or *Fellows* must therefore be local residents.

This argument has no foundation in law. In general, corporations may be said to have no locality, though the corporators may be local, and entitled as such only by locality; as the inhabitants of a town or parish are corporators only during their residence. But the corporation is not itself local. It exists only in intendment of law. It is a mere legal entity, and can have no *habitation*, though it has a *name*. It is itself but a shadow, though it necessarily moves, and is brought into operation by living beings. A corporation may be required to do its business at a particular place, and there only; but this is a limitation of its objects, and it does not give the corporation locality. This is frequently the case with regard to banks, insurance companies, bridge and turnpike corporations, academies, manufactories, &c. In Sutton's Hospital, 10 Co. 32 b. the court say, 'A corporation aggregate of many is *invisible*, immortal, and rests only in intendment of law.' So in Inhabitants of Lincoln County v. Prince, 2 Mass. R. 544, Chief Justice Parsons said, 'A corporation aggregate has in law no place of commorancy, although the *corporators* may have.' There is the same point in Taunton and South Boston Turnpike Corporation v. Whiting, 9 Mass. R. 321. And in general when corporations are created for local objects, the corporators are not to be deemed such only so long as they reside in the place, unless the charter expressly makes such a qualification. The proprietors of a bank, insurance company, bridge, turnpike, or manufactory, may reside anywhere, unless expressly prohibited by the charter. The law never imputes

locality to corporators, simply because the objects of the corporation are local.

Upon the whole, after examining all the grounds of legal right assumed by the memorialists, it appears to me that their case is wholly unsupported by any legal principles. And I advise that the corporation reject it accordingly.

[At a subsequent adjournment of the Board, Professor Everett and Professor Norton were heard before the Board in support of the memorial. A short discussion then ensued among the members; and the claim of the memorialists was rejected by the Board, *nemine contradicente.*]

Art. IV.—TRIAL BY JURY.

A Treatise on the Law and Practice of Juries as amended by the Statute of 6 *Geo. IV. c.* 50, *including the Coroner's Inquest, &c.* By James Kennedy, Esq. of Lincoln's Inn, Barrister at Law. London, 1826. pp. 196.

The institution of the jury is celebrated as the bulwark of British liberty, and the writers of Great Britain and the United States, the only two countries where trial by jury is supposed to be brought to anything like perfection, rarely allude to this tribunal except in terms of eulogy, taking for granted that the right of being tried by such a body is a most glorious and distinguishing privilege. This admiration and praise are so general and indiscriminate, that we should hardly know to what treatise to resort to find a rigid investigation of the peculiar advantages and defects, and all the distinct characteristics of this mode of trial. We have accordingly thought it would be worth while to scrutinize this institution a little more closely, and attempt to make some estimate of its peculiar and characteristic excellencies, and at the same time inquire whether our admiration is, in all respects, well founded. To whatever conclusions we may be led respecting this particular tribunal, the investigation will not be without its fruits, as it relates to a branch of the civil constitution of the most vital and homefelt importance, since of all the powers and prerogatives of government, none so nearly touches the welfare

of citizens as the exercise of the power of directly and practically applying the laws to their lives, liberty, and property. It is a part of the social system which can hardly be too much examined; and if we can establish ourselves in the opinion that the present constitution of our judicial tribunals, including the jury as it is now selected, and with its present functions, is the best possible, it will be a very grateful result, and richly repay us for the investigation.

The first peculiarity that strikes us in the constitution of a jury, is the mode of its appointment by lot, in which it is distinguished from all other officers and functionaries of government whatever, in our republic; for the election and appointment of all which some mode is provided that may secure men qualified for the particular duties to be discharged. At the first view it would strike one that next to deciding a lawsuit by duel, ordeal, or lot, would be the appointment of the judges who are to decide it, by this mode of choice. This sort of election is in fact more arbitrary than that adopted in hereditary governments, where a man's being a legislator or governor depends upon his birth, for though he may be originally by his native constitution and innate capacity the least fit person in the community for the discharge of the functions which fall to him by inheritance, still as it is known from his youth that he is destined to them, there is an opportunity for making amends, by his education, for his defects in natural endowments. In those governments certain persons are born governors and lawgivers; in Great Britain and the United States every man is born a juryman, that is, a judge; for every juryman is, or ought to be, a judge of the facts on which he gives a verdict. Some citizens, it is true, forfeit this birthright, but comparatively few; the great mass of the community retain and exercise it. If every man were invested with the right of being elected a juryman, if his fellow-citizens thought him qualified for the office, the appointment would stand upon the same footing as most others. But the case is quite otherwise; he has not the right of being a candidate merely, as in other cases, but of serving and discharging the duties as juryman, unless he forfeits this right, in which respect he stands upon a level with those who have hereditary political distinction in other countries, from which they may be degraded, and to which they may forfeit their title; as Nevile, Duke of Bedford, did in England, in the reign of Edward IV., being degraded

from the rank to which he was born, on account of his poverty. There is no kind of hereditary title in Europe to which some of the successors and heirs, from time to time, have not forfeited their right; from that of emperor or king, downwards.

This is certainly a very remarkable characteristic of our juries, and we are naturally led to inquire how it happened that these judicial officers are selected upon a principle so totally at variance from all other parts of our civil institutions; and as nearly as we can gather the origin of this peculiarity, from the history of this species of tribunal, it seems to have been derived from the ancient mode of summoning witnesses or accusers for particular cases. Passing over, for the present, at least, the Saxon *duodeni thani*, *compurgatores*, *sectores*, and *lahmen*, which made a part of the machinery of juridical administration, when, previously to the twelfth century, trials were had at first by ordeal, and after the Norman conquest, by battle, and adopting Mr. Kennedy's theory, that the first tribunals that may be fairly referred to this class are to be sought for in the time of Henry II. in the latter part of the twelfth century, as mentioned by Glanville, we find that by the constitutions of Clarendon, enacted 10 Henry II. A. D. 1164, it is provided, that 'if such men were suspected, whom none wished or dared to accuse, the sheriff, being thereto required by the bishop, should swear twelve men of the neighborhood, or village, to declare the truth,' respecting the dispute in question. This is supposed to be the origin of the grand jury, the jurors being summoned as witnesses, or accusers, rather than as arbitrators, or judges. The same principle was adopted in respect to the petit jury. In the same reign a writ, the form of which is given in Glanville, was directed in the king's name to the sheriff, and running as follows:—'I command you that without delay you send free and lawful men [not specifying the number] of the neighborhood of such a vill, to view a hyde of land in said vill, which M claims against R, and of which there is a suit between them in my court, and have *four* of them before me or my justices such a day, to testify their view, and what day.' This proceeding was similar to a view by our juries of the present day; but with this difference, that the jury thus summoned and taking a view, in Glanville's time, did not try the case, being merely witnesses; for after this view, the right was to be tried by the grand assize if the plaintiff chose; otherwise by duel.

This trial by the grand assize appears to have been the original form of the jury trial. It is supposed, from Glanville's account, to have been instituted by a law of Henry II., dated about the year 1160, which however has been lost. The party having put himself upon the assize, and the king having thereupon prohibited a trial by duel, the assize was summoned by a writ in the following form: 'The king to the sheriff, health: summon by good summoners four lawful knights of the village of Stoke, that they be at the Pentecost, before me or my justices at Westminster, to elect on their oaths *twelve* lawful *knights* of that vicinage, *who better know the truth*, to return on their oaths whether M or R have the greater right to one hyde of land in Stoke which M claims against R by my writ, and of which R the tenant *hath put himself upon my assize*, and prays a recognition to be made which of them hath the greater right in that land, and cause their names to be inserted in a writ. And summon R, who holds the land, that he be then there to hear that election, and have there the summoners.' &c. On the day appointed the four knights appeared and nominated the twelve jurymen, whose names were thereupon imbreviated, or inserted in a writ by 'which they were' summoned to appear at court *prepared* to return whether M or R had a greater right in the hyde of land in dispute,' and that they might be thus prepared, they were directed 'in the mean time to view the land or tenement itself.' These jurors were accordingly not summoned to try a question upon the law and facts submitted to them by the parties, but to state a fact within their own knowledge, and if it appeared on their presenting themselves that only part of them could make declaration on oath of the right to the land, those not able to make such declaration, were discharged and others summoned in their stead, until twelve were found who should agree in their declaration or verdict.

Glanville is supposed to have been the author of the law constituting the assize; at least he was well acquainted with its practical operation, being chief justiciary during a greater part of Henry's reign, until the death of that king, when he was displaced by Richard, and went on a pilgrimage to the Holy Land, where he died. He eulogizes this mode of trial, and thinks it quite superior to the duel, and calls it 'a certain benefit bestowed upon the people, and emanating from the clemency of the prince by the advice of his nobles. So effect-

ually,' says he, 'does this proceeding preserve the lives and civil condition of men, that every one may now possess his right in safety, at the same time that he avoids the doubtful event of the duel. By so much as the *testimony of many credible witnesses* in judicial proceedings, preponderates over that of one only, by so much greater equity is this institution regulated than that of the duel. For whereas the duel proceeds upon the testimony of one juror [witness], this constitution requires the oaths of twelve men at least.'

The whole proceeding is grounded upon the supposition that the jurors were witnesses, who, instead of giving their testimony on the stand, to those who were to decide upon the facts, gave the result of their own knowledge in the shape of a verdict. Their appropriate qualifications were, therefore, those of witnesses, to wit, a knowledge of the facts of the case, and an unexceptionable character as to credibility. And the exceptions which might be made to them as jurors, were precisely those which might be made to witnesses in the ecclesiastical courts. We see, therefore, why jurors were taken from the vicinage, in cases, especially, of dispute about title to land, the kind of cases apparently more particularly contemplated in the original institution of this mode of trial. In this view of the institution we very readily assent to Glanville's eulogy, but if he had been speaking of jurors discharging the functions allotted to them in later and more enlightened times, and maintained that the next neighbor of the plaintiff or defendant, whoever he might be, was the most capable of sifting, comparing, and determining the weight of testimony, and eliciting the truth of a case, or was more free from prejudice, than any other man's neighbor would probably be in the same case, we should not have thought him a first rate chief justice. The very circumstance which qualified a man to be a juror under the institution of the assize, namely, his having a knowledge and opinion of the case, is a disqualification under our present judicial administration, and one of the most frequent grounds of exception. In the county of Nantucket, in Massachusetts, for instance, where most of the inhabitants are collected together in one town, the administration of justice is exceedingly embarrassed from the circumstance of the jurors being of the same *vill* with the parties to the suit. One of the British East India judges recently gave it as his opinion, that justice was better administered there, from the circumstance that the

judicial officers went out from England, and were thus free from all the biases, party connexions, relationships, and prejudices of *caste*, which would warp the understandings of native judges. Allowing a judicial officer or juryman sufficient knowledge of the language, character, manners, customs, and institutions of the country, to understand the questions submitted, the more distant he is from the parties and the case, in all other respects, the greater is the probability of a right decision. We may safely assume that the circumstance of a juror's residing in the vicinity of the parties is in no other respect a recommendation than as it affords a probability of his being capable of understanding the case in litigation, a qualification of so slight importance in his favor, in comparison with the other members of the community in general, that it is not worth mentioning; being hardly an equivalent to the chance, on the opposite side, that he will be prejudiced.

This mode of appointing a jury by lot is not new, nor is it entirely modern. At Athens, any citizen of the age of thirty-five, and under no legal disability, or in other words being a *legalis homo*, might propose himself for a juror, and the different jurors were assigned to the various courts by lot, the *thesmothete* drawing the names as the sheriff does in England, and some officer with us. On this institution, Mitford remarks, that 'this is a department of the machine of government which ought to belong to the people at large. It is that for which they are most competent, and the security of property and equal liberty requires that they should possess it.' This is only a repetition of that general, indiscriminate, and unmeaning eulogy, which was at first pronounced when it had some actual practical import, but is repeated after it has become a mere sound. Mitford is not apt to speak without consideration, and yet what more extravagant, and, upon the face of it, improbable proposition could be laid down than is expressed in these very words, that the people at large are the most competent to understand and decide the various questions of the weight and construction of testimony in all the various cases, criminal and civil, that are brought into discussion in an improved and commercial community? No person can attend a court of justice one week, without perceiving that the jury do not in fact decide one case in twenty, which is submitted to them. This is so obviously and notoriously the case, that a gentleman of our acquaintance, who is in the habit of constantly

attending the courts in discharge of his official duties, and has made this mode of trial a particular subject of attention for many years, calls the jury 'a nose of wax' to be moulded and shaped as the judge may see fit. Take the very last case that has come under our observation, and any other will do as well, and we shall see that the verdict of the jury is dictated by the court, and the principal use of this body of twelve is, (what it has been declared to be by a very distinguished American jurist who has held a high judicial station,) to screen the court from the responsibility and odium of a decision, which in fact is, in most cases, the result of their own view of the testimony. In this case, for instance, there was testimony on both sides of the question mainly in dispute; three witnesses having testified one way, and two the other, and all of them respectable men. The judge, in commenting on the testimony, stated the reasons why the witnesses on one side of the question might be mistaken, and why those on the other side could not be so, but he did not say directly how he considered the fact to be, or whether he considered the defendant guilty—it was an indictment—but having gone through with the recapitulation and comparison of the testimony, he puts a supposition,—if, gentlemen of the jury, *the defendant has failed to make good this ground of defence, you will find him guilty.* What is this but dictating the verdict? We are not making an objection to this proceeding at present; we are only stating the fact. There is not one case in twenty in which it is not apparent what verdict the judge recommends. A judge very rarely has the talent of charging the jury in a way to present the law and all the considerations which ought to influence their minds, without at the same time disclosing his own opinion, and suggesting the verdict they should give. In many cases it would be quite impossible to do it. Some judges use no disguise in the matter; but advise the jury directly, and in plain terms, what verdict to give; and where the intention is to influence them, this is certainly the fairer way. If, however, he does not go this length, but says, 'this is for you to determine gentlemen, you must find according to the weight of the testimony on your own minds,' &c., still if he has an opinion, which is most frequently the case, it will show itself in his mode of presenting the testimony, his enforcing the part that makes for the side he takes, and diluting, disparaging, and sliding over that of the opposite side, and considering the weight

of his authority with the jury, and the skill he acquires in presenting a case to their minds in such a way as to lead them to the decision which he favors, the chances of their taking a stand upon their own convictions independently, and in spite of his charge, are so small as to be scarcely worth bringing into the account. Admitting it to be right that the judge should intimate, in many or in all cases, what verdict ought to be given,—and if he did not the jury would often make a very absurd decision,—yet what an abuse of language it is to call this *a trial by jury*. *The bulwark of our liberties*, as the jury is called in all the books, even to Rees' Encyclopedia, does indeed sit by during the trial, and at its conclusion returns a verdict; but to say that they *try* the case, is a legal fiction. Sometimes a special jury may try a difficult, complicated case, or one concerning some particular art, or branch of business, and a common jury may, in some instances, try a plain case; and where there happen to be some two or three skilful, able men of their number, they may try any case; but these are exceptions. Taking the ordinary run of cases and juries, and it is little better than burlesque to talk of a trial by the jury. To see how little agency they ordinarily have in trials, we have only to imagine the abstract law applicable to the case, to be given them on a piece of paper, and the testimony to be submitted to them without the presence of any judge, and without any comments upon the testimony, or *summing up*, as it is called; and it would be, instead of a trial, only the same sort of farce so often acted at Athens, where a jury decided without the assistance, direction, and influence of a judge. The idea of an ordinary jury's deciding, for instance, a complicated question on a policy of insurance, is ludicrous. A very strong instance happened in Boston a year or two since. After spending two or three days in stating the testimony in a complicated commercial case, spread over voluminous documents, before a jury who comprehended no more of the matter than if the whole had been read in Sanscrit, the parties at length, in compliance with the wish of the jury themselves, took the case out of court to a reference. To talk of a case being *tried* by men who do not understand it, is an absurdity in terms; they may *decide*, but cannot *try* it. And it is no reproach to jurymen, or a community, to say, that selecting twelve from the people at large by lot, the chance is that you will not get a body capable of understanding intricate contro-

versies: it is, on the contrary, a great credit to our community that so intelligent a body is ordinarily collected in this way. But to pretend that the first twelve men you may chance to meet in the street, or draw from the jury-box, are the most *competent* to decide on the malicious libellous character of a publication, or the seaworthiness of a ship, or the infringement of a patent right, is the next thing to maintaining the equity of trial by ordeal.

It is asserted and believed that justice is administered as uprightly and intelligently in England and the United States, as it is, or ever was, in any country, and we very confidently boast of a superiority of judicial administration, and attribute it to the peculiar constitution of our juries; forgetting the great and decisive influence upon this administration by the character, habits, education, morals, and social institutions of every community. Experience has shown that the institution of jury trials, before jurors selected by lot, will not, in all communities, secure a good administration of the laws; and on the other hand, the defects of this institution may be supplied, and its imperfections corrected, by the all-pervading influence of the character of the population. In many towns you may find the most perfect order, quiet, and security, where the whole police consists of a few constables, who scarcely make it any part of their business to maintain this order. This is no sufficient reason to eulogize the incomparable police of three or four constables, and recommend to all nations from the Pacific to the Sea of China, to introduce this admirable system. We may easily convince ourselves that the superiority of legal administration, as far as it exists, (for our national feeling no doubt leads us to overrate it exceedingly) is to be mainly attributed to other causes than this institution; we say *mainly* attributed, for in particular descriptions of cases, to which we shall by and by advert, this is an excellent institution.

On the score of capability and competency, a jury consisting of members selected and appointed for this particular purpose by the same body of the community, from which we take our juries by lot, would certainly be superior to one taken without any discrimination. We have an instance of a jury so constituted in Sweden, fifty years ago, at the date of Coxe's travels in that country; how much they may have advanced or retrograded since that period, we will not venture to say.

He says 'The Harads-raett is a sort of assize held three times a year under the county judges. Belonging to this court there is a kind of jury consisting of twelve peasants, chosen by the district, and confirmed by the governor of the province. They continue in office for life, and seven of them form a court. In all criminal causes, the judge demands their opinion, which prevails against his decision, if they are unanimous.' Here we have a jury, that, for qualifications and capacity, would, we should say at once, be superior to one appointed by lot. But what does Mr. Coxe say of it? 'This institution, according to practice, is a mere formality, for these criminal courts [in the civil courts they are chosen from a higher class of peasants] are so ignorant and poor, that most of them pay implicit deference to the dictates of the judge. The supineness, indeed, and passiveness of these insignificant retainers of justice, are so notorious, that a man remarkable for indolence and inattention is commonly said to be *as sleepy as a juryman.*' B. 7, ch. 5.

A recent British statute, passed 7 Geo. IV., makes provision for trial of criminal cases by jury in India. Before passing this statute the opinions of a great number of the judges in Hindostan were taken on the subject; and we will take a hasty notice of their answers, which may be found at length, by those who wish to consult them more particularly, in the Asiatic Journal for 1827, vol. 23 and 24. We may often get a more just view of any institution by contemplating it from some distant point of view, and detaching it from the other institutions with which it is blended, and by which it is modified, and from which it very possibly may derive all the advantages and excellencies which we might be apt, without such an examination, to attribute to the institution itself. Mr. Kentish, judge of the criminal court of Bronch, was against the introduction of juries on account of the obstacles thrown in the way by the distinction of *caste*. The work to which we have just alluded (v. 24, p. 790) states this objection. '*Caste* is a great difficulty in the way of native juries in Hindostan, and so the natives are averse to be of a jury, and not willing to give a verdict affecting the life or property of a Bramin.' Mr. Anderson, judge in Surat, was against the measure, on the ground of want of principle, education, and veracity on the part of the natives, as also their religious prejudices. Mr. Hale, another judge, thought it best to introduce

this mode of trial, on account of the future benefit expected from it, though he supposed it would not immediately be useful. Mr. Baillie was entirely opposed to it; and Mr. De Vitre thought it would impede, instead of promoting, the administration of justice. Judge Jones gave the same reason in its favor which we have before stated in favor of our juries. He says, 'the odium now incurred by the judge would be transferred to the jury.' But he adds, 'I have so little reliance upon the probity and independence of the natives in general, that I feel convinced they would seldom if ever act in opposition to what they considered to be the wish, or even opinion of the judge.' [This is a very sensible observation, and the more striking as coming from a judge, who considers the utility of jury trial to depend, in part, upon the ability and readiness of the jury, on occasion, to decide in opposition to the judge's opinion. If we apply the same test to many of our juries we shall find very many of them to be tribunals not entitled to all the admiration ordinarily bestowed upon *this* institution.] Judge Southerland says, in the *puncheyets* of Hindostan, which are arbitrations in civil cases, before a kind of jury, the natives do not place confidence in each other, and when they submit a case to these tribunals 'hardly ever fail to regret it.' Judge Barnard gives a singular opinion upon this subject: he says, 'However paradoxical it may appear, my opinion is, that if juries were to be adopted, the fittest persons to discharge the duties would be the least civilized and most ignorant,' and his reason is, that their prejudices would probably not be so strong. Judge Thackary objects the inconvenience of taking the jurymen from their customary employments. The committee on this subject in India remark, that we are too apt to estimate trial by jury by its advantages in England and America, 'the only countries where it is carried to anything like perfection.' They mention the circumstance so frequently repeated in favor of this institution, where the population is of a character suited to its introduction, namely, that it is a bulwark of liberty interposed between the government and the subject.

The whole drift of these remarks places the expediency and utility of the institution upon the character of the population. The qualities sought for are honesty, impartiality, and intelligence. But if we go a step further in the inquiry, we shall find that the very circumstances which make the population fit

for the introduction of this mode of trial, namely, the character of the judges, attorneys, and witnesses, will render a trial by a jury selected after the ordinary manner, not only a more cumbrous and expensive proceeding than others within the reach of the community, but for a great variety of cases one of the most clumsy and inadequate that could be devised.

It is from a misapprehension of the real causes of the superior administration of the laws in England and the United States, and attributing it too much to the form and constitution of the tribunals, that other nations have been so solicitous to transplant it among themselves, which will be done to little effect unless they can transplant the general good faith, feeling of the obligation of an oath, honesty and intelligence of the inhabitants, which will influence the legal administration in much the same manner, whatever be the specific form of the tribunals of justice. And if these can be transplanted, it will be of comparatively small importance whether the particular form of the constitution of juries goes with them.

But the only cases in which trial by jury is so highly esteemed by foreigners are criminal prosecutions. In this species of cases great efforts have been made to introduce juries in France. After some inquiry to find an account of the proceedings on this subject in that country, the most satisfactory one we have met with, is in the article *Jury*, in the German Conversation Lexicon, or popular encyclopedia, a translation of which is about being published in this country. It is an investigation of this institution in reference to criminal suits, for the idea of introducing jury trials in civil actions, does not appear to be once thought of on the continent; and if we recur to the English books and our own, we shall find that all the boasted advantages of this mode of trial are applicable only to criminal proceedings, which, as every body knows, form but a small part of our jury trials.

The writer of that article, limiting himself to the consideration of criminal prosecutions, begins by saying, that, in cases of alleged crime, two questions always arise, one whether the accused is guilty of the fact charged, the other what shall be the punishment; and he thinks the latter only should be submitted to the executive power, of which he considers the judiciary a part. His first ground, therefore, in favor of this institution, assumes that the executive and judicial powers are blended, and in a manner identified with each other, an as-

sumption inconsistent with theory, and, in a great degree, inconsistent with the fact, both in England and the United States; it being a great object of the constitutions and laws of both countries, to separate these powers, and render the judiciary absolutely independent of every other branch of the government. In some of our states, equal care is not taken to render the judges independent of popular feelings and opinions, from which quarter the integrity of the judges is much more liable to be assailed in the United States, than from the side of executive influence, as in Europe. But, on the other hand, the office and duties of a judge lead him to contract prejudices in favor of the support of the government and the maintenance of authority. This is venial, we were going to say commendable, in a judge; at least, if he leans at all, it should be in this direction. It is sufficient, however, to suppose such a bias possible in some cases, and we then have an argument in favor of jury trial similar to that made use of in this article, for the jury is to shield the accused from oppression by the government.

The writer proceeds to say that this is an office that cannot be intrusted to individuals, nor to a permanent body of jurors, since they would be liable to the same influence that is supposed to act upon the judges; it can only be discharged by the body of the people, since 'they cannot be corrupted.' 'But since the mass of the people cannot sit in judgment, and it is also known how little impartial justice is to be expected from the multitude, when their power is combined, this agency must be committed to single sworn substitutes, chosen for single cases, or only for short periods, in order that the popular tribunal may not degenerate into an established office. These substitutes, as they are not determined beforehand, cannot become subjects of corrupt influence, which, though it may reach some, cannot extend to all. In these views lie the foundation and essence of the institution of the jury; as well the petit jury of England, as the jury *de jugement*, in imitation of it, among the French.'

If we make the first position of the writer a little more general, his view of the advantages of a jury trial, will be a very fair and adequate one. He only supposes the influence of the executive, or (as we have modified his ground) the government, to be guarded against. In our country the influence of the government, that is the train of officers who take

the side of the prosecution, is something; before the revolution it was pretty strong, and in England it has operated in many instances with an oppressive severity. But its force is very much enfeebled in the United States; so much so, that there are not wanting instances in which the judges, through defect of vigor and independence of character, desert the laws themselves, and shrink from urging their salutary enforcement. It is not the government with its train of officers, considered as distinct from the rest of the community, from which the accused has anything to fear; for there is no such distinct interest in our community, since the members of the government are continually rising from, and subsiding into, the general mass, at short intervals. Nor is the administration of justice liable to any dangerous influence from any distinct class, since none has the means of arraying itself against the many, of whom in fact all classes form equally a part. We have nothing like the sinister influence formerly exercised upon judicial proceedings by the barons in England, when the institution was founded; nor like that of the executive in some, at least, of the governments of Europe. But we have an influence, which, though less constant in its operation, is not less dangerous when called into activity: we mean the influence of party. It will sometimes happen in the United States that the influence of party will be felt even in the courts of justice. Though we guard ourselves against any warping of the laws from this cause, and in general with great success,—for our judges have generally been men of independent integrity, who have studied to exclude from the tribunals all influence but that of truth and the law,—still you will sometimes hear it remarked, that the verdict of the jury, or opinion of the court, in such a particular case, was prompted by this or that political or religious opinion, or local prejudice. The suggestion is no doubt sometimes thrown out without grounds; but it would be too great a stretch of charity to suppose it always to be without foundation. One of the prominent uses of a jury with us, therefore, is to neutralize the influence of party; for parties run high only when the community is almost equally divided, as this is the only occasion for violent struggles and excitement, and the probability is, in such a case, that a selection of twelve men indiscriminately will embrace some of each party, and unanimity being necessary, a single juror has it in his power to interpose, and he will sometimes be instigated by party

prejudice to such interposition, to the obstruction of the just administration of the law. Other countries apprehend tyranny and oppression from emperors, kings, and privileged orders; the only tyrant that we have to apprehend is party, which, as is sufficiently shown by history, may be as unjust, cruel, and ferocious as any other tyrant.

This advantage of a jury, as well as those enumerated in the article we are noticing, and indeed all those which were ever enumerated, are of a mere negative character. No man upon reflection will think of saying that five, ten, or twelve men taken promiscuously will probably be the most *competent* tribunal for the decision of a cause. Their only general recommendation will be their probable freedom from corruption or prejudice, considered as a body. And even this advantage, which is only the absence of a positive and egregious disqualification, will depend upon the character of the community from which the jury is selected, as appears from what we have quoted respecting the East India juries.

To return to the article in the Conversation Lexicon, the writer proceeds: 'That the interests of different ranks may not give rise to injustice, partiality, or false decisions, the greatest possible equality of rank is to be sought between the judges and the accused.' This is the grand maxim of Magna Charta, nullus liber homo capiatur, &c. nisi per legale judicium *parium suorum*, vel per legem terræ; which was a very significant principle of infinite practical importance, when it was enforced upon king John at Runnymede, and may be of some useful application at present in Europe, but it has very little import in the United States, where there is no marked distinction of rank. Apply the maxim to Sweden. Is it any boon to a peasant of that country, to be tried only by his equals—those seven sleeping jurymen celebrated by Mr. Coxe? In India this very equality of the jurymen and the accused, is urged as an objection to the introduction of the institution, since it is said that a juryman will be exceedingly reluctant to convict one of his own *caste*. Where different ranks or *castes*, form distinct and opposite parties and interests, in a community, it is important to persons accused, that some of their judges should be of their own rank, *caste*, or party, in order to protect them from the hostile prejudice of those belonging to another set. Here is another negative recommendation of jury trial, similar to those already enumerated. But this is a very

different thing from assuming that a whole jury composed of men of the same rank with the accused are the most likely, in any community whatever, to decide his case justly. If we give the term *equals*, the meaning affixed to it by this German writer, the maxim that a man ought to be tried by his equals, is unobjectionable; for he says that all, except the peers of the realm, are equals. In this acceptation, the maxim, like most general maxims, has little or no meaning. The writer adds, that the ancient German judges, who were in effect jurors, were of the same rank with the accused, for the reason that none was willing to be judged by an inferior.

It appears by the same article that a German author of the name of Feuerbach, who published a work on this subject in 1813, that is held in high estimation, is of opinion that trial by jury is of importance only in popular governments, because the administration of the penal laws intrusted to a single magistrate, or a distinct body, would lead to monarchy or aristocracy; and considering the government of England a popular one, he supposes this species of trial to be well adapted to that country. An absolute monarch, he says, can interfere with this trial at his will. This is only saying that a trial by a jury popularly selected is incompatible with an absolute power, in the state, of which there can be no doubt. This same Mr. Feuerbach seems, according to this article, to take one very singular position: he says the trial by jury is superfluous in an absolute government, because in such a government the monarch, or ruling power, has no motive to injustice, and so will administer the laws very equitably without the intervention of a jury. This ground of argument is not very satisfactory, being in fact contradicted by historical instances innumerable.

The author of the article in question states the general objections to trial by jury, which we will quote.

'How far,' he asks, 'does trial by jury satisfy the demands of society? How far is a jury capable of forming a true opinion of guilt or innocence? That the English juries, in many cases, favor the accused, proves, on the whole, nothing against the institution, which among them has assumed a character in an extraordinary degree peculiar. Can we believe the juryman, who is accustomed to move only in the circle of common intercourse, and in and for this circle alone has formed his capacity, can we believe him possessed of sufficient sagacity

to look through the most complicated relations, which often occur in criminal trials? that his verdict is never determined by prejudice in favor of or against the accused? In the *viva voce* proceedings before the jurors, all those influences are put into the most powerful operation which can overwhelm or lead astray the judgment, by sophistry or excitement of the passions. The various grounds of accusation and defence, often infinitely numerous, can in nowise be comparatively examined and weighed against each other, a process possible only where the minister of justice forms his judgment from written statements of the testimony and arguments. In every case the last impression of the jury will be the decisive one. The charge, by which, after the argument is closed, the presiding judge directs the deliberations of the jury, and endeavors to instruct their understandings, by no means remedies all the defects of this system; though it usually decides the verdict of the jury; which may generally be foretold with certainty in England from the view taken of the case by the *judge*. There are cases, however, in which the jury will be governed by their own biases and opinions in giving their verdict; thus they always hesitate, even against their own convictions, to give a verdict of guilty, where the law affixes a penalty too severe for the crime. Though in theory they are to have no regard to the penalty, which is a matter wholly reserved for the consideration of the court, yet, in fact, they will blend in the question of guilt or innocence, a consideration of the legal consequences of their verdict. And it is better in some cases that they should do so, since they will thus correct, in some degree, the defects of the penal code, an office of some importance where, as in England, the improvements in this code have not kept pace with the times, and a small larceny is punished with the halter. The *legal consequences* of the act are thus considered by the jury, when they ought in the strict theory of this institution to be entirely excluded. On the other hand, the *legal construction* of the act charged *is* a question which must necessarily be taken into view by them. If a prisoner be accused of robbery, they not only have to decide whether he has done the act charged, but whether the theft is accompanied by acts and circumstances which constitute it *robbery*. In deciding questions of this sort, the jury is but an incompetent tribunal, with all the help it can obtain from the court. As to the circumstance of equality of the

accused and the jurors, it is a thing impracticable, or, at least, it does not exist in respect of criminal trials, either in France or England, where qualifications of property are required of jurors, whereas the prisoners brought before them for trial are from the very dregs of the community.'

Such are the tenor and substance of this German writer's general remarks upon this institution, considered in reference merely to criminal prosecutions. We proceed to cite his history of juries in France.

'The law of August 24, 1790, respecting the organization of the courts; an ordinance respecting criminal jurisdiction of September 29, 1791; a penal code of October 6, 1791; and a set of instructions for the conduct of criminal prosecutions of October 21, 1791, completed this new system, which has been subsequently retained, in its fundamental principles, though not without undergoing essential alterations, by which a portion of the benefits, that are ascribed to the constitution of the English criminal courts, was lost again, and the influence of the officers of the government on the administration of justice, it is said, improperly enlarged. The criminal courts were, at first, derived from the district courts, the judges sitting alternately in the criminal court of the departments. One of the judges was director of the jury, drew up the indictment, and assembled the jurors. The jury *d'accusation* consisted of eight members, three voices for the accused being sufficient to reject the complaint. This jury *d'accusation* is now entirely abolished in the new criminal ordinance of November 17, 1808 (see Codes les cinq). The criminal courts for more important causes *(Cours d'assises)* are now deputations of the king's court, *(Cour royale*, or *Cour d'appel)* and the decision respecting complaints is committed to a division of the king's court. The liberty of the accused to hold consultation with counsel, is less restricted by the new laws than by late practice; according to a very doubtful interpretation of the article 302 of the act of 1808, to regulate criminal process, the counsel is allowed access to the accused only a few days before the beginning of the public prosecution. And in some cases, as in libels, the definitive decision is taken from the jury, and given to the police courts. To require the unanimous agreement of the jurors to a verdict, which, even in England, is often attended with great difficulties, and leads to striking inconsistencies, was soon found entirely impossible in France. The simplicity of

the English process, which at the end of the proceedings leaves to the jury the verdict of guilty or not guilty, it was found in France impracticable to imitate. In England only the most important witnesses are brought forward, and a day, or in very complicated cases three or four days, are sufficient to complete the trial, and consequently no uncommon powers of mind are required to retain the whole testimony in the memory; but in France it would be deemed an inexcusable neglect of the dramatic display of the trial to omit even the most unimportant testimony. Hence several hundred witnesses are sometimes brought forward, and more weeks spent on one case than there would have been days employed in England. Thence arose also the habit of proposing single questions to the jury, which questions the president, to make a display of his acuteness and accuracy, often multiplies to hundreds or even thousands, but which, however, have been somewhat simplified by the ordinance of process in 1808. It being absolutely impossible to insist on unanimity in the jury, it has been resolved to assume the simple majority of seven against five as decisive; but in that case the court itself is obliged to deliberate on the same points, and an acquittal takes place, if the majority of the judges coincides with the minority of the jurors, so as to make the number of voices in favor of acquittal equal to those for condemnation. The courts have also the right to set aside the verdict of the jury, if it appears to them to rest entirely on an error; but this must be their own free act, and can be proposed by no one. A simple majority of jurors decided the case of Fonk; and at Paris in 1823, that of Dr. Castaing, indicted on a charge of poisoning. Among the objections made to the new French criminal process, is the excessive power committed to the president. In England the examination of witnesses is carried on by the prosecutor and the counsel for the defendant; but in France by the president alone, and there is frequently seen a very striking exercise of this privilege, as well as an hostility to the defendant, which ill comports with the judicial office. But the loudest complaints at present are made of the selection of jurors, (which belongs to the prefect alone) and the restriction of the right of challenging. The prefect draws up a list of sixty jurors, of which the president of the assizes strikes out twenty, the defendant (or defendants collectively, however many there may be of them,) and the attorney-general each can strike out

twelve, and the rest constitute the jury. In this way it is possible to collect a jury consisting of the enemies of the accused, and it is asserted that this is often done in the case of prosecutions for political offences. The best French jurists (Dupin, Berenger, Paillet, Bavoux, etc.) are therefore fully agreed that the French jury contributes little towards a pure administration of justice.

'Even in England its value is very doubtful. It may seem rash to attempt to assail the universal conviction, not only of the English, but also of the French, and other nations that recognise in this popular institution the palladium of all genuine civil freedom, and place entire confidence in their trial by jury. But it is only the cases of political prosecutions, or those in which the innocent have been pursued by the revenge of the great, that give the trial by jury this reputation; and there is still another great question, not only whether the jury always merits this reputation, but also whether the desired advantage cannot be attained equally well, and even better, by a proper organization of the judicial office. * * * * But to return to what we were saying on the value of the jury, this body in England was not able to prevent the infamous Judge Jeffries, chief justice under James II., from gratifying his private hatred; nor has the French jury been able to oppose any obstacles of importance to such an abuse of the judicial office. Algernon Sydney and Lord Russel were condemned to death by the verdict of a jury. * * * * For common criminal cases there can hardly be any more uncertain, fluctuating form of decision, than the trial by jurors, who, without imparting to others the grounds of their verdict, or even settling any just grounds in their own minds, decide on the honor, freedom, and life of their fellow-citizens. * * * * A proposal has been made in Germany, that juries should give their reasons for their verdicts; but this only proves that the nature of this institution is not understood. An exhibition of their reasons comports as little with their nature, as a further examination by a different tribunal. The verdict of the jury comes like a decree of destiny, without being capable of justification, examination, or amendment; for the whole of the decision rests on things which cannot be a second time exhibited in exactly the same modifications—the deportment of the accused, and the witnesses, the individual and momentary dispositions of the jurors. Even in England, doubts of the importance of the trial by jury

are by degrees excited, and there is an approximation to the fundamental views of the German criminal process, which aims at exciting the moral feeling of the criminal by solitude and examination, and producing a confession, which makes the accused his own judge. No criminal is so hardened as never to experience a state of mind when the burden of conscience is too heavy for him, and he desires to reconcile himself to the law and his inward judge. To produce this effect is the aim of the criminal judge of Germany, and certainly it is at least as conformable to the high dignity of the administration of justice as the trial by jury. The abridgment of the length of the process, and the publicity of the administration of penal justice, are different things, and though they are commonly united with the trial by jury, are advantages which may be embodied with any other system.'*

The instances we have cited show what would indeed appear to be true on the slighest reflection, that the character of this institution, and consequently its utility, will depend upon the state of society and forms of legal proceedings in the community where it is introduced, and that it may be introduced without bringing in its train a single one of the benefits attributed to it in all our treatises and histories. It has in England in many instances proved to be a frail bulwark against injustice and oppression, and some of the greatest atrocities with which the annals of jurisprudence are stained, have been sanctioned by the verdict of a jury. If we compare the legal administration in any community where a jury moves in the judicial train, with what it probably would be in the same community without these coadjutors to the court, we shall abate something of the high commendation bestowed so indiscriminately upon this institution. It has been in very little use, and only of very recent introduction in civil suits in Scotland, and yet we have never heard that the laws were not as well administered there as in England. The objections of this tribunal are obvious and important. Where the jurors are taken almost indiscriminately from the mass of the population, as in England and the United States, the chance is too great of not having a single juror of the twelve who is competent to understand a case of any complexity and difficulty. To present a case to

*The extracts and references are to this article as it stands in the German: we understand that it is to be revised by an eminent American jurist, and additions made, giving the English and American views on the subject.

istjury it is necessary to reduce it to a single simple proposition, as thing of some difficulty in many cases, as every lawyer experiences, and the impossibility of doing it successfully with the imperfect knowledge of the testimony which the attorney is able to obtain before the trial, defeats the whole process in a thousand instances, and gives occasion for a new trial, or a new suit, or the loss of a right in many cases in which the defect could be remedied at the moment of discovering it, were the proceedings before a different tribunal.

The uncertainty of the verdict of a jury, their liability to prejudice, excitement, passion, and imposition, have a most pernicious influence upon counsel, who, finding that a cause may be lost or gained upon other grounds than its merits, are led to practise a thousand arts and stratagems in this legal warfare, upon which they would never think of venturing in addressing themselves directly to a competent tribunal. So interwoven is this practice in our judicial proceedings, belonging to their very genius and character, that it is thought a very clever thing in the counsel, to impose upon a jury, and in many counties his reputation will depend upon his skill and address in influencing them by considerations foreign to the grounds of a just decision.

The expense of jury trials is a serious objection to them. The examination of the jury-charges in any county will account in some manner for the dearness of justice. To go into the smaller courts and see twelve able-bodied *legales homines*, besides the presiding judge, sitting in judgment on a small note of hand, a multifarious account with an inconsiderable balance in dispute, or a petty trespass, does certainly suggest a doubt whether ours is, in all respects, the most perfect system of legal administration. For simplicity, despatch, intelligence, and economy in the trial of civil suits, the judicial constitution of Rome would probably be thought quite equal to ours by an unprejudiced mind. The jurors, *judices*, *assessores*, to the number of two hundred, two hundred and fifty, or three hundred, were appointed annually by the prætor, from among the senators at first, and afterwards from among them and the *equites*. And in each trial of a civil action, one or more were nominated by the prætor with the consent of the parties; and though he might appoint them without such consent, he seldom did so. One being nominated, could not refuse to serve without assigning a sufficient cause. Instead of appointment by the

prætor, *we* should of course choose by a popular election. Such a selection would no doubt supply a more intelligent and able tribunal; and three or four jurors thus elected, would constitute a tribunal before which the parties to nineteen-twentieths of the civil actions tried in our courts, would submit a case in preference to the present juries. And we can see no reason why such a body of jurors or *assessors* to the court, should not be provided for by the laws, before whom cases should be tried where the parties should agree or where neither should object. Some provision of this sort is the more needed, where the laws make no provision for special juries. In reply to this suggestion it may be said that parties may agree to references, as well as to a trial by such a jury. But the slightest reflection will show the two cases not to be parallel, for in a reference, the law as well as facts are now submitted to the referees, whereas the parties resort to the courts, in many cases, with points of law on which they wish to obtain the opinion of the judges, as well as points of fact to be contested to the jury. Besides, there is great difficulty in getting referees to serve; and, as it is going out of the ordinary routine, it is often attended with greater trouble, and in some cases with greater expense. A reference, again, cannot be had without a conference and agreement between the litigating parties, who, from their attitude in respect to each other, are not apt to be predisposed to enter into negociations of this sort. If we consider one of the uses of a jury to be that of assuming a part of the responsibility and warding off some part of the odium of a decision, the advantage in this respect will depend upon the share they take in the decision of the case; and in proportion as they are under the direction of the court in rendering their verdict, they cease to be such a defence. A smaller number, who actually examine and decide the facts for themselves, would answer this purpose much better.

How cumbrous and ill-suited a body of twelve men is to hear and decide upon controversies, is shown by the circumstance that so large a number is never agreed upon by the parties themselves. A submission of a case to the arbitrament of twelve men, chosen by the parties, was never heard of, except in the old feudal times, when a disputed point or a contest for honor was submitted to the arbitrament of some dozen, twenty, or thirty knights in armor.

There are cases, both in civil and criminal judicial admin-

istration, in which the number of jurors is of importance, where, as in the instances mentioned by Glanville, a small number might endanger their personal safety by exposing themselves to the hostility of a faction or the resentment of the executive power. There are also cases in which the members of the community arrange themselves in parties on particular questions under litigation, in which the only way to get an unprejudiced tribunal, by combining in it members from each party, is to select a large number upon the principles of appointment adopted in respect to our ordinary juries. There would be no difficulty in providing for such cases according to the present system. The great object in these cases is to get a tribunal of which the decision shall not be the result of prejudice or passion. Where either party should think his case one of this description, he would of course elect to be tried by the ordinary jury. But in all other cases, the ends of judicial institutions would be much better attained, by paying greater regard to the positive qualifications of the jurors; and adopting a mode of selection and appointment that should give a greater chance of obtaining those who may probably be capable of understanding the cases submitted to them, and not taking a greater number than is convenient for the investigations and discussions which most usually arise in suits at law.

Art. V.—FUGITIVES FROM JUSTICE.

[The following opinion, with which we have been favored by the politeness of a correspondent, was first published in the Montreal Gazette, in 1827. The question examined in it is one of deep and general interest in the United States. It is discussed by the Chief Justice with great learning and ability; and derives an additional interest from recent circumstances, which have drawn public attention to the subject in this country.]

Court of King's Bench, Montreal, June 20th, 1827. } On Habeas Corpus.
Dom. Rex. v. *W. E. Ball* et al. }

Reid, Ch. J.—The case before us presents the following facts: One Joseph Fisher, stated to be an alien, came lately into

this province, where he was attached by his body about the 10th May last, at the suit of one John Wood, a merchant in the state of New Hampshire, for a civil debt of £160, and was thereupon detained in the gaol of this district. On the 28th day of the same month, two warrants, signed by Samuel Gale, Esq., the police magistrate, were lodged with the keeper of the same gaol, the one charging the said Joseph Fisher, as late of Vermont, gentleman, of 'being accused on oath with having feloniously stolen, taken, and carried away from a trunk previously locked, bank notes, to the amount of $638, the property of John Wood;' and directing the detention of the said Joseph Fisher, in the said gaol, to be dealt with according to law. The other warrant being somewhat more extended and precise, stating 'that whereas Joseph Fisher, late of Vermont, gentleman, an alien, to wit, a Prussian, now in confinement, under civil process, in the said gaol, stands charged upon oath with having at Middlebury, in the state of Vermont, feloniously stolen, taken, and carried away from a trunk previously locked, bank notes to the amount of $638, and to the number of upwards of 240, the property of John Wood, of Keene, in the state of New Hampshire, and with having immediately upon the commission of the said felony, come into this province,' and directing also the detention of the said Joseph Fisher to be dealt with according to law. These warrants appear to be founded on two depositions made by the said John Wood on the said 28th May last, before the said police magistrate, in one of which the stealing of the bank bills or notes, to the amount of $638, is mentioned, but without stating the time or place where the felony was committed, and that the said John Wood verily believed the said felony to have been committed, by the said Joseph Fisher, and in the subsequent deposition the said John Wood swears, 'that the said Joseph Fisher committed the crime and felony charged in the affidavit aforesaid at Middlebury, in the state of Vermont; that the said Joseph Fisher is not an English subject, but an alien, to wit, a Prussian, as declared by him the said Joseph Fisher, and came into this province, from the state of Vermont aforesaid, immediately after the commission of the aforesaid offence.' It further appears that the offence so charged against the said Joseph Fisher, is a felony, and a crime punishable by the laws of the state of Vermont.

On the 30th day of the said month of May last, a warrant

was issued in the name of our sovereign lord the king, tested in the name of, and signed by his excellency the Earl of Dalhousie, the governor in chief of the province, the said warrant, addressed to the sheriff of the district of Montreal, in which it is stated as follows:

'*Whereas* Joseph Fisher, late of the town of Middlebury, in the county of Addison, in the state of Vermont, one of the United States of America, gentleman, is now committed and detained, in our common gaol in our said district of Montreal, under your custody, upon, and by reason of a certain charge on oath of felony, to wit, upon the charge on oath of having on the 23d day of April, 1827, at the said town of Middlebury, in the county of Addison, in the state of Vermont, one of the United States of America, feloniously stolen and carried away divers, to wit, 240 bank notes for the payment of divers sums of money, in the whole amounting to $638, of the value of £143 11 sterling money of Great Britain, and then and there being the property of one John Wood. And whereas the said Joseph Fisher, not being one of our subjects, but being an alien, to wit, a Prussian, has since the commission of the said offence come into this province from the said United States of America, and the said offence whereof he is charged as aforesaid, having been committed within the jurisdiction of the said state of Vermont, it is fit and expedient that the said Joseph Fisher be made amenable to the laws of the said state of Vermont for the offence aforesaid. We, therefore, command you, that the body of the said Joseph Fisher, under your custody as aforesaid, you do immediately convey and deliver to such person or persons as according to the laws of the said state of Vermont may be lawfully authorized to receive the same, at some convenient place on the confines of this province and of the said state of Vermont, to the end that the said Joseph Fisher may be thence safely conveyed by such person or persons as aforesaid, to the town of Middlebury aforesaid, and there be made to answer for the offence aforesaid, according to the laws of the state of Vermont. Provided always, that the said Joseph Fisher be detained under your custody aforesaid for no cause, matter, or thing, other than the offence aforesaid; and this you are not to omit at your peril. Witness,' &c.

By the return made to the writ of *Habeas Corpus* sued out by the said Joseph Fisher, it appears that the sheriff of the

district of Montreal, made his warrant to William Easton Ball, his bailiff, and charged him with the execution of the said warrant, so issued in the name of his majesty.

Upon the return to this writ of Habeas Corpus, several questions have been raised, and objections taken, on the part of the prisoner, as to the sufficiency and the legality of this proceeding against him. These we shall now consider.

1. It is first objected that there is here no clear and positive charge of any felony or crime having been committed by the prisoner; the charge against him amounting merely to a suspicion, the grounds or causes of which are not set out, so as to enable the court to judge how far they are reasonable or sufficient.

It cannot be supposed that much stress was meant to be laid upon this objection, as in the affidavit of John Wood there is a positive charge against the prisoner, *that he committed the felony in question at Middlebury, in the state of Vermont,* and so expressed in the warrant of commitment. It was no doubt necessary, that the charge against the prisoner should be sufficiently clear and positive to render him amenable to the laws of that country he is stated to have violated, for this constitutes the groundwork of the whole proceeding. The court, however, thinks the accusation against the prisoner to be sufficiently clear and positive in all material points. It is true the day when the felony was committed is not mentioned in the affidavit of Mr. Wood, although it is in the warrant addressed to the sheriff; but from the circumstances stated of the prisoner's coming into this province immediately after the felony committed, and his subsequent arrest here in May last, this would be sufficient to hold him amenable to the law; the omission of a positive day or date being in many respects not so material.

2. It is objected, that upon the supposition that a sufficient charge of a crime be made out against the prisoner, yet that the sovereign cannot lawfully deliver him up to the state where the crime is said to have been committed; and even allowing this right to the sovereign, yet that it has never been practised or allowed, except in offences of the most aggravated nature, such as murder and robbery, but never in the minor offences of larceny, and such like.

This objection embraces the main points in the case, and the determination upon it, will, in a great measure, obviate all

the other objections. In considering this part of the case, much of the argument used must be laid out of the question, such as that founded on offences of a political nature, arising out of revolutionary principles, excited in any government, as in these cases the refusal of a state to surrender the accused cannot be drawn into precedent, for the authority of the state to which the accused has fled may well be extended to protect rather than deliver him up to his accusers, and this upon a wise and humane policy, because the voice of justice cannot always be heard amidst the rage of revolution, or when the sovereign and the subject are at open variance respecting their political rights; and, therefore, no state will ever be induced to deliver men up to destruction, nor even to malicious prosecution. We will, also, lay out of the question all the cases depending upon treaties and conventions entered into between different nations, as in such cases the surrender of the accused by one nation to another is not so much the effect of the exercise of a prerogative right or power of the executive government, as the execution of a national convention binding on both parties. We must meet the case as it presents itself, which calls upon us to determine, whether for any crime, great or small, committed in a foreign state, there exists in the executive government of this country any authority to deliver up the accused to be dealt with according to the offended laws of such foreign state.

The crime here charged against the prisoner is recognised as an offence against the laws of all Christian and civilized nations, and this crime may be more or less aggravated according to the circumstances of every particular case. In looking at the authorities cited from Grotius, Pufendorf, Vattel, Heineccius, Burlamaqui, and Martens, and to what has been written by them on this subject, we feel it unnecessary to make particular quotations from them in support of the doctrine in hand, because it is impossible that any unprejudiced man can read these authors without being satisfied that the principle here objected to, stands admitted as a thing understood, practised, and recognised by the comity of nations, that the offender against the laws of one nation, taking refuge with another, may be surrendered to the offended nation for the ends of justice. The difference of opinion among these writers as to the enormity of the offence, cannot affect the principle, although it may vary the practice among different

nations according to circumstances. This right of surrender, is founded on the principle, that he who has caused an injury, is bound to repair it, and he who has infringed the laws of any country is liable to the punishment inflicted by those laws; if we screen him from that punishment, we become parties to his crime,—we excite retaliation,—we encourage criminals to take refuge among us. We do that as a *nation*, which as *individuals* it would be dishonorable, nay, criminal to do. If, on the contrary, we deliver up the accused to the offended nation, we only fulfil our part of the social compact which directs that the rights of nations as well as of individuals should be respected, and a good understanding maintained between them; and this is the more requisite among neighboring states on account of the daily communications which must necessarily subsist between them. A modern writer* on the laws of natjons, says, 'La communication journaliere entre deux pais limitrophes est inevitable, et elle doit etre d' autant plus favorisée par leurs gouvernements respectifs, qu'elle est naturellement fondée sur des besoins reciproques, et qu'elle donne par la, lieu à des changes, d'ailleurs elle etablit entre les habitans respectifs des liaisons, et un sorte de confiance qui assurent leur tranquillité, et contribuent à leur jouissances.' Indeed were we to take into account the opinions of modern writers on international law, we would be still more strongly fortified in the principle we here hold, and we see no reason why those opinions should be rejected. By lapse of time, by new combinations and events, and by revolution, the principles of government may be altered and improved, and we have in the present age, had many lessons to teach us wisdom. At all events, we may safely say, that at the present day, the world has become enlightened in the science of government, as well as in all the other departments of human knowledge, far beyond what was known to those writers who have lived centuries ago, and therefore, that the maxims of government of the present day may be considered as at least as well understood, and better adapted to the rights and feelings of mankind, than they could have been in the days of Grotius and Pufendorf.

But let us look more immediately to the laws of our coun-

* Instit. du droit des Gens, &c. par C. Gerard de Rayneval; liv. 2, ch. 3, § 4, p. 134.

try, as the principles there adopted, must serve to guide our decision on the question. The law of England recognises the law of nations as part of the common law of the land, and although upon this question, from the insulated situation of that country, we do not meet with numerous decisions on the point, yet we find enough to satisfy us that we are holding to those principles which have been there adopted. Here we must refer to the cases cited at the bar, as furnishing the only light on the subject which we have at this moment been able to procure. Rex v. Hutchinson, (3 Keb. Rep. 785) where the court refused to bail a man committed for a murder in Portugal. Col. Lundy's case, (2 Vent. Rep. 314) who was arrested in Scotland for a capital offence committed by him in Ireland; held, that he might be sent there to be tried. Rex. v. Kimberley, (Str. Rep. 848) Justices of the Peace in England may commit a person offending against Irish law, in order to be sent to be tried in Ireland. East India Co. v. Campbel, (1 Ves. senr. 246) where it was held, that one may be sent from England to Calcutta to be tried for an offence committed there. Mure v. Kaye, (4 Taunt. Rep. 43) where Judge Heath held that it has been generally understood, that whenever a *crime* has been committed, the criminal is punishable according to the *lex loci* of the country against the law of which the crime was committed, and by the comity of nations, the country in which the criminal is found has aided the police of the country against which the crime was committed in bringing the criminal to justice. In Lord Loughborough's time, the crew of a Dutch ship mastered the vessel, and ran away with her, and brought her into Deal; and it was a question, whether we could seize them and send them to Holland, and it was held we might. And the same has always been the law of all civilized countries.

It has, however, been said, that the cases of Lundy, Kimberley, and Campbel, do not apply, as the countries to which these persons were sent were under the same dominion of the authority sending them, and therefore there could be no question raised touching international law. This may be considered an ingenious, but we think not the true construction to be put upon these cases, for the question was the right to send these persons to a different country from that in which they then were, to be tried by the laws of that country for an offence committed against them, and without some law to warrant this,

and none is cited or relied on, the sovereign had no more authority to send those persons to such distant countries for their trial, than he had to send them to a foreign country for this purpose; besides, we see nothing said in any of these cases which can lead us to believe that the decision was founded on the power of the crown over these several countries; on the contrary, from what was observed in Campbel's case, we must believe it was the general principle we here contend for, which was recognised. In that case the court is stated to have said, that 'the government may send a person to answer for a crime wherever committed, that he may not involve his country, and to prevent reprisals.'

In the two other cases, the pretence that the offended country was under the same dominion, will not apply; the general principle is there clearly established, particularly in the latter of Mure v. Kaye, for there Judge Heath lays it down as the law of all civilized countries, and although the particular instance for elucidating this general principle in the case of the Dutch sailors has been called a case of piracy, and as such always restrained among friendly nations, yet without a particular treaty on this subject, this case presented only a question of international law, which stood upon no better *right* than the present; the particular circumstances alone could lead to a more ready exercise of the right of interference of the British government, and accordingly we find that Mr. Chitty in his treatise on criminal law, 1 vol. p. 16, has laid it down as a *general principle*, that 'if a person having committed a felony in a foreign country comes into England, he may be arrested here, and conveyed and given up to the magistrates of the country against the laws of which the offence was committed,' and he cites as the groundwork of this principle the above case of Mure v. Kaye.

Two cases have been cited as having been decided in the United States of America, applicable to that before us; the one by Mr. Chancellor Kent, in the state of New York, and the other by Judge Tilghman in the state of Pennsylvania. We are happy to have the opinions of enlightened men upon a question of this kind laid before us, particularly from a country with which our communications are so frequent, and our interests mutual. The opinions of these learned men are, however, at variance upon some points, so that the question might still be considered as unsettled in that country, without

some local law on the subject. We cannot, however, help expressing our entire approbation of those principles which have been adopted and so forcibly applied by Mr. Chancellor Kent in his judgment; they appear to us to be founded on a fair interpretation of the law, and well suited to the national intercourse and good understanding between the two countries.* The opinion and decision of Judge Tilghman, which has been cited, and relied on by the prisoner, does not seem to favor his case; we would even say, that some parts of it make strongly against him.† According to the report of the decision which has been communicated to us, it would appear that one Short, who had fled from Ireland to the United States, was charged by an individual there with having committed a murder in Ireland, and was arrested at the instance of this individual, with a view to his being sent back to Ireland; but no demand had been made of the accused by the government, nor had the executive of the United States directed anything to be done in regard to him, either as to his arrest or detention. The prisoner Short being brought before Judge Tilghman on the writ of Habeas Corpus, it became a question before him, how far the prisoner was liable to be detained under such circumstances. The Judge determined that he could not. But this is not the case of the prisoner before us, for he has not only been accused of a crime, but by the order of the executive government it is directed that he shall be delivered

* The case referred to is, Matter of Washburn, 4 Johns. Ch. R. 106, in which the points decided are:—1. It is the law of nations, to deliver up offenders charged with felonies and other high crimes, and who have fled from the country where such crimes were committed, into a foreign and friendly jurisdiction. 2. It is the duty of the civil magistrate to commit such fugitives from justice, to the end that a reasonable time may be afforded for the government here to deliver them up, or for the foreign government to make application to the proper authorities here, for that purpose. 3. But if such application is not made in a reasonable time, the party ought to be discharged. 4. The evidence, to detain a fugitive from justice, for the purpose of being surrendered to his government, ought to be such as would be sufficient to commit him for trial, if the offence was committed here. 5. The 27th article of the treaty of 1796, between the United States and Great Britain, was merely declaratory of the law of nations, on the subject; and since the expiration of that treaty, the general principles of the law of nations remain obligatory on the two powers. 6. Therefore, the chancellor, or a judge of the Supreme Court in vacation, has jurisdiction to examine a prisoner brought before him on *Habeas Corpus*, and who had been taken in custody, on a charge of theft or felony committed in Canada, or a foreign state, from which he had fled; and if sufficient evidence appears against him, he may be remanded; otherwise he must be discharged.—*Edit.*

† Commonwealth *v.* Deacon, 10 Serg. & Raw. 125.—*Edit.*

up to the legal authority of that state where the crime was committed; and from what we can collect of Judge Tilghman's decision, there is some reason to believe, that had the prisoner Short, when brought before him, stood in the same situation as the prisoner Fisher now does, he would have determined differently. We will make a short extract from this decision to show the reasonableness of this belief, from the general principles there held, which we conceive to be consistent with the opinion we now hold: he says, 'I grant, that when the executive has been in the habit of delivering up fugitives, or is obliged by treaty, the magistrates may issue warrants of arrest of their own accord, (on proper evidence,) in order the more effectually to accomplish the intent of the government, by preventing the escape of the criminal. On this principle we arrest offenders who have fled from one of the United States to another, even before a demand has been made by the executive of the state from which they fled. But what right is there to arrest in cases where the government has declared that it will not deliver up? For what purpose is such an arrest? Can any judgment be given, by which the executive can be compelled to surrender a fugitive? Most certainly not. If the President of the United States should cause a person to be imprisoned, for the purpose of delivering him to a foreign power, the judges might issue a Habeas Corpus, and inquire into the legality of the proceeding; but they have no authority whatever to make such delivery themselves, or to command the executive to make it. If these principles be just, it follows, that, under existing circumstances, no magistrate in Pennsylvania has a right to cause a person to be arrested in order to afford an opportunity to the President of the United States to deliver him to a foreign government. But what if the executive should hereafter be of opinion, in the case of some enormous offender, that it had a right and was bound in duty to surrender him, and should make application to a magistrate for a warrant of arrest? That would be a case quite different from the one before me, and I should think it imprudent at the present moment to give an opinion on it. *Every nation has an undoubted right to surrender fugitives from other states. No man has a right to say, "I will force myself into your territory, and you shall protect me."* In the case supposed, the question would be, whether under the existing constitution and laws, the president *has a right to act for the*

nation, or whether he must wait until Congress think proper to legislate on the subject. The opinion of the executive hitherto has been, that it has no power to act, and should it ever depart from that opinion, it will be for the judges to decide on the case as it shall then stand. Neither do I give any opinion whether the executive of the state of Pennsylvania has power to cause a fugitive criminal to be arrested for the purpose of delivering him up. But confining myself to the case before me, in which the arrest was made at the request of a private person, I am of opinion that there is no law to support it, and therefore the prisoner is entitled to his discharge.'

Taking then the opinion of Judge Tilghman on the principle here stated, and supposing that there existed a law in the United States authorizing the President to act for the nation, as the prerogative of the King of Great Britain authorizes him to act in this behalf, there can be no doubt but that in the one country, as well as in the other, what the executive legally directed to be done in regard of delivering up a fugitive, would be confirmed by the judiciary.

The objection, that the offence charged against the prisoner is not of that enormity as either to require, or permit, that the executive should interfere to deliver him up, can have no weight. It would be difficult to establish a rule, where none has been settled, to enable us to distinguish the shades of enormity of different offences, their evil tendency, or pernicious effects, so as to limit the power of the prerogative as applicable only to such crimes as are productive of a certain *quantum* of evil in a state. The certain and positive rule laid down by all writers on international law, and the decisions had thereon, as above referred to, agree to say, that where a *crime* has been committed, the criminal may be surrendered to the offended country. There is certainly great difference of opinion among these writers as to what kind of crime this ought to apply: some holding it to extend only to *high treason, robbery, and murder*, while others apply it to minor offences, and even to civil damage; but where the general right is acknowledged, it must be left to neighboring nations to determine the necessity of enforcing it according as good policy and sound discretion shall require.

3. It is, however, further objected, that allowing the sovereign may have the power to deliver up a criminal to another

state, yet that such power cannot be exercised by the governor of this province, who as the servant of the crown, cannot be considered as vested with the exercise of such high prerogative—or at furthest, it is necessary to show that by his commission he is vested with this authority.

It would certainly be considered rather extraordinary that this, or any other prerogative of the crown, necessary to be extended to every part of its dominions, and none more than in this province, should require either the personal presence of the sovereign, or his express mandate in every case of the exercise of his right. This would render it nearly impracticable and certainly most burthensome to the subject when seeking to derive a benefit therefrom. But the prerogatives of the crown do not rest on this limited principle, they are equally in vigor in all its possessions, and may at all times be exercised when necessary for the general welfare. The principle as laid down by eminent crown lawyers and explained by Chitty, (Chitty on Prerog. 32, 3. 1 Chalm, Op. 232, 3.) is, that the king's prerogative in the colonies, unless where it is abridged by grants, &c., made to the inhabitants, is that power over the subjects considered either separately or collectively, which by the common law of England, abstracted from acts of parliament and grants of liberties, &c. from the crown to the subject, the king could rightfully exercise in England; that is, that the common law of England, with respect to the royal prerogative, is the common law of the colonies. As therefore, the prerogative rights in Canada are the same by law as in England, how are they to be exercised but by his majesty's representative in the colony; governors of colonies, (Chitty on Prerog. p. 34,) although but the servants and representatives of the king, yet are in general vested with royal authority, and exercise many kingly functions. It is true, they cannot declare war, nor make treaties, nor do many other acts of royal authority, which involve the interests of the whole realm, but what regards the security, the interest, or the honor of the province over which he presides, every governor of a colony, as the king's representative must hold and be authorized to exercise all royal prerogative incident to that situation, as a thing requisite for the maintenance of the public welfare, unless it has been particularly excepted and reserved by his commission. The governor is answerable to the king for this exercise of the prerogative and for the right discharge of his

duty, and if in the case before us, the party be aggrieved, the question must be settled according to the principles of international law, between the sovereign of that country to which the prisoner belongs, and the king's majesty, but not by his courts of justice.

4. It has also been objected that no demand appears to have been made by the American government, or by any of the American States, for the surrender of the prisoner. But it is not for the court to inquire into this. The nature of the demand and the sufficiency of it, must be best known to the executive, to which it is made, and which alone is competent to determine, how far the royal prerogative ought to be exercised. What we have to determine is, whether there was legal ground for the arrest and surrender of the prisoner, and we hold there was. By the warrant of his excellency the governor in chief to the sheriff, the latter is authorized to convey and deliver up the prisoner to such person or persons as, according to the laws of the said state of Vermont, may be lawfully authorized to receive him, that is, the executive authority of that state, and we must presume it was the same authority which demanded him. This is not, however, a question for our consideration.

But the prisoner comes before us in a very different character from that of a subject to whom protection is due as of right; he is an alien, to whom protection is not due, if the king sees fit to withhold it. The observation of Judge Tilghman may well be applied to him: '*That he cannot force himself into the king's territories and say, you shall protect me.*' It is held, (Chitty on Prerog. p. 49, 1 Bl. Com. 259, 260) that alien friends may lawfully come into the country without any license or protection from the crown, though it seems that the crown even at common law, and by the law of nations, possesses a right to order them out of the country, or prevent them from coming into it, whenever his majesty thinks fit—and the reason given is (1 Ch. Crim. Law 131, and 143, n. *a*) that it is inseparable from the governing power in any country, that it should be able to take precautions against foreigners residing in such country, and particularly in a country where foreigners are only amenable to the ordinary laws. The prisoner came into this province under suspicious circumstances, charged with a felony; as an alien his conduct did not merit protection, unless he had come with a fairer charac-

ter—and he ought not to be surprised, nor to complain that his majesty's government should direct him to be-taken back to that country from which he came.

Upon the several grounds alleged, therefore, the court have no hesitation in saying, that the prisoner cannot be liberated from the restraint under which he is held, but that he must be remitted to the custody of the proper officer for the execution of the warrant issued against him in the name of his majesty.

Art. VI.—BROUGHAM'S SPEECH.

Present State of the Law. The Speech of Henry Brougham, *Esq. M.P., in the House of Commons, on Thursday, February 7,* 1828, *on his motion, 'that an humble Address be presented to His Majesty, praying that he will graciously be pleased to issue a Commission for inquiring into the Defects occasioned by time and otherwise in the Laws of this Realm, and into the Measures necessary for removing the same.' Second Edition.* London, 1828. pp. 125.

The speech of Mr. Brougham was made on his motion, 'That an humble address be presented to his majesty praying that he will be graciously pleased to issue a commission for inquiring into the defects occasioned by time and otherwise in the laws of this realm, and into the measures necessary for removing the same.' The following resolution, which was afterwards substituted by him with the assent of the government, was unanimously carried: 'That an humble address be presented to his majesty, respectfully requesting that his majesty may be pleased to take such measures as may seem most expedient, for the purpose of causing due inquiry to be made into the origin, progress, and termination of actions in the superior courts of common law in this country, and matters connected therewith; and into the state of the law regarding the transfer of real property.' It will at once be perceived, that the resolution originally proposed embraces a far wider field of inquiry, than that which was finally adopted. Enough, however, is left to task the abilities of any commissioners.

In compliance with this resolution, two commissions have been issued by the King of England: one with regard to actions, and the other the law of real property. The commissioners appointed by the former, are John Campbell, Esq. one of the king's counsel, and William Henry Tinney, John Hodgson, Samuel Duckworth, and Peter Bellinger Brodie, Esquires, barristers; and by the latter, John Bernard Bosanquet, and Henry John Stephen, Esquires, serjeants, and Edward Hall Alderson, James Parke, and John Patterson, Esquires, barristers. These commissioners are directed to report to the court of chancery. What progress they have made in their examination we are unable to say.

It would not be possible for us, without making very copious extracts, to do justice to Mr. Brougham's thorough and masterly examination of the vast and complicated subject of his motion. With the exception of equity, criminal and commercial law, and the law of real property, he has attempted to point out the particulars in which the English law and administration of justice require to be reformed. This he has done in the most definite and business-like manner; stating in most cases the precise evil to be corrected, the general principles by which a reform ought to be attempted, and then in many instances offering a specific remedy. The nature and the multitude of the evils to be redressed, must strike with surprise those who have been accustomed to regard the common law with superstitious reverence. Mr. Brougham brings to his task such high endowments both as a lawyer and a statesman, as, though not absolutely inconsistent, are rarely united in the same person. None but a lawyer could have understood so completely the evils and abuses of the existing system; and none but a statesman of a high and resolute character would have dared to examine them and expose them to the public gaze, and to propose the remedies. Nor could a mere theoretical jurist have performed the task so efficiently, even with the most sound and liberal views; it required a lawyer practically familiar with the operation of the dark mysteries of his art.

Every thing which Mr. Brougham says has that air of truth and reality, and that directness of application which might be expected from his declaration in the outset: 'I pledge myself, through the whole course of my statements, as long as the house may honor me with its attention, in no one instance to make any observation, to bring forward any grievance, or mark

any defect, of which I am not myself competent to speak from personal knowledge. I do not merely say, from observation as a bystander; I limit myself still further, and confine myself to causes in which I have been counsel for one party or the other.' p. 2. Every subject is discussed in the most frank and fearless manner, without any attempt to disguise or palliate existing evils, or any shrinking from the application of severe but necessary remedies.

It has been sometimes objected to this declaration of Mr. Brougham, that a specification of particular hardships arising in individual cases, would not prove any defect in the law, because under the very best human system individuals must sometimes suffer from the application of general rules. It is very true that it does not follow, because an individual is aggrieved, that the law ought to be changed. But yet it is only by a careful observation of particular cases that we can know thoroughly the general operation of the law. It is obvious that on this subject, as on all others, to make a beneficial use of personal experience, demands a sound and discriminating mind. It requires a power of judging whether the evil which is felt, is a common consequence of the law, or one that is merely occasional, and whether it is or is not compensated by greater good effects. No unprejudiced person, we think, can examine Mr. Brougham's speech, without being satisfied that he has made a good use of his own experience.

The propriety of some of the changes which he proposes may be questionable; and some inaccuracies may perhaps be found in his statements of the existing law. But taking the speech as a whole, it exhibits great vigor of intellect, and a complete mastery of the subject. It has made a deep impression on the public mind; and has given a powerful impulse to the reform of the English law which is now going forward.

We shall not attempt to give any analysis of Mr. Brougham's speech, but confine ourselves to the discussion of one or two topics which it has suggested to us.

No American can read this work without being surprised to find how many of the evils of which it complains have been remedied in this country. We had occasion to make the same remark in our notice of Humphreys on Real Property. But though we have thus far avoided many of the evils of the English system, yet they deserve to be studied in this country, because the laws of all the states are based on that system, and

in addition to the elements of corruption which are found in all human institutions, contain, no doubt, some of the peculiar principles of evil which have produced the present state of the law in England. By learning, therefore, the causes and nature of the disease in that country, and the history of its gradual introduction into the frame, we may perhaps, devise means to check it when its first symptoms appear in America. If we will but listen to the warning voice of experience, we may, perhaps, arrest the slow and stealthy progress of abuse, and by an unceasing vigilance to preserve the purity of our institutions, and a constant regulation of practice by principle, we may for a long time avert the evils which now press heavily on our parent country.

Most of the grievances specified by Mr. Brougham are such as relate not so much to the general principles of right, as to the means by which they are enforced. The great difficulty seems to be in the machinery of justice, such as the constitution of the courts, fines and recoveries, mesne and final process, the rules of pleading and evidence, modes of trial, and costs. Excepting the law of real property and criminal law, which are not touched on by Mr. Brougham, the greatest changes which have been made in this country in the common law, are in relation to the particular subjects which he treats. The nature and obligation of contracts, such as insurance, bills of exchange, promissory notes, the law of principal and agent; the rights and duties arising from the relations of husband and wife, master and servant, guardian and ward, are more likely to be similar among civilized nations, than the regulations by which rights are enforced, which admit of an almost endless variety. And on examining the legal systems of different and disconnected countries, we shall find that while many and very striking analogies exist in the general principles of law, the means for carrying them into operation, are often very dissimilar.

A large part of Mr. Brougham's speech is occupied by an examination of the constitution of the courts of justice in England. The chief evils which he mentions are the accumulation of business in the Court of King's Bench, the administration of justice in Wales, the mode of appointing and paying the judges of the civil law courts, appeals to the privy council, and some other connected topics. This part of the speech can have little direct application in the United States; yet we

could not read it without reflecting on our own judicial systems. Many of them seem to us very faulty. Thus in Connecticut, Vermont, Rhode Island, Virginia, Ohio, Illinois, North Carolina, Tennessee, South Carolina, Georgia, Alabama, and Mississippi, the judges of the highest courts are chosen by the legislature. We doubt whether popular bodies, composed of such materials as our legislatures usually are, are the most suitable for selecting judicial officers. Many of the members must always be ill-qualified to estimate the comparative merits of candidates for judges. Party feelings and popular prejudices are always likely to influence strongly the choice made by large bodies of men. But above all, the responsibility of the choice does not rest on any individual. The governor of a state who appoints a notoriously incompetent person to a judicial office, disgraces himself. His own personal character suffers. But though a legislative body may disgrace itself by a similar appointment, the share of disgrace which rests on each individual is generally considered a very light burden. The qualities, besides, which create popularity in a party leader, who will be most likely to receive the suffrages of a popular body, are not those which are required in a judge. These remarks are, no doubt, familiar to most of our readers, and we should not repeat them if the practice of so many of our states did not show that the arguments are not felt so strongly as they deserve to be.

Another, and as it seems to us a still greater, error into which some of the states have fallen, is to have the judges of the superior courts chosen for limited terms. The term is seven years in New Jersey, Ohio, and Indiana; three in Georgia, and one in Vermont and Rhode Island. It is scarcely necessary for us to point out the tendency of such a system to destroy the independence of the courts, to introduce perpetual changes among the judges, and thus lower the character of the judiciary. The desire of retaining his situation tends to create in the judge the same subserviency to the person or body to whom he looks for re-appointment, which the fear of removal formerly did in the judges in England, while their continuance in office depended solely on the royal pleasure. The shortness of the term of office, besides its thus diminishing the independence of the judiciary, must also generally deter the most able professional men from accepting a situation, the tenure of which is so precarious; and must prevent judges from

acquiring the practical skill, which is only to be gained by long continuance in a judicial situation. The character and habits of thinking of the most able advocate must undergo a change, before he can become completely fitted for the bench.

It is but justice to add, that in most of the states the judges are appointed during good behavior, and are only removable from office by the governor on the address of both branches of the legislature. Such is the provision of the constitutions of Maine, New Hampshire, and Massachusetts. In Connecticut, Pennsylvania, Delaware, Maryland, Missouri, Illinois, Kentucky, Mississippi, and Alabama, the concurrence of two-thirds, and in Louisiana of three-quarters, of both houses is required, in order to authorize the removal of a judge. In New York the judges may be removed by a joint resolution of both branches of the legislature, if two-thirds of all the members elected to the assembly, and a majority of all the members elected to the senate, concur therein.

A very strange limitation of the office of judge exists in New York. 'The chancellor and justices of the Supreme Court hold their offices during good behavior, or until they attain the age of sixty years.'* This provision, no doubt, proceeds on the presumption that the faculties begin to decay at sixty years. But this presumption, in a very great majority of cases, is erroneous. And if it should now and then happen, in consequence of abolishing this rule, that it should be necessary for the legislature to remove an enfeebled judge; it would be a far less evil than to be constantly losing the fruits of matured wisdom and experience. At sixty years judges are usually as fully competent to the duties of their office as at any period of their lives. The judicial situation, indeed, has been considered as more favorable than most others to longevity, and to the preservation of the intellectual powers in full vigor. The constant exercise of the mind, without any feverish excitement, probably produces this result. Instances without number might be cited of judges who have continued on the bench beyond sixty years, without any diminution of their usefulness. Many, indeed, have continued in office far beyond that period. Lord Mansfield at eighty years betrayed no symptoms of weakened power; nor does Chief Justice Marshall at seventy-three. The same is true of the Chief Justice

* Const. N. Y. Art. 5, s. 3.

of Nova Scotia, who is now, we believe, more than eighty-five years old. If this absurd rule should have no other effect than it has already had in New York, to drive one of the most thorough and profound jurists of the age from the office of chancellor, the evil is deeply to be lamented. Of nineteen persons who have been judges of the Supreme Court or chancellors in New York, between 1777 and 1824, four have vacated their seats in consequence of having arrived at the age of legal incompetency.

The constitution of Missouri, with a little more show of reason than that of New York, fixes the age at which judges are to retire, at sixty-five. In Maine, New Hampshire, and Connecticut, the age is seventy.

In order to ensure the respectability of the bench, it is not only necessary that the office should be held during good behavior, but also that the judges should be well paid. We should hardly think it necessary to insist on what may be considered almost an axiom with regard to judicial officers, were it not so much disregarded in the practice of the country. It is so evident that the salaries of judges of the highest courts ought to be sufficient to command the best talents of the profession, that it is a matter of regret and wonder that so many of our states should have neglected to make the suitable provision. In all the states the salaries are moderate, and in some altogether inadequate. It is not necessary that the salary should equal the largest incomes earned by professional men; for many lawyers are willing to make a large sacrifice of income, for the sake of exchanging the harassing cares of their business for the honorable and less wearing, though perhaps equally laborious, duties of the bench. But when the salary of a judge is little better than the annual income of a common mechanic from the labor of his hands, no lawyer of eminence can afford to make the sacrifice of accepting a seat on the bench. The highest judicial offices necessarily fall to incompetent men, and the administration of justice becomes contemptible. It appears from Griffith's Law Register, that the salary of the chief justice in the highest court in Vermont is $1000, Connecticut $1100, Indiana $800, Delaware $1000, and in Rhode Island $250. As in most cases the salary of the chief justice is alone stated, it is very likely that the salaries of the puisne judges may be still less. In Indiana, indeed, we find from the same authority, that though the senior judge

of the Supreme Court receives eight hundred dollars, the other judges have only seven hundred each.

The system of appeals in England is much complained of by Mr. Brougham.

'The last subject which presents itself to our notice is the Appeal from judgments recovered. Here, as in every other branch of our jurisprudence, the courts of Law and of Equity proceed on opposite principles, though dealing with the same matter. In the former, you can only appeal on matter of law appearing upon the face of the record, or added to it by bill of exceptions, and never in any case before final judgment. In the latter, you can appeal from any interlocutory order as well as from the final decree, and upon all matter of fact as well as of law. So it is in the Ecclesiastical Courts, where a grievance (or complaint upon interlocutory matter) is as much the subject of appellate jurisdiction as the appeal from the final sentence; and the court above sits on all the facts as well as on the law. But the courts of Common Law are as much at variance with themselves; for it depends on the court you sue in, and the process you sue by (Bill or Original) how many stages of review you have.

'The principal evil of courts of Error, is the stay of execution which they effect, thereby giving the losing party in possession an interest in prosecuting groundless appeals. The Bill of the Right Hon. Gent. (Mr. Peel) being a partial measure, while it intended to remedy this evil, has rather increased it; because another more costly mode of obtaining the same delay being left open, the parties by defending actions in themselves without defence, avail themselves of it, to the enormous multiplication of frivolous trials. The true remedy I take to be this. Let the party who obtains a judgment be so far presumed right as to get instant possession or execution, upon giving ample security for restitution should the sentence be reversed. This is the rule in the Cape and other of our Colonies; in the Cape, two sureties, each in double the amount, are required.' pp. 110, 111.

The evil which Mr. Brougham complains of in this passage is not at all corrected in the United States. On the contrary, in some of the states it is increased, an appeal being allowed from one court to another after a trial by jury, where no error in law is pretended, but the party wishes to take the chance of another jury trial. And in all the states cases are constantly carried from court to court for the mere purpose of delay, at an expense which is sometimes ruinous to both parties. The length of time which suits have been continued in some of the

states, almost rivals the delays of the Court of Chancery in England. The plain remedy which Mr. Brougham proposes of giving the party in whose favor the decision first is the benefit of his judgment, would, we are confident, prevent a great part of the expense and delay which now attend litigation in the United States.

Out of the multitude of topics noticed by Mr. Brougham we shall only give his remarks on some of the laws of evidence.

'Ought the testimony of the Parties to be excluded? The strong opinion expressed by some great authorities on this head requires that, before entering on the Law of Evidence, we should touch the fundamental rule which draws so broad a line between parties and witnesses. It is clear that the law on this head requires revising; it is not so clear that the reform will be best accomplished by receiving every one's testimony in his own cause. The friend of exclusion proceeds upon the *supposition*, that the situation of a party differs wholly from that of another person; whereas it only differs in the degree of the bias arising out of interest, from the situation of many who are every day allowed to depose. He also maintains that it is dangerous to receive the party's evidence, because of the temptation afforded to perjury. That there is much in this argument, I admit; but, speaking from my own observation, I should say that there is more risk of rash swearing, than of actual perjury—of the party becoming zealous and obstinate, and seeing things in false colors, or shutting his eyes to the truth, and recollecting imperfectly, or not at all, when his passions are roused by litigation.' pp. 85, 86.

'Our system is clearly inconsistent in this particular. At least we ought to be uniform in our practice. Why refuse to allow a party in a cause to be examined before a jury, when you allow him to swear in his own behalf in your Courts of Equity, in your Ecclesiastical Courts, and even in the mass of business decided by Common Law Judges on affidavit? Why is the rule reversed on passing from one side of Westminster Hall to the other, as if the laws of our nature had been changed during the transit; so that no party being ever allowed before a Jury to utter a syllable in his own cause, in all cases before an Equity Judge parties are fully sworn to the merits of their own cause? If it be said that there is no cross-examination here, I answer, that this is a very good argument to show the inefficacy of equity proceedings for extracting truth from defendants, but no reason for following a different rule in the two jurisdictions. Indeed, the inconsistencies of our system in this respect almost pass comprehension. All

pleas at law are pleaded without any restriction upon their falsehood; in equity the defendant answers under the sanction of an oath. But Equity is as inconsistent with itself as it is different from Common Law; for the plaintiff may aver as freely as he pleases, without any oath or any risk at all. When an inquiry is instituted into these things, I do venture to hope that something will be done to diminish the number of matters decided on affidavit. This is, indeed, a fruitful parent of fraud and perjury, and not only a great departure from the principle which excludes the testimonies of parties, but an abuse of all principle; for he who would allow such testimony, under due restraints, may very naturally argue that suffering men to swear for themselves, without being exposed to cross-examination, must lead to endless equivocation, suppression of truth, and all the moral guilt, without the danger, of actual perjury. If it be right to exclude the parties from giving evidence in their own behalf in one case, it is not right to admit them to give evidence in others; and more especially is it absurd to admit them where they have the power of deceiving with impunity, and exclude them where they would swear under checks and restraints.' pp. 87, 88.

The exclusion of the testimony of parties remains in most, if not all, the states as at common law, with a few exceptions introduced by statute.

Mr. Brougham also disputes the propriety of excluding the testimony of a witness in any case on account of interest; and points out the absurdity of rendering a person incompetent to testify, on account of a slight pecuniary interest in the event of a suit, and yet declaring him competent where he has, from any other cause, the strongest bias in favor of the party for whom he testifies.

We believe that truth is far oftener concealed, than falsehood prevented, by rigidly excluding the testimony of parties and persons interested. Mr. Brougham's opinion is entitled to respect on account of his extensive experience. But without any regard to authority, it seems almost too clear for argument, that the best mode of ascertaining the circumstances of any transaction, would be to examine and cross-examine all persons who were present at it, whether parties or mere spectators. Any judicious person wishing to satisfy his own mind, would probably pursue this course. Where no persons but the parties themselves are privy to a transaction, it is obvious that the only direct information with regard to it must come from their own mouths. It should also be consi-

dered that while the examination of parties and interested persons would not shut up any of the present sources of information in any case, it might frequently lead to new and unexceptionable ones. Is it not probable that there are many individuals, who are now willing to prosecute or defend suits unjustly, who would yet shrink from supporting them by the commission of wilful perjury? And even in cases where perjury should be prevented, it would rarely, if ever, have any influence on the result of the suit; for in most cases the falsehood would be exposed either by a cross-examination, or the conflicting testimony of the other party and the other witnesses. We will not undertake to say whether it would be better to admit the testimony of parties by a general rule, specifying particular qualifications and exceptions, or by a provision for the introduction of this evidence in certain particular cases. The propriety of some exceptions to any general admission of the testimony of parties, is obvious, such as, that where one party to a transaction is dead, or so situated as not to be able to appear before the court, the other party ought not to have the right of testifying for himself. Other exceptions probably should be made. The mode of introducing the testimony of parties, and the extent to which it might safely be admitted, would demand a very careful consideration, since any rules on the subject unskilfully framed and rashly adopted might be pernicious. But we are very strongly inclined to the opinion that the admission of this testimony to a greater or less extent, beginning perhaps with the strongest and most palpable cases, and including others by degrees, as experience should suggest, would prove to be a very great improvement in the law of evidence. There would at least be no risk in giving each party to a contract the right of making his adversary a witness in the case. The party who should thus appeal to the testimony of his antagonist, would do it voluntarily, and therefore would not be injured by this new privilege; and the party who should be compelled to testify surely could have no right to complain of being allowed to tell his own story, and substantiate it by his oath.

Art. VII.—STORY'S EDITION OF ABBOTT ON SHIPPING.

A Treatise of the Law relative to Merchant Shipping and Seamen. By Charles Abbott. *Edited by* John Henry Abbott. *Fourth American from the fifth London edition. With Annotations, containing the principal American Authorities:* By Joseph Story, *one of the Justices of the Supreme Court of the United States.* Boston. Hilliard, Gray, Little, & Wilkins. 1829. 8vo. pp. 629.

This work by Mr. Abbott, the present Lord Tenterden, Chief Justice of the Court of King's Bench, was originally published in 1802, as we learn from the introduction dated at the Inner Temple on the 25th of January of that year. It is the first English work devoted exclusively to this particular subject; and has maintained its ground to the present time as the most popular and frequently consulted and quoted text-book on mercantile navigation. The author says in 1802, 'it is now a century since the first publication of Molloy, *the only English lawyer* who has written on these matters.' Though many points had been decided and many doctrines introduced by the English courts, during that century, especially by the King's Bench in Lord Mansfield's time, and though the very learned and exact treatise of Emerigon, and the profound, original, elaborate, and comprehensive work, of Valin had, in the mean time, been published in France, yet the work of Molloy, which had reached the ninth edition as early as 1769, was still very little enriched or improved from all these sources, up to 1802, and it was upon a plan hardly admitting of being improved into a good practical book, its range of subjects being very wide, comprehending international law, bills of exchange, an article on the Jews, another on planters, &c. all, of course, treated very generally. Maritime law did not become a subject of general attention to the profession in England until after the time of Lord Mansfield, and it was not until near the close of the last century, that it began to approach near to the improvements that had been made in France. Emerigon's treatise on Insurance, and Valin's Commentaries, are greatly superior to any contemporary English works.

The laws of trade seem to have been left very much to the

merchants, who were for a long period the great writers on these subjects, whose compilations usually included the Sea-laws of Oleron, the Hanse Towns, &c. with a multitude of heterogeneous matters collected in the course of their experience, and thrown together with little system or arrangement. Malynes published his collection under the title *Lex Mercatoria*, as early as 1622, when his dedication, addressed to his 'dread and gracious sovereign,' bears date, in which he says: 'If your most excellent majesty, therefore, shall be pleased, (from the zodiac of your gracious aspect) to cast some reflecting beams upon the plain superficies of this law merchant, every little spark therein will become a flame, and all merchants and others shall be enabled to draw (by the diameter of it) meridian lines of your royal favor, without which this book may be compared to a sun-dial, which is no longer serviceable than whilst the sunbeams do illuminate the same.'

This Lex Mercatoria includes the subjects of bills of exchange, the sovereignty of the British seas, bankrupt laws, the admiralty jurisdiction, the laws of Wisbuy, weights and measures, and a treatise on colours, to which is added, in the third edition of 1685, a long system of book-keeping. Under the head of manufactures the author introduces the subject of the treatment of bees. This work may be taken as a sample of the plan of the other that followed, about a century afterwards, under the title of *Lex Mercatoria Rediviva*, by Beawes, though Malynes is of the two the more multifarious. Beawes is, however, sufficiently comprehensive, as may be inferred from the character given of it by himself, as recited in his copyright, dated the 8th of March, 1750–1, which reads thus: 'Whereas our trusty and beloved William Wyndham Beawes, of our city of London, merchant, hath represented to us that he hath, with great labor, application, and expense, compiled a work which contains every particular relative to the commerce, not only of this kingdom, but of all the known world,' &c.

Postlethwaite's Dictionary of Commerce, published about 1752, was nearly contemporaneous with Beawes, and is a better executed book, being made on a plan admitting of all the variety and multifariousness, which the authors of the time aimed to introduce into treatises respecting the laws of trade, upon whatever plan, and under whatever title they were published.

Exton's Dicæology, published in 1664, and Godolphin's

Admiral Jurisdiction, in 1685, are more limited in plan and less discursively written. They are rarely mentioned and were not intended as general treatises on commercial law and merchant shipping.

Weskett and Magens wrote more particularly upon the subject of insurance. Weskett published in 1781, and his book is a dictionary of the laws and practice of insurance in his time, including the most of Lord Mansfield's decisions. His work is a little overcharged with detail, but on the whole much superior to that of Beawes.

Magens is a still better book. It contains, as usual, a collection of the various codes of sea laws. The introductory treatise on the specific subject of insurance, may be read with advantage, even at this day, being the production of a sensible, indefatigable, practical man. His collection of actual adjustments is the fullest that has ever been, or probably ever will be published in the English language, and will afford a good deal of instruction to a practical insurer of the present day, who will be at the trouble of analyzing them. He did not profess to treat of general mercantile law, though one volume, that is, one half of the work, is mostly occupied with the maritime codes and subjects which strictly belong only to a work of that general character.

We have alluded thus cursorily to the English works on maritime law, which have most readily occurred to us, that had been published, when Mr. Abbott undertook the one of which Judge Story has now given us a new edition. And this glance at the previous state of this branch of law, will, we think, sufficiently show that there was ample room for a new commercial treatise, and that, with the help of Valin, Pothier, Emerigon, and the decisions of the English courts, besides the abundance of other materials, as yet unwrought, it was scarcely possible for a writer to have made a digest which would not have met with a favorable reception, and be incomparably better than anything already in the hands of the profession.

This work is well arranged, each division of the subject is distinctly presented, and the author everywhere adheres closely to the title of the chapter. This is a characteristic of the work for which he will have due credit only from those who have labored through an undigested mass of materials which had never been reduced to a clear scientific arrangement, and it is an excellence which is the less likely to be recognised,

since the more clear and complete his arrangement is, the more easy and obvious it will appear to be to have hit upon and adopted it. We feel especially obliged to him, also, for not inflicting upon us a history of commerce in his introduction, to which he had a great temptation in the example of his predecessor, Molloy, and another still higher, and, at the time, very recent authorities. Molloy, indeed, starts from a still more distant point, for he begins,—'The wisdom of God is highly to be admired, who hath endowed the other living beings with that sovereign perfection of wisdom, and secured and provided for them by natural muniments from assault,' &c. Mr. Abbott, on the contrary, only states very simply and directly some of the principles upon which he had constructed his work, and mentions what seemed to be of importance to say respecting the sources from which he had obtained his materials.

It is not the business of an author of a digest of this description to launch into speculations, in pursuit of unsettled questions; he professes to present the law as it is settled, or as it is entangled and embarrassed by contradictory decisions and authorities, as the case may be, so as to give its precise actual state as he finds it. Not that he is to be afraid of contaminating his pages with his own opinions; the more of these he gives the better, if they are accurate, and the reasons fully stated. Emerigon, and Valin, and Pothier's works are full of their own opinions and speculations, and not thought the worse of for this reason. But speculations and decisions upon doctrines are not required of the author of a digest. All he professes is to state the received or proposed law, to do which completely, he ought to introduce and touch upon all the doctrines of practical importance which have been either adopted or drawn into discussion, and so to present them that their grounds, as well as the authority by which they are supported, may be apparent to the reader. And this is a sufficiently arduous task in a branch of science still in its rudiments, consisting of a confused and unarranged mass of materials. The great difficulty often is to sift out and present the precise question, the decision of which shall establish a doctrine having relation to a system. When such a question is once distinctly presented, so that the decision of it shall decide a part of a system or science, very much is done towards settling the doctrine, for one great difficulty, and frequently the

greatest, is to raise a question that shall involve a distinct principle; for in the law, no less than in politics, and indeed in all affairs, as well of speculation as practice, nothing is more usual than to hear parties dispute, when neither of them in fact conceives the general principle which is drawn in question in the inquiry. An instance will make this more clear, and the book before us supplies one, it would indeed supply us with many. In Part iii. ch. 7, s. 7. 8. where the earning of freight is considered, the questions are raised, 1. Whether the merchant may exonerate himself from the liability to pay freight by abandoning the goods to the master, that is, to the owners of the vessel. 2. What degree of damage to the goods, or waste or leakage, will amount to such a destruction of them as to defeat the right to demand freight. 3. Under what circumstances will freight *pro rata* be allowed. Now the author does not, unless we have overlooked some passage, assume any definite decided position upon either of these questions. They had, however, been discussed, sometimes blended with other questions arising on the stipulations of particular charter-parties, and sometimes being distinctly and independently presented, upon the ordinary bill of lading, in Molloy, Le Guidon, Valin, Pothier, and in Lord Mansfield's opinion in Baillie v. Modigliani, with a good deal of diversity of reasoning and doctrine, and with a reference to different authorities as rules of decision; Valin, for instance, resting on the French ordinance of 1681, Pothier grounding his position on general principles, or the reason and equity of the case, which position might be assumed also by the British and American courts, with a reference at the same time to the general usage, where such usage could be shown to exist so distinctly as to be presumed to govern the parties in making and acting under their contract. Though the author does not state any positive opinion upon either of these questions, still he arranges all the reasoning and authorities upon each, and by keeping the questions distinctly in view, and bringing the arguments and views of the various authors and judges to bear upon the point in discussion, he furnishes the reader with all the helps towards forming an opinion which are supplied in the books. To do this, especially in questions embracing multifarious materials, which have never been subjected to any scientific analysis, requires in the author a clear and comprehensive view of the subject in all its relations and conse-

quences. An able writer will often so present the subject that every reader will come to the same, and a right conclusion, though the author does not express the inference, which is a plain and necessary consequence of his premises; and he will often show as much skill, in not directly pressing upon the reader all the consequences which are very clear and obvious to himself. A good, complete, and scientific distribution of the whole subject into its general divisions, the collecting all that is sufficiently important to be introduced, and the analyzing and arranging all these materials so thoroughly that all which belongs to each particular topic or question shall be found in its proper place, and in its due proportion of space, are the great and distinguishing excellencies of an elementary work. If the author succeeds in these points, it is enough; if he can add sound original views of his own, this will be a still higher species of excellence, whereby the science treated of may be still further advanced; but this is more than the reader has a right to demand in a digest. We state these leading characteristics of a good digest, thus formally, and dwell upon them with some emphasis, not because we apprehend they will be questioned—they will more probably be thought to be too obvious and generally acknowledged to be insisted upon—but because in practice we are too apt to lose sight of them. We are too much in the habit of looking at the citations merely, and judging of a work of this description merely from a consideration of the learning it is supposed to display. We find, for instance, an immense mass of learning in Chitty's digests, and can hardly avoid forming a high opinion of books of which the pages are so thickly sprinkled with references; but when we apply to him for assistance towards forming a satisfactory conclusion upon any given question, he is not usually ready to befriend us. If we consult Comyns upon any legal subject of which he treats,—and he treats of almost all,—we are sure to be enlightened; if we consult Chitty we are almost as sure to be bewildered. The works of each are sufficiently learned, but in those of the Chief Baron, the particular subjects are digested, elaborated, and scientifically arranged; all the materials are reduced to their just dimensions, and disposed in a close connexion; in those of Chitty, we have an *indigesta moles.*

To return to Mr. Abbott,—we use the name as being more familiar than that of Lord Tenterden—his work is not defi-

cient in the general divisions of his subject, nor in the disposition of the particular topics, nor in extent of learning and research. It is not, at the same time, characterized by originality; he does not appear to look far beyond the point to which his authorities lead him. And his relative, the editor of the English edition of which this is a republication, has, in most parts of the work which we have examined, merely added abstracts of subsequent cases and statutes. This is no subject of censure, for he has done all he professes to have undertaken, and his apparent modesty would dispose us to refrain from taking exception to his labors for anything less than a glaring defect. This edition is an important improvement upon the preceding, as a lawyer's manual, as is sufficiently apparent from the fact that the editor has added references to nearly six hundred cases not cited in the edition of 1810, the latest edition which had been published in this country.

Before speaking of this edition, however, we ought to have mentioned, what appears to us to be a slight imperfection of the original work, namely, the occasional superabundance of words, its want of pithiness and condensation. Continuity of sentences, or what is called a flowing style, is well enough in a course of law lectures, such as the Commentaries, and is not wholly out of place in what is strictly the historical or narrative part of any law treatise, but in a manual for use, a mere digest of doctrines and decisions, all circumlocutions and merely introductory or connecting phrases, serve only to weary the reader, and dull his attention. We look only for the pertinent propositions, undiluted by phraseology, and unencumbered by irrelevant or immaterial circumstances. This brevity is more especially to be studied in making abstracts of cases, and not least of all in those decided by Lord Mansfield, of which we will give one example from Part 3, ch. i. s. 15, putting the superfluous expressions in italics—superfluous, if the author has, as in the present instance he had, previously stated the question and the facts.

A ship had been chartered by the E. I. Company, and the ship-owners had agreed, in the charter-party, to indemnify the Company against all damage to the cargo, which should appear to be '*ship-damage.*' During a storm the ship was sunk in the Thames, and the cargo, consisting of saltpetre and pepper, was in consequence, a part of it destroyed, and a part greatly damaged.

The question was whether this was *ship-damage*, for which the owners were answerable. Lord Mansfield observed, 'the question is, whether the owners are to pay for the damage occasioned by *the storm*, the act of God, *this must be determined by the intention of the parties and the nature of the contract. It is a charter of freight. The owners let their ship to hire, and* there never was an idea that the owners insure the cargo against the perils of the sea. The Company stand their own insurers; *words must be construed according to their subject matter.* What are the obligations upon the owners arising out of the fair construction of the charter-party? Why that they shall be answerable for damage incurred by their own fault, or that of their servants, as from the defects of the ship, or improper stowage, such as mixing commodities together which hurt one another, &c. *If they were liable for damage occasioned by storms, they would become insurers.*' 'As to the other point, of the goods lost, *the whole is one entire contract, and must be understood in a manner consistent with itself, and* it could never be intended that the owners should be protected from the lesser loss, and remain answerable for the greater.'

In a section added by the English editor, in Part 2, c. iv. s. 15, after quoting the opinion of Lord Ellenborough in Thompson v. Havilock, the editor adds, 'No lawyer will doubt the correctness of this opinion. It was fit that the reader should be informed of it, in the very forcible terms in which it was expressed.' At p. 166, we are informed that if the charterer of a ship have not goods enough of his own to load her, he may take those of other persons. In making remarks of this sort, the writer seems to suppose his readers to be very much at leisure. But the instances of superfluity are not frequent or oppressive. The work is on the whole skilfully made, and is in little danger of being *ousted* of its popularity by that of Mr. Holt.

The profession is greatly indebted to Judge Story for his very elaborate notes of the American cases and statutes, besides some references to English decisions and old authorities overlooked by the author and English editor. The part added by him constitutes a very considerable portion of the work, the plan and subjects of which are so well adapted to our system of commercial law, that our decisions fall in, for the most part, very naturally, and are scarcely less pertinent to the text in the places where introduced, than if the book had been originally made to be used in the United States. In some instances the American cases resume the subject precisely where it was

left by the English, and take the next step to which they were introductory. Thus in one of the questions already mentioned, namely, whether the shipper may exonerate himself from the payment of freight by declining to accept the damaged and worthless goods at the port of destination, the court in New York has distinctly decided the point, in the case of Griswold v. New York Ins. Co. 3 Johns. R. 321, cited by Judge Story. In conformity to the clear and conclusive reasoning of Pothier, they have decided that the shipper cannot thus defeat the stipulations of the bill of lading.

The parts of the work which are least applicable to this country, and the republication of which are of the least utility, are those relating to the British statutes; which do not, however, occupy great space, the statutes of 1824 and 1826, relating to property in British shipping, and those relating to pilotage, being the principal. Judge Story omits the statutes on these subjects in the appendix, substituting the corresponding laws of the United States in their stead; but retains the analysis of them, with the remarks and reference to decisions, in the text, subjoining, at the same time, in the notes, a reference to our own statutes and decisions upon the same subjects. It is only in a small part of the volume, and principally in the two chapters above alluded to, that the work thus divides itself into two parallel treatises upon the same general subject; and, in these parts, it happens, in some instances, that one set of statutes and decisions reflects light upon the other.

As Judge Story, as a member of the Supreme Court, may have some of the questions come before him in his judicial character, which might be introduced in these notes, we have examined many of them with some curiosity, to see whether he had anywhere given opinions, or discovered a leaning, which parties might suppose would bias or embarrass him in any case which might actually arise and be brought under adjudication; but we have not discovered a single instance in which he has laid himself under the least restraint in this respect, the notes being so framed that he is as free in adjudicating upon any case that may arise, as if he had not prepared the edition. Wherever he has expressed an opinion, it is on points made so clear that no one can have a doubt respecting them.

It is hardly necessary to mention that this edition contains

a faithful and elaborate digest of the American cases up to the present time; of this the editor's reputation is a sufficient guaranty. It is now eighteen years since the publication of his former edition of the work. It was again published at Exeter in 1822, with an appended index or digest of subsequent American cases; but all the cases subsequent to 1810 are now, for the first time, incorporated into the notes, and they constitute a very important part of the edition. The number of new cases referred to, is about equal to that of those added in the English edition, being nearly six hundred. Nor is the digest of these cases the only improvement in this edition, the notes of the former have been revised, and obviously with great care and rigid scrutiny, and some of them very materially improved, independently of the additional extracts and references. Where new decisions have been made upon points embraced in the notes to the former edition, they have not been merely added, but the whole notes have been remoulded, and all the cases introduced in such order and connexion, as to be the most conveniently consulted, and reflect the greatest light upon each other and upon the subject.

Judge Story says he had some hesitation whether to include the cases decided in his own circuit, and reported in Gallison and Mason: we do not see any sufficient reason for his having any scruple in this respect, for the edition would certainly have been very imperfect if so important a portion of our commercial law as is embraced in those reports had been omitted.

This edition of Abbott will, we think, be considered an important acquisition to the profession, and to the commercial community.

Art. VIII.—COXE'S DIGEST.

A Digest of the Decisions in the Supreme Court, Circuit Courts, and District Courts of the United States. By Richard S. Coxe. Philadelphia. P. H. Nicklin. 1829.

This digest embraces a number of volumes and decisions, which had never before been brought into any similar compilation. It contains the decisions of the Supreme Court, the

Circuit, and District Courts of the United States, nearly up to the time of its publication. 'Many of these,' Mr. Coxe observes, 'have been collected into volumes, but many are scattered through periodical publications, or interspersed among the decisions of the state tribunals, or collected by the industry of the authors of elementary treatises, and commentators on foreign publications. All these sources of information have been industriously explored, and the materials which they contain carefully collected.' The digest, from the nature of its contents, must prove an accession to the library of the American lawyer.

Mr. Coxe has omitted to give a list of the names of the volumes which he has digested. We believe they are

Cranch's Reports, 9 vols.
Wheaton's Reports, 12 vols.
Bee's Reports, 1 vol.
Washington's Circuit Court Reports, 3 vols.
Peters's Circuit Court Reports, 1 vol.
Gallison's Reports, 2 vols.
Mason's Reports, 3 vols.
Paine's Reports, 1 vol.
Peters's Admiralty Decisions, 2 vols.

He has also introduced many manuscript cases, and the decisions of the United States Courts reported in Dallas, Day, Hall's Law Journal, the Journal of Jurisprudence, and other volumes.

While we accord Mr. Coxe all praise for the diligence with which he has searched such various sources of information, we regret to be obliged to notice what appear to us serious defects in the plan and execution of his work.

Mr. Coxe gives no table of cases. This we consider indispensable in a good index. It sometimes happens that one remembers the name of a case, and has an indistinct recollection of the point decided in it, while he is puzzled to conjecture under what title it may appear in the digest; he may consequently be obliged in Mr. Coxe's volume to search half an hour for a case under different titles, when a table of cases would have helped him to it in half a minute.

Mr. Coxe in his preface states,

'In regard to the manner in which the materials have been arranged, various opinions will doubtless prevail. That which has been pursued has been the result of much reflection and wide

consultation. Subdivisions of the general heads have seemed so dependent upon the peculiar frame of mind, and sometimes even upon the caprice of the author, as to prove of little or no practical advantage, and they have therefore not been adopted. The cases have been arranged under the titles to which they seemed properly to belong, generally pursuing a chronological order, but placing the decisions of the Supreme Court in the first place, which are followed by those of the Circuit and District Courts.'

We read this declaration of our author with great surprise. But we were still more surprised on turning to the body of the volume to find that he had literally performed what he promised. The cases even under the most extensive titles are thrown together without any arrangement, unless the order which he mentions can be considered such, and with no subdivisions. Thus the titles, Chancery, comprising 254 articles in 22 pages; Evidence, 313 articles in 26 pages; Insurance, 274 articles in 31 pages; Jurisdiction of Courts, 260 articles in 24 pages; Statutes of United States, 256 articles in 25 pages;—have none of them any division, or anything to direct the reader in examining them. There are, besides, other titles nearly as long, which are given in the same manner.

We believe that there are few lawyers, who may have occasion to consult Mr. Coxe's volume, who will not regret the plan that he has adopted. The use of subdivisions to long titles is so obvious, that it can scarcely be rendered more so by any argument. The same reasons that may be given for general divisions, apply with nearly equal force to subdivisions. Both assist the person who consults the digest, by directing him to the particular subject of his inquiry, and saving him the labor of reading matter which has no connexion with it. Suppose a person wishes to examine the decisions on the subject of *deviation*, he must look through thirty-one solid octavo pages in Mr. Coxe's Digest, under the head of Insurance, before he can ascertain what the Courts of the United States have decided on that subject; and if he wishes to know who ought to be made parties to a suit in Chancery, he must look through twenty-two pages. So, whatever the subject of inquiry is, unless he stumbles by accident on a case that relieves all his doubts, which, by the way, very rarely happens, he must, in every instance, go through the whole title of perhaps fifteen, twenty, or thirty pages, and sometimes two or three such titles. Now we cannot imagine that even

the most loose and inaccurate division will not be a great assistance to those who consult a digest. For even if the subdivisions are so inartificial that it becomes necessary for the reader to examine more than one, still it can rarely happen that under an extensive head he will not find his labors materially relieved. Even if he should occasionally have to run through the whole of the general title, it is no more than he will always be obliged to do with Mr. Coxe's Digest.

Mr. Coxe's method, we believe, is in opposition to that of all the best compilers of digests, both in this country and in England. Indeed the convenience of subdividing long titles is so obvious, that even indexes to single volumes of reports, where any considerable number of points fall under one general head, it is common for the reporter to make several subdivisions.

The inconvenience arising from the want of subdivisions in the volume before us is increased by the total neglect of an analytical arrangement. If, instead of a chronological order, the cases had been digested methodically under each head, so that one would have reflected light on another, and the current of authorities on a particular point could have been readily traced, and the reader conducted through a title in a course in which he should perceive the connexion and bearing of the different parts of the system,—the inconvenience of having no subdivisions would have been materially diminished. If our author had attempted such an arrangement, it would have been impossible for him to have given the case of Coolidge v. Payson twice over, first as it was decided in the Supreme Court,* and again as decided in the Circuit Court,† instead of stating the point but once, and with suitable references to show that the decision in the Supreme Court confirmed that of the court below.

---

* P. 92. † P. 97.

Art. IX—WILLIAMS'S EDITION OF HOBART'S REPORTS.

The Reports of that Reverend and Learned Judge, the Right Honorable Sir Henry Hobart, Knight and Baronet, Lord Chief Justice of his Majesty's Court of Common Pleas, and Chancellor to both their Highnesses Henry and Charles, Princes of Wales. First American, from the fifth English edition, with Notes and References to Prior and Subsequent Decisions: By John M. Williams, *one of the Justices of the Court of Common Pleas of Massachusetts.* Boston. Hilliard, Gray, Little, & Wilkins. 1829. 8vo. pp. 639.

The established reputation of Judge Williams, the American editor of this edition of Hobart's Reports, gives, in advance, the assurance, that his notes will be found to contain a mass of useful legal learning. He is known to the profession as a learned, laborious, and able lawyer. In all these respects his notes sustain his well-earned reputation. They show much research, in collating numerous cases, American and English, and a very thorough examination of the cases reprinted. Where cases decided have been overruled by after decisions, or their authority shaken, the information is given in the notes and the grounds of the after decisions, with references to the several cases, briefly and intelligibly stated. To select a case almost at hazard; the case of Pope v. Skinner (p. 184) in which the doctrine in relation to variances is somewhat loosely laid down, is corrected and qualified by the note appended to it, in which the governing principle of the more recent English cases, and of the cases on the subject in New York, Massachusetts, and the United States Supreme Court are collected.

Another recommendation of Judge Williams's edition of Hobart is, that he has wholly omitted the cases relating to tithes, and also to other doctrines and principles, inapplicable to the institutions of the United States. For this he deserves the praise of the profession, for nothing can be more valueless to the American reader, than a very considerable portion of the English reports, on subjects exclusively English, and which can hardly in any contingency become of importance even re-

motely and indirectly, in the discussions which occur in our own courts.

The abstracts which precede the cases, are also the work of the American editor, and are made with commendable brevity. They are not, as is the case in some modern Reports, swelled to a size almost as unwieldly as that of the cases of which they purport to be abstracts; while they present the principles decided by the several cases briefly, they also do it fully and clearly. Judge Williams is also entitled to commendation, for generally confining himself to an examination of the principles decided by each case, collating the authorities applicable to it, and thus avoiding, in addition to the increase of the bulk of his volume, a complexity and intricacy that would almost be the necessary consequence of launching forth into prolix discussions, where he happened to differ, in opinion, as to the legal doctrines advanced in the text, or in analogous cases.

The following short sketch of the life and character of Judge Hobart, is from the advertisement prefixed to this edition.

'Henry Hobart, afterwards Lord Chief Justice of the Court of Common Pleas, was brought up to the profession of the law, at Lincoln's Inn. He was made serjeant at law in Easter Term, 1603. He had received his serjeant's writ in Hilary Term, 45 Eliz., returnable in Easter Term following, before which time the writ was abated by the demise of the queen, and a new writ was awarded, under the name of the king, returnable the same Easter Term. He was knighted the same year.

'On the 3d November, 1606, he was made Attorney of the Court of Wards, the king giving him, the day before, a discharge or release of the office, state, and degree of a serjeant at law.

'In 1607 he was made Attorney-General, in which office he was the successor of Sir Edward Coke, who was made Chief Justice of the Court of Common Pleas.

'In 1611 he was made a baronet.

'On the 26th October, 1614, Lord Coke having been appointed Chief Justice of the Court of King's Bench, Sir Henry Hobart succeeded him as Chief Justice of the Court of Common Pleas; and on the 2d April, 1618, (his first patent having been revoked) another patent, during pleasure, was granted to him, to be Chief Justice of the Common Pleas and Chancellor of the Prince of Wales. He retained the office of Chief Justice until his death, which occurred at his house at Blickling in the county of Norfolk, in the vacation after Michaelmas Term, 1 Car. I. *anno* 1625, "being a most learned, prudent, grave, and religious judge," says

Coke; and "a great loss to the common weal," says Spelman. Several eminent men have appeared among his descendants. One of them, Sir John Hobart, was, in 1728, created Lord Hobart of Blickling, and in 1746, was advanced to the title of Earl of Buckinghamshire.

'The following sketch of the character of Lord Hobart is extracted from the preface to Jenkins' Centuries.

'"Lord Coke and Lord Hobart have furnished surprising light to the professors of the law. They were two men of great authority and dignity; men who, to the most accurate eloquence, joined a superlative knowledge of the laws, being also judges of consummate integrity. The monuments of their great abilities and diligence will flourish as long as our most just and holy laws, and the splendor, majesty, and name of the kingdom of England, shall endure. I knew, marked, observed, and revered that noble pair for many years. Lord Hobart was adorned with the brightest endowments; his eloquence was excellent; his family honorable; and his understanding piercing; in him the sweetest affability was united with the most venerable gravity; and he always had equity before his eyes; which is a most valuable quality in a judge, because the law very often is laid down in general terms; for it is infinite; and it is impossible for it to take in those things which are yet to come, and which may possibly happen. The praise which I have here given Lord Hobart is a just tribute to his memory."

'His reports were printed in 1646, and in a subsequent age they were revised and corrected by Lord Chancellor Nottingham. "Like the reports of Lord Coke," says Chancellor Kent, "they are defective in method and precision, and are replete with copious legal discussions. Lord Hobart was a very great lawyer."'

Art. X.—QUESTION OF GENERAL AVERAGE.

An Opinion of Charles Jackson, *Esq. late one of the Justices of the Supreme Judicial Court of Massachusetts.*

[Our readers will understand that this opinion was given by Judge Jackson as counsel, since his retiring from the bench.]

The ship Diamond was stranded on a reef in the Baltic, and was finally lost there, having never afterwards been got afloat. Soon after she struck, the captain, in order to lighten

her, threw overboard two or three hundred boxes of candles, and set the upper sails, with a view to get her off the reef, but without success. The residue of the cargo, or the greater part of it, was shipped by another vessel (the Diana) and has arrived somewhat damaged, at the original port of destination.

The question is, whether the cargo and materials that have been saved, are liable to contribute for the candles thrown overboard, as a loss by general average.

This case seems to me to be the same in principle with that of a jettison made to prevent a shipwreck, when the sacrifice proves ineffectual, and the vessel is notwithstanding wrecked. In such a case it is stated explicitly in almost every book that I have been able to consult, that no contribution is to be made for the articles thrown overboard. This opinion has been lately controverted by Mr. Benecke in his treatise on Insurance; and it appears to me in some measure inconsistent with opinions expressed in sundry adjudged cases, and in several of the books which we are accustomed to regard as of authority in this branch of the law. Yet in the very instances in which these last mentioned opinions are expressed, we find the same judges or writers declaring most explicitly that in the case of a jettison, there is to be no contribution if the ship is lost by the perils which the sacrifice was intended to avert. I allude particularly to the case of Caze v. Richards et al. in the Circuit Court of the United States in Pennsylvania, 2 Sergeant and Rawle, 237, and to Gray et al. v. Waln, in the Supreme Court of Pennsylvania, 2 Sergeant and Rawle, 229.

It would seem absurd and presumptuous for any counsel to oppose such a clear and uninterrupted course of authorities; and I, therefore, feel constrained to say, that by the law as now established, the owner of the candles in this case cannot claim contribution from the owners of the property saved from the wreck.

I should not, however, be surprised if, on a review of all the cases, and of the principles relating to this subject, in some of our courts, it should be decided that this was a case for a general average, and that goods sacrificed under such circumstances should be paid for by a general contribution, although the ship should be finally wrecked. Such a decision would not apparently be more extraordinary than the two above cited from 2 Sergeant and Rawle's Reports. Those two decisions

are not only opposed to the letter of the rule which is applied to the present case, to wit, by allowing a general average, although the vessels were wrecked and wholly lost; but they also contradict the case of Bradhurst v. the Col. Ins. Company, 9 Johnson's Reports, 9, in which the Supreme Court of New York had decided that no contribution could be demanded or allowed in such a case.

It would require some time, and probably be of no use, to state the reasons which have induced me to doubt the correctness of the rule as above stated. I would only refer in general to the treatise of Mr. Benecke, page 178; to the arguments of the judges in the two cases cited from Sergeant and Rawle; and to the definitions and general principles relating to general average, as stated in all our common books on this subject. Although these reasons are not sufficient to justify me in giving an opinion in favor of allowing the general average in this case; yet they induce me to wish that the insurance companies would embrace this or some other convenient opportunity to present the question for a deliberate and thorough discussion in some of our courts.

DIGEST OF RECENT DECISIONS.

In pursuance of our plan of giving in our journal a digest of the cases of general interest in the volumes of American Reports, we give below a digest of the principal cases in

PETERS'S REPORTS of the Supreme Court of the United States, Vol. I.

PICKERING'S REPORTS, No. 1. Vol. VI.

ABANDONMENT. See INSURANCE.

ABATEMENT.

1. In an action on a contract the non-joinder of a joint-contractor can only be taken advantage of by a plea in abatement. *Barry* v. *Foyles*, 1 Pet. 311.
2. The citizenship of the plaintiff as averred in the declaration, can only be disputed by plea in abatement. *De Wolf* v. *Rabaud*, 1 Pet. 476.
3. So in a suit by a corporation, the legal existence of the corporation can only be questioned by plea in abatement; by pleading to the merits the plaintiff's capacity to sue is admitted. *Conard* v. *The Atlantic Insurance Company*, 1 Pet. 386.

ACTION. See PARTNERSHIP.

ADMIRALTY PRACTICE. See CLAIM.

AMENDMENT.

Where the court below allows an amendment the Supreme Court of the United States will not interfere; the allowance of amendments and the terms on which they are allowed being entirely within the discretion of the courts of original jurisdiction. *Wright* v. *Hollingsworth*, 1 Pet. 165.

ARBITRATION.

1. One partner A B cannot bind the partnership A B & Co. by a submission of partnership controversies to arbitration, but he may thus bind himself. *Karthaus* v. *Ferrer*, 1 Pet. 222.
2. Where on such a submission the award was that A B & Co. should pay a certain sum of money; in an action on the arbi-

tration bond, it was held to be a sufficient assignment of a breach to aver that A B did not pay, he being the only person bound by the submission. *Ib.*

3. Where the submission made by A B and C D is of all disputes, differences, and controversies with A B acting for his late house of A B & Co. and for himself, an award with regard to the partnership controversies merely, is good on the face of it; for it shall not be intended that there were any controversies with A B individually. *Ib.*

4. If any controversies with A B individually did exist, as they are not specified in the submission, in order to impeach the award, he must show by averment and proof *aliunde* that they were brought before the referees. *Ib.*

5. Where an award, after directing the payment of a certain sum by one party, A B, to C D, the other party, continued, 'a parcel of cutlasses, or their proceeds, are considered as becoming the property of C D,' it was held that A B could not impeach the award for uncertainty. *Ib.*

6. Where a question of boundaries was submitted by the plaintiff and defendants to arbitrators, who awarded that the plaintiff had a title to the land as far as a certain line, and that the defendants, who were in possession, should give him a release of the same, the award was held valid, though it did not direct the plaintiff to give a release to the defendants of the land on the other side of the line. *Jones* v. *Boston Mill Corporation*, 6 Pick. 148.

7. When it is evident from a submission that the parties intended to leave the law as well as the facts to the decision of arbitrators, the award is conclusive, though they should have mistaken the law, unless the award itself refers the point to the decision of the court. *Ib.*

ARMY OF THE UNITED STATES.

The Adjutant and Inspector General of the Army of the United States was not entitled to double rations from September 30th 1818 to May 31st, 1821. *Parker* v. *The United States*, 1 Pet. 293.

ASSUMPSIT. See CORPORATION.

ATTACHMENT. See FOREIGN ATTACHMENT; SHIPS AND SHIPPING.

AWARD. See ARBITRATION.

BANK.

1. A bill in chancery may be brought against a bank to compel

it to open its books and permit a transfer of stock. *Mechanics' Bank of Alexandria* v. *Seton*, 1 Pet. 299.

2. Where bank stock standing in the name of A B was held by him in trust for others, which was trust known to the bank, though not expressed in the transfer to him, the bank can acquire no lien on the stock as security for a debt due from him to it; and if A B transfer the stock to the bank, it would take it subject to the trust. *Ib.*

3. Notice to the Board of Directors of such a trust, is notice to the bank; and no new notice is necessary to a new board of directors. *Ib.*

See STATUTES; BOND 2, 3, 4.

BANKRUPTCY.

An underwriter to whom an abandonment had been made, became bankrupt in 1802 under the bankrupt law of 1800, c. 19; it was held that his assignees were entitled to the compensation for the loss, awarded in 1824, by the commissioners under the Spanish treaty of 1819. *Comegys* v. *Vasse*, 1 Pet. 193.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. A bill payable at a certain time after date need not be presented for acceptance. *Bank of Washington* v. *Triplett*, 1 Pet. 25.

2. But if presented, and acceptance be refused, it is dishonored, and notice must be given to the parties in order to charge them. *Ib.*

3. The absence from home of the drawee of such a bill, when it is sent for acceptance, is not a refusal to accept; and does not render it necessary to protest the bill, or give notice to the parties. *Ib.*

4. The drawee of a bill may accept and pay it *supra protest* for the honor of an endorser, and can maintain an action as holder of the bill against him. *Schimmelpennich* v. *Bayard*, 1 Pet. 264.

5. But the drawee, if bound to honor the bill as drawee, can acquire no rights as holder of the bill by accepting and paying it *supra protest*. *Ib.*

6. Where a bill is protested for non-acceptance by the drawee, who has no funds of the drawer, and another person at the request of the drawee accepts it *supra protest* for the honor of an endorser, the drawee guaranteeing the acceptor *supra protest*, the latter on paying the bill may have recourse to the endorser or any prior party. *Konig* v. *Bayard*, 1 Pet. 250.

7. The endorser in such case may avail himself of every defence against the person paying the bill, that he would have had against the drawee. *Ib.*

8. The usage of the banks of the District of Columbia to allow four days of grace on bills and notes, is binding on parties ignorant of its existence who have sent a bill for collection to one of the banks. *Bank of Washington* v. *Triplett*, 1 Pet. 25.

9. When a promissory note falls due on Saturday, and the maker lives at a distance from the residence of the holder, it seems that a presentment on Monday would be seasonable. *By Parker C. J. in Barker* v. *Parker*, 6 Pick. 80.

10. A hard rain is no excuse for not presenting a note for payment. *Barker* v. *Parker*, 6 Pick. 80.

11. The makers of a note were insolvent, and the holder on the day it fell due, which was Saturday, asked the endorser, if it would not be best to call on them, and he replied, that it would be of no use. On Tuesday the holder made a demand on one of the makers, and took a letter from the endorser dated on Monday, addressed to the other, requesting him to pay the note, and stating that the endorser had been called on to pay it. The latter maker had absconded, having before the note fell due made a mortgage to the endorser, which, however, turned out to be of no value. It was *held*, that the jury would be warranted in inferring that the endorser had waved a demand. *Ib.*

12. If a note specifies no place of payment, yet if all the parties agree that payment may be demanded at a particular place, a presentment at that place is sufficient, without any personal demand on the maker. *Pearson* v. *The Bank of the Metropolis*, 1 Pet. 89.

13. Such an agreement may be proved by parol evidence. *Ib.*

14. A declaration on such a note which did not set out the agreement, but averred a demand of payment at a certain bank where the said note was payable, was held sufficient after verdict. *Ib.*

15. In a suit on a note payable at a particular bank, proof that the note at maturity was in the bank and not paid, is sufficient evidence of a presentment. *Fullerton* v. *The Bank of the United States*, 1 Pet. 604.

16. It seems that in such case the plaintiff need not prove a non-payment; the *onus* of proving payment is on the defendant. *Ib.*

17. A notice of the dishonor of a note for an endorser put into the postoffice, the day after the last day of grace, in time to go by the succeeding mail, is seasonable. *Ib.*

18. Where the facts are undisputed, what constitutes due diligence in giving notice of the dishonor of a bill or note, is a question of law. *Bank of Columbia* v. *Lawrence*, 1 Pet. 578.

19. Where a note was made payable at a bank in the town of A,

and an endorser resided two or three miles from A, and the postoffice at A was the nearest postoffice to his residence, it was held that notice of the dishonor of the note put into the postoffice at A, and directed to the endorser at A, was sufficient. *Ib.*

20. Where a bill of exchange is left with a bank for collection, a neglect to present it for payment at maturity, renders the bank liable to the owner for the damages occasioned by the neglect. *Bank of Washington* v. *Triplett*, 1 Pet. 25.

21. An agent who is authorized to draw on his principals for such moneys as he shall employ to make advances on merchandize consigned to them, is not thereby authorized to draw on them on account of goods of his own that he consigns to them. As to his own goods he has the same right to draw, that any other merchant would have to draw on a consignee. *Schimmelpennich* v. *Bayard*, 1 Pet. 264.

See USURY.

BILL OF LADING.

Though the owner of goods shipped on his own account and risk, if he be not the consignee, or the goods be not deliverable to his order, cannot pass the title in them by a mere endorsement on the bill of lading; yet he can pass the title by an assignment written either on the bill of lading or by a separate instrument; and it will be good against all persons except purchasers for a valuable consideration to whom the bill of lading is endorsed. *Conard* v. *The Atlantic Insurance Company*, 1 Pet. 386.

BOND.

1. In an action on a bond in which the declaration does not set out the condition, but only alleges a breach in the non-payment of the penalty, and the condition is set out on oyer, and the defendant pleads performance, a replication denying the performance generally without specifying any breach, is bad, but is cured by a verdict for the plaintiff. *Minor* v. *The Mechanics' Bank of Alexandria*, 1 Pet. 46.

2. A bond conditioned that A 'shall well and truly execute the duties' of a certain office, is a security not merely for A's honesty, but reasonable skill and diligence. *Ib.*

3. A vote or usage of the directors of a bank will not justify the cashier in misapplying the funds of the bank, as by allowing certain customers to overdraw; and such a misapplication of the funds is covered by his official bond. *Ib.*

4. The official bond of a cashier covers defaults in all duties that are annexed to his office from time to time by the proper authorities of the bank. *Ib.*

5. The law of the United States makes it the duty of the Postmaster-General to sue for the balances due from delinquent postmasters within six months from the time of the delinquency, otherwise the balance due from delinquents is chargeable to the Postmaster-General's account; a failure in the Postmaster-General to sue a delinquent postmaster within the time prescribed, will not discharge the sureties in the official bond of the delinquent. *Dox* v. *The Postmaster-General*, 1 Pet. 318.

See COVENANT.

BOTTOMRY AND RESPONDENTIA.

It is not necessary that a *respondentia* loan should be made before the departure of the ship on her voyage, or that the money loaned should be employed in the outfit of the vessel, or the purchase of the goods on which the risk is run. *Conard* v. *The Atlantic Insurance Company*, 1 Pet. 386.

CA. SA. See SURETIES.

CHANCERY.

1. Where parties deliberately reject one species of security and select another, under a misapprehension of the law as to the nature of the security so selected, a court of equity will not direct a new security of a different character to be given, or decree that to be done which the parties supposed would have been effected by the instrument finally agreed on. *Hunt* v. *Rousmaniere's Admr.* 1 Pet. 1.

2. Where the bill of a judgment debtor prays for an injunction against the judgment, on the ground that he has satisfied it by a settlement with his creditor, the court will not grant the injunction, if the settlement has been made under circumstances of mistake or misapprehension, but will modify or grant the relief prayed for on such conditions as justice requires. *The Mechanics' Bank of Alexandria* v. *Lynn*, 1 Pet. 376.

See VENDOR AND PURCHASER; BANK.

CHANCERY PLEADINGS AND PRACTICE.

1. Parties claiming under a deed that has not been proved, acknowledged, and recorded, and which would, therefore, be insufficient against subsequent purchasers without notice, have a right to come into a court of equity for a discovery, on the ground of notice; and if notice should be brought home to the subsequent purchasers, the complainants have a right to relief by a decree quieting the title. *Findlay* v. *Hinde*, 1 Pet. 241.

2. The original grantor must be made a party to the bill. *Ib.*

3. The heirs of a deceased trustee of land must be made parties to a bill relative to the execution of the trust, brought against

a trustee who had been substituted by the court. *Greenleaf* v. *Queen*, 1 Pet. 138.

4. A bill will not be dismissed for want of proper parties without a demurrer, plea, or answer, pointing out the persons who ought to be made parties, and a refusal or unreasonable delay on the part of the plaintiff in making proper parties. *Ib.*

5. Where a bill is brought against a bank to compel a transfer of stock, which the bank claims to have a lien upon, the person in whose name it stands need not be made a party to the bill, where he claims no interest in the stock. *Mechanics' Bank of Alexandria* v. *Seton*, 1 Pet. 299.

6. Where a legacy is given jointly to several persons in different families, and the numbers in neither family are ascertained by the will, all the persons entitled to the legacy must be stated in a bill for its recovery, and made parties to the suit, either as plaintiffs or defendants. *Pray* v. *Belt*, 1 Pet. 670.

7. Where a bill had been filed against a trustee, and after his death administration was granted to A, who was also appointed by the court trustee in place of the deceased, a bill of revivor was brought against A *as administrator*, it was held that no decree could be properly made against A *as trustee*, without his being first made a party to the suit in that capacity. *Greenleaf* v. *Queen*, 1 Pet. 138.

8. Where the *loss* of a deed is made the ground of application to a court of equity for relief, if there is no affidavit of the loss annexed to the bill, it is good cause of demurrer; yet if the defendant does not demur for this cause, but answers over, or permits the bill to be taken for confessed by default, the absence of the affidavit is not sufficient ground for reversing the decree. *Findlay* v. *Hinde*, 1 Pet. 241.

9. A decree of a court of chancery, which after directing a party to perform certain acts, in order to entitle him to the benefit of it, dismisses the bill, is erroneous; as the dismission of the bill renders the decree ineffectual. *Greenleaf* v. *Queen*, 1 Pet. 138.

10. When a decree in chancery ordered some of the defendants to make a conveyance, and was general against all the defendants for costs, and all the defendants appealed; although those against whom the decree was for costs only could not have appealed alone; yet the reversal of the decree of the Circuit Court was made general as to all the appellants, where all had an interest in the defence. *Findlay* v. *Hinde*, 1 Pet. 241.

11. Where property is given for life, alienation being prohibited under penalty of forfeiture, a court of chancery is not the pro-

per tribunal to enforce a forfeiture. *Horsburg* v. *Baker*, 1 Pet. 232.

12. A bill brought in such case to enforce the forfeiture, should be dismissed without prejudice to the rights of the parties. *Ib.*

13. Where a bill is brought for discovery, after answer and discovery the bill cannot be revived. *Ib.*

14. Parties are not obliged to make disclosures which will expose them to penalties. *United States* v. *The Saline Bank*, 1 Pet. 100.

15. Therefore where a bill was filed against certain persons as cashier and stockholders of an unincorporated bank, for discovery and relief, it was held that the defendants were not bound to make any discovery which would expose them to the penalties of the laws of Virginia prohibiting unincorporated banks. *Ib.*

CLAIM.

1. In proceedings *in rem*, the claimant must put in his claim on oath, averring in positive terms his proprietary interest. If this is not done it may be insisted on by the other party for the dismissal of the claim. *United States* v. 422 *casks of wine*, 1 Pet. 547.

2. If the claim be admitted on this preliminary proof, the question of proprietary interest, sufficient to support the claim, may be contested and formally decided by a suitable exceptive allegation in the admiralty, or by a plea in the nature of a plea in abatement to the person of the claimant, in the exchequer. *Ib.*

3. After the claim is admitted without objection, and allegations or pleadings are put in to the merits, it is too late to except to the person of the claimant. *Ib.*

4. Though, if it should appear, even after a decision in favor of the claimant, that he had no title to the property; but that the same was the property of a third person, not represented by him; the court might retain the custody of the property, in order to give the true owner an opportunity to interpose his claim. *Ib.*

COMMISSIONERS UNDER THE SPANISH TREATY.

The award of the commissioners under the Spanish treaty dated May 22, 1819, though it is final as to the amount and validity of claims upon Spain, is not so as to the party who may be interested in the compensation recovered. The claimant to whom compensation is awarded, is liable to answer the legal and equitable claims of others to the funds in his hands, in the common course of justice in the established courts. *Comegys* v. *Vasse*, 1 Pet. 193.

CONSTITUTION OF THE UNITED STATES.

The act of Ohio of Feb. 18, 1820, authorizing the holder of a bill or note to bring a joint action against all the drawers or endorsers, is not a violation of the constitution, in its application to a note made before the passage of the act; for the defendants are by the statute secured the same defences which they would have had in separate suits against them. *Fullerton* v. *The Bank of the United States*, 1 Pet. 604.

See JURISDICTION; STATUTES.

CONSTRUCTION OF STATUTES.

See STATUTES.

CORPORATION.

1. Where by an act creating a corporation for the purpose of erecting mill-dams, it was provided that the capital stock should be divided into five thousand shares, not exceeding $ 100 each, and that after one thousand shares should be subscribed for, a meeting of the proprietors might be called, at which any acts might be done 'for the purpose of organizing the corporation and arranging its affairs,' it was *held*, that no legal assessment could be made for the general objects of the act of incorporation until all the shares should have been subscribed for; but that an assessment laid to defray the preliminary expenses incurred in obtaining the act of incorporation, and ascertaining the practicability and utility of the enterprise, would be valid. *The Salem Mill Dam Corporation* v. *Ropes*, 6 Pick. 23.

2. Held also, that the subscribers were *personally* liable for such assessment, they having, after the incorporation, signed an agreement to pay all such legal assessments as should be made after the corporation should be organized according to the act. *Ib.*

COVENANT.

The defendant having covenanted to pay the plaintiff's debts with the proceeds of property assigned to him for the purpose, and to pay over the balance to the plaintiff on a day specified, the plaintiff before that day, by a sealed instrument, agreed that this balance should be put on interest by the defendant, and expended by him for the sole benefit of the plaintiff's children, the defendant 'to be under bonds for the faithful performance of the trust, and to account for and refund said balance when thereto required.' The defendant tendered a bond with condition to pay the debts, to apply the balance to the support and education of the children, and to pay over in equal shares to the children any balance that might remain in his hands at the plaintiff's decease. *Held*, that the covenant to pay the balance to the plaintiff was waved, and that the bond tendered was sufficient. *M'Kenzie* v. *Rea*, 6 Pick. 83.

CURTESY, TENANT BY THE.

The husband will be tenant by the curtesy of *wild lands* of the wife, where they are not possessed adversely, without any actual entry by him in his wife's lifetime. *Davis* v. *Mason*, 1 Pet. 503.

DEED.

1. Whether an erasure or alteration of a deed be material or not, is a question of law. *Steele* v. *Spencer*, 1 Pet. 552.

2. In Massachusetts a deed of land executed by two, but acknowledged by one only, may be registered; and if registered it is presumptive, if not conclusive, evidence of notice to creditors or subsequent purchasers of the other; and whether the grantors were seized as joint-tenants or tenants in common of the whole land, or respectively seized of distinct parts, is immaterial. *Shaw* v. *Poor*, 6 Pick. 86.

DEPOSITION.

1. A deposition taken under the statute United States of September 24, 1789, c. 20, cannot be used as evidence, unless the certificate of the magistrate who takes it shows a compliance with all the requisites of the statute. *Bell* v. *Morrison*, 1 Pet. 351.

2. Therefore where the certificate does not show that the deposition was reduced to writing in the presence of the magistrate, the deposition will be rejected. *Ib.*

3. No objection can be made in the Supreme Court of the United States to a deposition as taken irregularly, unless the objection is taken in the court below and entered of record. *The Mechanics' Bank of Alexandria* v. *Seton*, 1 Pet. 299.

See GRANT.

DEVIATION. See INSURANCE, 11, 12.

DISCLAIMER. See REAL ACTIONS.

DISCOVERY. See CHANCERY PLEADINGS AND PRACTICE, 1, 13, 14, 15.

ERROR.

Where a declaration is amended by adding a new count, the defendant has a right to plead anew; but if he does not, and goes to trial, and judgment is given against him, the new plea being in form a sufficient answer to the whole declaration, including the new count, the judgment is not erroneous. *Wright* v. *Hollingsworth*, 1 Pet. 165.

See PRACTICE, 2.

EVIDENCE.

1. The loss or destruction of an original paper on which a party relies, may be proved by the affidavit of the party, in order to let in secondary evidence of its contents. *Tayloe* v. *Riggs*, 1 Pet. 591.

2. Where parol evidence is introduced in order to prove a written contract that is lost, the substance of the agreement must be proved satisfactorily. *Ib.*

3. Where A, one party to an agreement signed by the other party, B, had delivered to B a copy of the agreement in his, A's, own handwriting, but not signed by him; in a suit on the agreement by B, it was held that notice to produce the original paper in order to give the copy in evidence is not necessary. The copy when offered to charge the party by whom the same was made, and who, by the tenor of the agreement, was to perform certain acts therein stated, may be considered, not as a copy, but as an original, and be so given in evidence. *Carrol* v. *Peake*, 1 Pet. 18.

4. Where the general agent of parties carrying on a tan-yard, gave certificates at considerable intervals of the amount of hides received from the last settlement to the date of the certificates; such certificates were held to be evidence to charge the principals. *Barry* v. *Foyles*, 1 Pet. 311.

5. In a writ of entry, upon the question whether the grantees of a cove, under whom the tenants derived their title, had ever claimed, or taken possession of, flats outside of a certain line, the tenants were permitted to give in evidence an ancient deed under which possession had been taken and continued to the present time, from the grantees to a third person, of a part of the flats so situated. *Rust* v. *Boston Mill Corporation*, 6 Pick. 158.

6. Where a controversy had arisen concerning the validity of a deed of land, which was claimed by certain persons as heirs of the grantor, but no controversy was then expected to arise about the heirship; it seems that a letter written stating the pedigree of the claimants, by a member of the family, would be evidence after the death of the writer. *Elliot* v. *Peirsol*, 1 Pet. 328.

7. Where a joint and several bond is offered in evidence, proof of the execution by one obligee, is sufficient, where it is introduced in evidence with regard to that obligee only. *Conard* v. *The Atlantic Insurance Company*, 1 Pet, 386.

8. Evidence of the *signature* of an obligee of a sealed instrument, is *prima facie* evidence of the *execution* of it by him. *Ib.*

See FRAUDS, STATUTE OF; INSURANCE.

EXECUTOR AND ADMINISTRATOR.

Where A as administrator of B recovers judgment against C in one state, and brings a suit in another state on the judgment, a plea that the defendant has been appointed administrator of B in the latter state, and still continues to act as such, is bad on demurrer. *Biddle* v. *Wilkins*, 1 Pet. 686.

See LEGACY, 2.

FEME COVERT.

1. Where a feme covert, whose husband by his cruelty drove her from his house without providing any means for her support, came to Massachusetts, and maintained herself for more than twenty years as a feme sole, the husband having always resided in one of the other states; *held* that she was entitled to sue as a feme sole. *Abbot* v. *Bayley*, 6 Pick. 89.

2. A married woman, who is deserted by her husband, though she may act as a feme sole trader, and as such be liable for debts, cannot make a valid deed of real estate, unless he joins with her in the conveyance, and all the formalities required to pass the estates of married women are complied with. *Rhea* v. *Rhenner*, 1 Pet. 105.

FOREIGN ATTACHMENT.

Where the person summoned as trustee in a foreign attachment, had property in his hands the title to which was in controversy between the defendant and a third person, being submitted to referees, and during the pendency of the process the referees awarded in favor of the defendant, the trustee was charged. *Thorndike* v. *De Wolf*, 6 Pick. 120.

FORFEITURE. See CHANCERY PLEADINGS AND PRACTICE, 11, 12.

FRAUDS, STATUTE OF.

1. Where A agrees to make a consignment to B. on account of C, in consideration of B's agreeing to allow C to draw on him for a certain amount, this is an original undertaking on the part of A, and not within the statute; and therefore parol evidence may be admitted to show the consideration of A's agreement. *De Wolf* v. *Rabaud*, 1 Pet. 476.

2. An account in the handwriting of A, in which his name was written at the head, and in which a balance was acknowledged due to B, contained the following credit, '*By my purchase of your half E. B. wharf and premises this day as agreed on between us.*' In a suit in chancery by B against A to compel a specific

performance of the contract, by a conveyance of the estate, it was held that this was a sufficient memorandum in writing signed by the party, within the statute of frauds. *Barry* v. *Coombe.* 1 Pet. 640.

FRAUDULENT CONVEYANCE.

1. Want of possession by the assignee of personal property assigned, is not a badge of fraud, where the property is so situated that he cannot take possession of it. *Conard* v. *The Atlantic Insurance Company*, 1 Pet. 386.

2. When the property is at sea the assignee is only bound to take possession of it within a reasonable time after its arrival. *Ib.*

3. Where the owner of real and personal estate gave a bond with condition that he would convey the same to the obligee, when certain notes given for the consideration were paid, and that the obligee should have the possession and enjoyment of the property so long as he continued to pay the notes at maturity and no longer, and possession was delivered him immediately; it was held that the transaction was not fraudulent *per se* as against the creditors of the obligee. *Ayer* v. *Bartlett*, 6 Pick. 71.

4. The possession by the obligee, though it might induce persons to trust him, supposing him to be owner of the property, yet if not permitted with a fraudulent design to obtain credit for him, would not render the property liable for his debts. *Ib.*

GENERAL AVERAGE. See INSURANCE.

GRANT.

An ancient grant of 'all that cove *already bounded*,' &c. in the absence of all proof of ancient bounds supposed to be referred to, will be held to operate according to the general description of the estate. *Rust* v. *Boston Mill Corporation*, 6 Pick. 158.

HEARSAY. See EVIDENCE, 6.

HIGHWAY. See TURNPIKE.

INJUNCTION. See CHANCERY, 2.

INSURANCE.

1. The master of a vessel to whom the cargo is consigned, and whom the papers represent as owner of it, but who in fact holds it in trust for the real owner, has an insurable interest to the whole value of the cargo. *Buck* v. *The Chesapeake Insurance Company*, 1 Pet. 151.

2. Seaworthiness is a question of fact for the jury. *M'Lanahan* v. *The Universal Insurance Company*, 1 Pet. 170.

3. Seaworthiness in port, is a different thing from seaworthiness at sea. *Ib.*

4. A vessel is not necessarily unseaworthy because she sails into the offing of a port without having her captain and all her crew on board. *Ib.*

5. A policy 'for whom it may concern' will cover belligerent property. *Buck* v. *The Chesapeake Insurance Company*, 1 Pet. 151.

6. A person effecting insurance in this form is not guilty of a fraudulent concealment, in not stating a belligerent interest in the property insured, where the voyage insured against and the letter requesting insurance, would probably lead the underwriters to inquire whether it was belligerent property or not. *Ib.*

7. Where a party orders an agent to get insurance done for him, and afterwards receives intelligence material to the risk, or has knowledge of a loss, he ought to communicate the intelligence to his agent with reasonable diligence, and if he neglect to do so, where by reasonable diligence the intelligence might have been communicated before the policy was effected, the policy is void. *M'Lanahan* v. *The Universal Insurance Company*, 1 Pet. 170.

8. What is reasonable diligence in such cases is principally matter of fact for the jury. When all the facts are given and the inferences deducible therefrom, the question may resolve itself into a question of law. *Ib.*

9. The operation of any concealment on a policy, depends on its materiality to the risk, which is to be judged of by the jury. *Ib.*

10. The time of sailing is not necessarily material to the risk. *Ib.*

11. A ship's heaving to in the offing of the port from which she sails, for the captain, owner, and passengers to come on board, is not necessarily a deviation. *Ib.*

12. Insurance was made from Boston to Terceira, and at and from thence to port of discharge in the United States, a quarter per cent. to be added to the premium for every other port used in the Western Islands. The vessel, without going to Terceira, went immediately to Graciosa, another of the Western Islands, where a loss happened. Held that there was no deviation. *Hale* v. *The Mercantile Marine Insurance Company*, 6 Pick. 172.

13. An abandonment to an underwriter of a ship or cargo entitles him to the compensation for the loss recovered under the Spanish Treaty of 1819. *Comegys* v. *Vasse*, 193.

14. The owner of goods insured cannot abandon on account of the vessel's being disabled in the course of her voyage, if on

the whole it is reasonable, taking into view the nature of the voyage, and the time, expense, and risk of sending on the cargo, that the master should procure another vessel for that purpose, although he should not be able to do it at the port of distress or one contiguous, and although it should be necessary to make use of land carriage to re-ship the goods. *Bryant* v. *Commonwealth Insurance Company*, 6 Pick. 131.

15. A usage for the master of a vessel to sell the cargo without necessity, is void. *Ib.*

16. Claims for a general average loss and a total loss may be joined in one count. *Ib.*

17. Where a policy provided that a loss should be paid in sixty days after proof and adjustment thereof; and the assured gave notice of a total loss more, and of a general average loss, less, than sixty days before bringing the action; held that in respect to the average loss the action was premature. *Ib.*

18. Where a ship was surveyed during a voyage, and condemned as not worth repairing, and in an action on a policy upon her, the underwriters defended on the ground of unseaworthiness, it was *held* that the production of the survey was not essential to the support of the action. *Mitchell* v. *The N. E. Marine Insurance Company*, 6 Pick. 117.

19. Insurance against fire was made on stock in a store. A fire happening in the neighborhood, the insured, with the approbation of the insurer, procured blankets, and spread them on the outside of the store, whereby the building and its contents were preserved, but the blankets were rendered worthless. *Held*, that this loss was not covered by the policy, but that it was a subject of general average, to which the insurer and insured should contribute in proportion to the amount which they respectively had at risk in the store and its contents. *Held* also that buildings in the neighborhood which would have been endangered if the store had taken fire, and upon some of which the defendants had made insurance, were too remotely affected to be liable to contribution. *Welles* v. *Boston Insurance Company*, 6 Pick. 182.

See BANKRUPTCY.

JURISDICTION.

1. The jurisdiction of any court exercising authority over a subject, may be inquired into in any other court, when the proceedings of the former are relied on, and brought before the latter, by a party claiming the benefit of such proceedings. *Elliott* v. *Peirsol*, 1 Pet. 328.

2. In a suit against an incorporated bank, in order to give the

United States' courts jurisdiction, it must be expressly averred that all the stockholders are inhabitants of a different state from the plaintiff. *Breithaupt* v. *Bank of Georgia*, 1 Pet. 238.

3. Where the chief magistrate of a state is sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character, the state itself is a party in the record; and therefore the courts of the United States can have no jurisdiction of such a case. *Governor of Georgia* v. *Madrazo*, 1 Pet. 110.

4. Where a sale of land was made by a citizen of the state in which it lay to a citizen of another state, one object of the sale being to give the courts of the United States jurisdiction of a controversy with regard to the land; it was held that if the sale was a real, and not a fictitious one, the object of the parties in making it, would not prevent the courts of the United States from having jurisdiction of a suit brought by the vendee. *M'Donald* v. *Smalley*, 1 Pet. 620.

5. The Supreme Court of the United States has no jurisdiction of a case, in which, although the whole property claimed by the lessor of the plaintiff in error under a patent, and which was recovered in ejectment, exceeded two thousand dollars, the title of a part of the tract only, and which was of less value than that sum, was involved in the case before the court. *Grant* v. *M'Kee*, 1 Pet. 248.

6. The Supreme Court of the United States has jurisdiction of a case in which both parties claim a title to land under a statute of the United States, which is brought before the court by a writ of error from a state court. *Ross* v. *Doe*, 1 Pet. 655.

7. The Supreme Court never requires that the treaty or act of Congress under which a party claims who brings the final judgment of a state court into review before it, should be spread on the record: but in order to give jurisdiction the record must show a complete title under the treaty or act of Congress, and that the judgment of the court is in violation of the treaty or act. *Hickie* v. *Starke*, 1 Pet. 94.

8. The Circuit Court has no original admiralty jurisdiction. *Georgia* v. *Madrazo*, 1 Pet. 110.

9. When a libel was filed in the District Court claiming certain Africans as the property of the libellant, which had been seized by the Governor of Georgia for an alleged illegal importation into the state, and process issued against the slaves, but was not served; and the case was carried by appeal into the Circuit Court, and the Governor of Georgia filed a paper in the nature of a stipulation, agreeing to hold the Africans subject to

the decree of the court; it was held that such a stipulation could not give jurisdiction to the Circuit Court. *Ib.*

See ABATEMENT.

LAND AND LAND TITLES.

1. The act of Congress of March 2, 1807, for extending the time of locating Virginia military warrants, &c. which prohibits locations on lands that had been previously surveyed, extends to protect lands actually surveyed by the regular officers, even where the warrants on which the survey is founded have already been satisfied by patents for the whole quantity of land specified in them. *Jackson* v. *Clark*, 1 Pet. 628.

2. Congress could rightfully limit the time within which military warrants should be located and surveyed. *Ib.*

3. The statute of the U. S. of March 3, 1803, giving to every person that 'did on that day of the year 1797, when the Mississippi Territory was finally evacuated by the Spanish troops, actually inhabit and cultivate a tract of land in said territory,' a right to a grant of the tract, is not confined to persons inhabiting the territory in 1797, but extends to those inhabiting it at the time of the actual evacuation of the Spanish troops, March 30, 1798. The decision of the commissioners under the statute as to the time when the evacuation took place, is final. *Ross* v. *Doe*, 1 Pet. 655.

4. A right to a tract of land derived from a donation certificate given under the statute, is superior to the title of any one who subsequently purchased the same land at the public sales by virtue of the same statute. *Ib.*

LEASE.

1. In declaring on an agreement by way of lease, by which the lessor agreed to let a farm, from the 1st of January, 1820, an assignment of breaches, that though specially requested on the said 1st of January, the defendant neglected and refused to turn out the former tenant, who then was in the possession of the land, and to deliver possession thereof to the plaintiff, was held to be sufficient. *Carroll* v. *Peake*, 1 Pet. 18.

2. It is sufficient to aver the plaintiff's readiness and offer and his request on the 1st of January generally, and not at the last convenient hour of the day. And an averment of a personal demand is sufficient; it is not necessary that it should be on the land. *Ib.*

LEGACY.

1. A testator directs his executor to appropriate to the support of a school the income of twenty-seven shares in one bank, ten

and a half in another, and fifteen in an insurance company. When he made the will he owned just so many shares in those corporations respectively; but before his death sold the twenty-seven shares in the first mentioned bank. It was held that the legacy was specific, and that the sale was an ademption pro tanto. *White* v. *Winchester*, 6 Pick. 48.

2. If a specific legacy is in the legatee's possession at the testator's death, the executor's acquiescence in such possession is sufficient to vest the property in the legatee, without any formal assent, if there are assets sufficient to pay the debts *Andrews* v. *Hunneman*, 6 Pick. 126.

3. Where a testator bequeathed to his wife, 'all rents in arrear on the real estate at L.' which was estate of the wife's, it was held that memorandums written and signed by him, were admissible in evidence to show that he included in those terms not merely rents unpaid by the tenants, but all the money he had ever received for rent or otherwise belonging to his wife, with interest. *Wadsworth* v. *Ruggles*, 6 Pick. 63.

See WILL.

LIEN. See SHIPS AND SHIPPING.

LIMITATIONS, STATUTE OF.

1. In Kentucky an admission by the defendant of the existence of an unliquidated account on which something is due to the plaintiff, but without admitting a specific balance, no document being produced at the time from which it can be ascertained what the parties understood the balance to be, will not, *it seems*, take the case out of the statute of limitations. *Bell* v. *Morrison*, 1 Pet. 351.

2. Nor will an offer to pay a gross sum, in order 'to close the business,' take the case out of the statute, so as to enable the plaintiff to recover the amount offered, where it is evidently intended as an offer to compromise on condition of the plaintiff's giving the defendant a discharge, the plaintiff not having performed the condition. *Ib.*

3. An acknowledgment of a debt by one partner, after the dissolution of the partnership, will not take the debt out of the statute as to the other partners. *Ib.*

[Mr. Justice Story, in concluding the opinion of the Court in Bell v. Morrison, observes, that the opinion is 'principally, although not exclusively, influenced by the course of decisions in Kentucky.']

MANDAMUS.

The Supreme Court of the United States refused a *mandamus* to the Circuit Court of the county of Washington, commanding that court to strike off a plea which the court had permitted

the defendant to put in, and to compel the defendant to enter another plea, which the plaintiffs' counsel thought the proper plea, under the provisions of an act of the legislature of Maryland on which the proceedings were founded. *Bank of Columbia* v. *Sweeny*, 1 Pet. 567.

NEW TRIAL.

1. If the court at a trial give an absolute direction for a verdict in favor of one party to a suit, where any material fact is contested by the other, a new trial will be granted. *M'Lanahan* v. *The Universal Insurance Company*, 1 Pet. 170.

2. A new trial will not be granted on the ground of newly discovered evidence which is merely cumulative in relation to facts testified at the trial. *Gardner* v. *Mitchell*, 6 Pick. 114.

3. In an action for a breach of warranty on the sale of oil warranted to be of a fair merchantable quality, each party introduced the testimony of witnesses who had examined the oil, and a verdict was found for the plaintiff. On a motion for a new trial on the ground of evidence newly discovered, of the plaintiff's admission that the oil was of a proper quality, this was held to be a new fact, and not cumulative; and the evidence being nearly balanced, a new trial was granted. *Gardner* v. *Mitchell*, 6 Pick. 114.

NOLLE PROSEQUI.

In an action on a joint-contract where the defendants sever in their pleas, a *nolle prosequi* may be entered against one defendant after judgment against the others. *Minor* v. *Mechanics' Bank of Alexandria*, 1 Pet. 46.

NONSUIT.

A nonsuit cannot be ordered at a trial without the plaintiff's consent. *Doe* v. *Grymes*, 1 Pet. 469; *De Wolf* v. *Rabaud*, 1 Pet. 476; *Mitchell* v. *New England Marine Insurance Company*, 6 Pick. 117.

PARTNERSHIP.

In an action by one partner against another to recover a balance due from the defendant on the dissolution of the partnership, the plaintiff obtained a verdict, but it appeared at the trial that one debt against the firm remained unpaid; the plaintiff was permitted to take judgment, on releasing to the defendant the amount of this debt. *Brinley* v. *Kupfer*, 6 Pick. 179.

See PLEADING, 2, 3.

PEDIGREE. See EVIDENCE, 6.

PLEADING.

1. Surplusage in pleading does not in any case vitiate after verdict. *Carroll* v. *Peake*, 1 Pet. 18.

2. A declaration in a suit brought on a partnership contract against one partner alone, which stated a contract of the person sued alone, is supported by evidence of the joint *assumpsit*. *Barry* v. *Foyles*, 1 Pet. 311.

3. If the declaration were to show a partnership contract, it seems that the judgment against the single partner could not be sustained. *Ib.*

4. Where a suit is commenced by attachment, under the law of Maryland, which is dissolved by the defendant's appearing and entering special bail; and the plaintiff files his declaration and the defendant pleads; no advantage can be taken of a variance between the account filed in the attachment, and the declaration filed after the defendant has appeared. *Ib.*

See ABATEMENT; BILLS OF EXCHANGE AND PROMISSORY NOTES, 14; BOND, 1; ERROR; LEASE; REAL ACTIONS.

POSTOFFICE.

See BOND, 5.

PRACTICE.

1. The Supreme Court of the United States will not decide any questions in a case, except such as have been decided in the Circuit Court, even where the parties agree to submit the questions. *M'Donald* v. *Smalley*, 1 Pet. 620.

2. If the counsel for a party move the court to exclude the whole evidence of the adverse party, or instruct the jury that it is insufficient, the refusal of the court to grant the motion is not erroneous, unless all the evidence is incompetent. If any part of it is incompetent, the court may on a general motion exclude such parts, but the court is not obliged to do so. *Elliott* v. *Peirsol*, 1 Pet. 328.

3. Where the record before the Supreme Court of the United States did not show a judgment of nonsuit to have been entered in the Circuit Court, although the bill of exceptions stated it, it was held that the plaintiff might apply for a *certiorari* to bring up a perfect record. *Doe* v. *Grymes*, 1 Pet. 469.

4. The act of Ohio of February 18, 1820, authorizes the holder of a bill or note to bring a joint action against all the drawers or endorsers, allowing the defendants to make the same separate defences as if separate suits were brought against them; it was held that a joint action might be properly brought against the maker and endorsers of a note under this statute, in the Circuit Court of the United States for the District of Ohio, the practice of suing in this mode having been adopted in that

court after the passage of the act. *Fullerton* v. *The Bank of the United States*, 1 Pet. 604.

5. Where letters, a part of the evidence in the court below, are lost, the party denying that the letters authorized the decision of the court upon them, must show their contents by evidence. *Carroll* v. *Peake*, 1 Pet. 18.

See AMENDMENT; DEPOSITION; NOLLE PROSEQUI; NONSUIT; VERDICT.

PRINCIPAL AND AGENT. See BILLS OF EXCHANGE, 21.

PRIORITY OF THE UNITED STATES.

1. The priority of the United States under the statute 1799, c. 128, s. 65, is a mere right of prior payment, out of the general funds of the debtor in the hands of his assignees, it does not prevent the property from passing to the assignees by the assignment. *Conard* v. *The Atlantic Insurance Company*, 1 Pet. 386.

2. The priority of the United States will not overreach a specific and perfected lien. *Ib.*

REAL ACTIONS.

To a plea of disclaimer in a writ of entry the demandant replied, that at the time of the purchase of the writ, the tenant claimed to have title by virtue of a deed from a collector of taxes; and on special demurrer, because it was not alleged that the tenant ever had possession, the replication was adjudged bad. *Favour* v. *Sargent*, 6 Pick. 5.

RECOGNIZANCE.

Where a person under a recognizance to keep the peace, committed a breach of the peace for which he was tried and fined; *held*, that he was still liable to an action for the penalty of the recognizance. *Commonwealth* v. *Braynard*, 6 Pick. 113.

REGISTRY. See DEED.

RESPONDENTIA. See BOTTOMRY AND RESPONDENTIA.

SALE OF CHATTELS. See FRAUDULENT CONVEYANCE.

SEAWORTHINESS. See INSURANCE, 2, 3, 4, 18.

SHIP AND SHIPPING.

1. Where property belongs to two as owners of a vessel, they hold it as tenants in common, and not as partners; and an attachment of the interest of one of them by his creditor, is good against a subsequent attachment by a joint creditor. *Thorndike* v. *De Wolf*, 6 Pick. 120.

2. Where two persons build a ship together, to be owned by them in certain proportions, and one advances more than his

proportion of the expenses, he has no lien on the ship for the balance due him; but the interest of the other in the ship, at least to the extent of his advances, is liable to attachment at the suit of other creditors. *Merrill* v. *Bartlett*, 6 Pick. 46.

SPANISH TREATY. See COMMISSIONERS UNDER THE SPANISH TREATY.

STATUTES OF THE UNITED STATES.

Where the statute incorporating a bank provided that the capital stock '*may* consist of $500,000, divided into shares of ten dollars each,' it was held that the bank might legally go into operation with a less number of shares. *Minor* v. *Mechanics' Bank of Alexandria*, 1 Pet. 46.

See LAND AND LAND TITLES.

STATUTES.

An act of the territorial legislature of Florida, erecting a court, which proceeded in conformity with the statute to decree, for salvage, the sale of the cargo of a vessel that had been stranded, and which cargo had been brought within the territorial limits, is not inconsistent with the laws and constitution of the United States; and consequently a sale of the cargo, in pursuance of the decree, changed the property. *The American Insurance Company* v. *Canter*, 1 Pet. 511.

SURETIES.

Where the principal in a bond to the United States had been imprisoned under a *ca. sa.* in favor of the United States, and was discharged from his imprisonment by order of the Secretary of the Treasury, on his surrendering his property for the use of the United States, in conformity with the statute of the United States of June 6, 1798, it was held that this discharge from imprisonment did operate as a release of his sureties. *United States* v. *Stansbury*, 1 Pet. 573.

See BOND, 5.

TRUSTS AND TRUSTEE.

1. Where a deed of land to a trustee directs him to sell it at public auction, he is bound to sell in that mode. *Greenleaf* v. *Queen*, 1 Pet. 138.

2. But if the trustee sells it by private sale, and afterwards has it fairly sold at public auction, in order to make a title to the private purchaser, at which time more is bid than the private purchaser had agreed to pay, and possession is delivered to him at the agreed price, the sale is not void, and he cannot refuse to perform his part of the contract; although the trustee may be liable to those interested in the proceeds of the sale, for the amount bid at auction. *Ib.*

See BANK.

TRUSTEE PROCESS. See FOREIGN ATTACHMENT.

TURNPIKE.

The owner of the soil over which a turnpike road is laid out, may maintain trespass against a servant of the corporation for taking the herbage. *Adams* v. *Emerson*, 6 Pick. 57.

UNITED STATES. See PRIORITY OF THE UNITED STATES.

USURY.

1. When notes are discounted by a bank, for which instead of cash it gives its own note payable at a future day without interest, while such bank notes are at a discount of one and a half per cent. in the market, the transaction is usurious. *Gaither* v. *Farmers' and Mechanics' Bank of Georgetown*, 1 Pet. 37.

2. The statute of Maryland declares 'all bonds, contracts, and assurances whatever, taken on an usurious contract, to be utterly void.' The endorsement of a note, for an usurious consideration, is a contract within the statute, and void. *Ib.*

3. The endorsement of a note of a stranger as security for an usurious loan, is a void contract, and passes no property to the endorsee in the note; and the subsequent payment of the original note for which the security was given, and the repayment of the sum received as usury, will not give legality to the transaction. *Ib.*

4. A note free from usury in its origin, is not tainted by a subsequent transfer of it for a usurious consideration; but the person who acquires it through the usurious transaction cannot maintain a suit on it against any party to it. *Ib.*

VARIANCE. See PLEADING, 4.

VENDOR AND PURCHASER.

1. Where a person purchases land from a trustee, which is subject to the dower of a widow, of which he might be informed, by using proper diligence, a court of equity will not interfere to relieve him, but will leave him to any legal remedy to which he may be entitled. *Greenleaf* v. *Queen*, 1 Pet. 138.

2. A bank offered to sell two lots of land to A at a stipulated price, payable at such periods as the bank should appoint; A wrote to the bank agreeing to the price, and proposed to pay in six quarterly payments, the first payment October 1, 1818, giving his notes, and taking a deed from the bank; or to pay at the same times, taking a bond from the bank conditioned for the conveyance of the property when the money should be paid; on this letter the president of the bank wrote, 'accepted, interest on each note as it becomes due;' A took possession of

the land June 1818, but subsequently relinquished it: on October 7, 1818, A offered in writing to pay the first instalment, and requested a bond for the conveyance; and May 8, 1821, he wrote to the bank, stating that he considered his agreement void; September 28, 1821, the bank tendered deeds of the land to A. In an action by the bank against A, declaring on an agreement by him to purchase, the court was divided on the point whether any contract was concluded between the parties; but it was held, 1. That the undertakings of A and the bank were dependent, and that the bank could not sue without showing a performance of the contract on its part: 2. That the tender of a deed by the bank not being made by the day the last instalment fell due, was too late: 3. That A's letter relinquishing the contract, being written after the time for making a conveyance, could not excuse the neglect of the bank to make a tender at the proper time: 4. That the possession taken of the lots by A could not prevent his abandoning the contract on the bank's neglecting to give him a title. *Bank of Columbia* v. *Hagner*, 1 Pet. 455.

See TRUSTS AND TRUSTEE.

VERDICT.

Where a special verdict was found, on which judgment was to be entered according to the opinion of the court upon a certain deed and other evidences of title; but the verdict did not set forth the deed or evidences of title. A deed formed a part of the bill of exceptions in the case: The Supreme Court, as they could not judicially know that this was the deed referred to in the verdict of the jury, or where the other evidences of title were, ordered a *venire facias de novo*. *M'Arthur* v. *Porter's Lessee*, 1 Pet. 626.

WILL.

1. Where a testator authorized a majority of his acting executors, 'my wife to have a voice as executrix, to decide in all cases in case of any dispute or contention: whatever they determine it is my intention shall be final and conclusive, without any resort to a court of justice:' it was held that this clause would not authorize the executors to distribute the testator's property contrary to the express intention of his will. *Pray* v. *Belt*, 1 Pet. 670.

2. It seems that such a clause would not prevent any person injured by the misconstruction of the will by the executors from submitting his case to a court of justice. *Ib.*

3. It seems that nothing can be done under this clause until the wife becomes executrix; and that a case in which she would be benefited by a particular construction of the will would be an exception to the operation of the clause. *Ib.*

LEGISLATION.

Great Britain.

The following is a brief notice of Acts passed by the British Parliament, 9 Geo. IV. 1828.

Promise in Writing.—'In actions of debt or upon the case grounded upon simple contract, no acknowledgment or promise by words only, shall be deemed sufficient to take the case out of' the operation of the statute of limitations; 'unless such acknowledgment or promise shall be in writing;' and the acknowledgment or promise of one joint contractor or administrator, shall not renew the obligation against the others. 9 *Geo. IV. c.* 14, *s.* 1.

Contracts by Infants.—No action shall be maintained on any promise or ratification after full age of any simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith. *Ib. s.* 5.

Representations of Character.—No action shall be maintained against any person upon or by reason of any representation or assurance made concerning the character, credit, ability, or trade of any other person, with the intent that such other person may obtain credit, money, or goods, unless such representation or assurance be made in writing and signed by the party to be charged. *Ib. s.* 6.

Test Acts.—Instead of receiving the sacrament according to the forms of the church of England, public officers are now required, by 9 Geo. IV. c. 17, to make declaration never to make use of any power, influence, or authority, possessed by virtue of their offices, to injure or weaken the Protestant Church as it is now established in England; or to disturb the bishops or clergy in the possession of their rights and privileges.'

This act was opposed by some few of the Lords, and particularly by Lord Eldon, who proposed various amendments narrowing the provisions and curtailing the relief intended to be given, the most of which amendments were rejected, and some of them without a division.

Crimes.—The statute 9 Geo. IV. c. 31, is a consolidation act for amending the laws relative to 'offences against the person,' consisting of thirty-eight sections, the analysis of which would not be particularly interesting to American readers. The act is a specimen of partial codification, as it takes up the various species of the more grave crimes and misdemeanors scattered through

the former statutes, making some additions to the list, and giving more precise descriptions and definitions, and introducing some provisions on the subject of testimony. One of the most striking features of the act is its providing more specifically for punishing *attempts* to commit crimes. The following provision in relation to the arrest of clergymen attracted our attention.

'If any person shall arrest any clergyman upon any civil process, while he shall be performing divine service, or shall (with the knowledge of such person) be going to perform the same, or returning from the performance thereof, every such offender shall be guilty of a misdemeanor, and shall suffer such punishment, by fine or imprisonment, or by both, as the court shall award.'

The act contains some new provisions in relation to accessaries to felony.

It is provided, also, that prosecutions for all crimes punishable on summary conviction by virtue of the act, shall be commenced within three months after the commission of the offence.

The provision in relation to amendments, and quashing proceedings for want of form, is pretty broad.

'No conviction shall be quashed for want of form, or be removed by certiorari or otherwise into any superior court; and no warrant of commitment shall be held void by reason of any defect therein, provided it be therein alleged that the party has been convicted, and there be a good and valid conviction to sustain the same.'

The act does not touch the subject of high treason.

In case of the revision of the criminal laws of the United States, or of any state, this statute will be well worth consulting.

Testimony of Quakers.—By chapter 32, the testimony of quakers is admitted in criminal prosecutions. This section of the statute was mentioned in our former number. The other sections provide that where any offender has been convicted of any misdemeanor, (except perjury or subornation of perjury,) and has endured the punishment to which he has been adjudged, he shall not, by reason thereof, be incompetent to be a witness in any proceeding, civil or criminal.

Lunatic Asylums.—The subject of chapters 34 and 41 is one which ought to attract the attention of our state legislatures. Ch. 34 is an amendment of the law in relation to madhouses in Scotland; providing s. 1 for licenses; s. 2 for entry of the names of the persons confined, in a book to be kept for that purpose; s. 3, that a record shall be made in a book to be kept for inspection, of all punishments of greater severity than solitary confinement, with the reasons of the same; s. 5, that no lunatic shall be received into any public asylum without a warrant from the sheriff; s. 8, that no person (except a relative) shall receive any patient into a private asylum, without the order or certificate of two physicians.

Chapter 41 provides general regulations for the treatment of insane persons in England. Asylums for the insane must be licensed, by special commissioners in and about London, and by the quarter sessions in other parts of England; application for a license must be made fourteen days previous to the session, and accompanied by a plan and description of the house to be used, specifying the number of apartments, and the number of persons proposed to be accommodated; licenses may be revoked on complaint; no person is permitted to confine two or more insane persons without license; the houses are to be visited and inspected by persons appointed for this purpose; the visiters authorized to visit the house during the night, in case of suspicion of malpractices, which might not be detected during the day; the commissioners or visiters are authorized to summon witnesses to testify in relation to such asylums; the visiters are required to make an entry in a book to be kept for the purpose, of the condition of the establishment at each visitation; no persons to be received except upon certificate of two physicians, the particulars of which are prescribed, and a registry is to be kept of the names of all persons received; notice is to be given to the clerk of the commissioners, of the name of each person received; and of the death of any one; upon the inquiry of any person whether any one named by him is confined in any such house, the clerk is bound to make true answer; if it appear to the visiters at three distinct visits, made after a period of twenty-one days intervening between every two visits, that any one confined in such asylum is of sane mind, they shall discharge him, unless he be confined by order of the chancellor or the principal secretary of state; no one except a relative or one commissioned by the chancellor, is permitted to receive and confine any person as insane without a certificate of two physicians as to his insanity, and the name of the person so confined is to be forthwith transmitted to the clerk of the commissioners; in case of the death or cure of a patient, the secretary of state may order his name to be erased from the records of the asylum.

[This act is to be in force for three years, which shows it to be considered by parliament somewhat experimental. We have not observed, in the analysis of the act from which the preceding epitome is made, that it contains any provision in relation to the severity of treatment of patients which shall be allowable.]

Polling for Candidates for Parliament.—Chapter 59 provides that candidates for election to parliament shall defray the expenses of providing accommodations for polling or taking the votes, and limits the time of keeping the polls open, to eight days; the former act allowed fifteen days.

Importation of Corn.—Chapter 60, is a long act of 46 sections, regulating the importation of corn, which, as is well known, has

become a subject of complicated legislation. The principle of the act is to allow of importation for consumption at different rates of duty depending upon the market price, the duty being reduced as the price is enhanced. For instance, when the market price of wheat is 64s. per quarter, it pays a duty of £1 3s. 8d. but when it is 73s. the duty is only 1s.

The Licensing of Inns and Alehouses in Great Britain is a much more complicated system than ours, one reason being its greater importance in relation to the revenue. The new act, c. 61, on this subject, extends to thirty-seven sections.

Notes under £5, issued in Ireland or Scotland, and *payable to bearer*, are forbidden to be circulated in England. Ch. 65.

Savings Banks.—By chapter 92 all former acts in relation to savings banks are repealed, and the subject regulated by the particular provisions of this act, which extends to forty-three sections; which sufficiently indicates the importance of these institutions in the estimation of parliament. The most material provision of any legislative act upon this subject is the providing for the security of the depositers. This act provides that the trustees shall vest all the moneys received by them in the Banks of England or Ireland, and not in any other security. The act also regulates the rate of interest to be allowed on deposites.

Private Acts.—The number of private acts passed during the last session of parliament, was 182; on the subjects of enclosures, 24; draining, 2; banking company, 1; gas, 3; mining, 1; navigation and fisheries, 1; building improvements, 9; churches, markets, bridges, &c. 19; local water-works, 2; gas-works, 2; paving and sewers, 1; municipal regulations, 12; roads 65; canals, 3; improvements in rivers, 4; railroads, 11; harbors, 2; docks, 3; piers, 1.

The number and subjects of these acts are given that our readers may have the means of comparing the course of British legislation, in this respect with our own. As is justly remarked in the companion to the Almanack of 1829, to which we are indebted for the list of acts, the legislation upon private local subjects throws great light upon the course that the industry and improvements of a country are taking.

United States.

The following is a summary of the very meagre legislation of the last session of Congress. The whole number of acts passed is sixty-seven.

Adjournment of the Supreme Court.—§ 1. 'If at any session four justices shall not attend, such justice or justices as may attend shall have authority to adjourn from day to day for twenty days,'

(instead of ten days as before limited.) § 2. Less than four may adjourn any day during the term. Jan. 21, 1829.

Internal Improvement.—Five acts were passed on the subject of Internal Improvement. The Secretary of the Treasury is authorized to subscribe in the name of the United States for 750 shares of the Chesapeake and Delaware Canal Company, and for 200 shares of the Dismal Swamp Canal Company. A subscription is authorized in behalf of the United States for shares in the stock of the Louisville and Portland Canal Company, the number subscribed for not to exceed 1350. Three acts were passed making appropriations for surveying and constructing roads, two of them relate to continuation and repairing of Cumberland road, and one for a survey of a military road in Maine, from Mars Hill to the mouth of the Madawaska.

Apprehension of Deserters from Foreign Vessels.—On application of a consul of any foreign government, having a treaty with the United States, stipulating for the restoration of seamen deserting, made in writing, stating that the person therein named has deserted from a vessel of any such government, while in any port of the United States, and on proof, &c. it shall be the duty of the court or judge to issue a warrant to have the said person arrested for examination; and if on examination the facts stated are found to be true, the person, not being a citizen of the United States, shall be delivered up to said consul, to be sent back to the dominions of such government; or on request and at the expense of such consul, shall be detained until the consul finds an opportunity to send him back. Provided, that no person shall be detained more than two months after his arrest; and in case of his having been convicted of any crime, his surrender is to be delayed until after his trial or punishment.

The drawback on refined Sugars exported is made five cents per pound, the operation of the act to cease when the export shall be equal to the importation.

A *Charter* of a steam-packet company in the District of Columbia, was granted.

Regulations of the Penitentiary in the District of Columbia are the subject of another act.

Support of Government, &c.—Thirteen acts were passed providing for the payment of the salaries of public officers, pensions, improvements in the public buildings; erecting and completing fortifications; support of the army and navy.

Sale of Lead Mines, &c.—Two acts authorize the sale of the lead mines and salt springs belonging to the government in Missouri.

Port of Entry.—Magnolia in Florida is made a port of entry.

Courts.—Two acts were passed respecting the time and place of holding the courts of the United States.

Territories, &c.—The public lands, territories, and school reservations, are the subjects of nine acts.

Harbors, Rivers.—Three acts were passed providing for the improvement of harbors, removing obstructions to the navigation of rivers, erecting buoys, lighthouses, and beacons.

Indians.—Two acts relate to the Indian department, one of them providing particularly for carrying into effect divers treaties with the Indians.

Infantry Tactics.—Provision is made by one act for the distribution of 60,000 copies of an abstract of Infantry Tactics.

Private Acts.—Twenty-four private acts were passed, the greater part of them being provisions for the relief of petitioners.

Unfinished Business.—The business completed at this session of Congress, bears but a small proportion to that left unfinished. No less than two hundred and twenty bills, reports, and propositions to amend the constitution, originating in the House of Representatives, were left upon the table March 3, 1829. Among them are bills, to authorize the payment of the Massachusetts claim; to equalize the duties on imported teas; to provide for taking the fifth census; to provide for the reduction of interest on the United States six per cent. stocks.

Thirty-seven bills passed the Senate, which were not finally acted on in the House.

Fifty-nine bills passed the House, which were not finally acted on by the Senate. Among them are bills, providing for an expedition to the South Sea; to repeal the tonnage duties on ships and vessels of the United States, and on certain foreign vessels; for the relief of sundry revolutionary and other officers and soldiers.

A very large part of the unfinished business relates to claims of individuals on the United Sates, many of whom must be seriously injured by this delay of justice.

Massachusetts.

The whole number of acts passed by the legislature of Massachusetts at the January session, 1829, is one hundred and eleven. Twenty-eight of them are, we believe, technically *public* statutes, though but a small part of these are of general interest. The larger part of the private acts were either to incorporate companies, or in addition to previous acts of incorporation. Among the corporations created at this session are, sixteen Manufacturing Companies, twelve Religious Societies, seven Schools and Academies, five Insurance Companies, four Trustees of Ministerial Funds, two Savings Institutions, and an Asylum for the Blind. Below is an abstract of the most important public statutes.

Ch. 55.—*Provision for Wives divorced a mensa et thoro.*

Sec. 1. The court when a woman obtains a divorce *a mensa et thoro*, may assign to her the whole or any part of the personal estate which her husband has received by reason of the marriage, and such part of the personal estate of the husband as may be necessary.

Sec. 2. All legacies, personal property, promissory notes, and other choses in action of the wife not reduced to possession by the husband before the libel for divorce is filed, shall become the sole property of the wife, and she may sue for the same as a *feme sole:* Provided, that this act shall not avoid any lien on the property, by attachment or execution, for the husband's debts, created previously to the filing of the libel.

Ch. 60.—*Receivers in Equity.* The court is empowered to authorize receivers in equity suits to compound debts, or give further time for their payment.

Ch. 96.—*An Act to regulate Banks and Banking.*

Sec. 1. After the passing of this act, [Feb. 28, 1829] every bank which shall be incorporated, or whose capital shall be increased, or charter extended, shall be subject to its provisions.

Sec. 2. Every bank incorporated by the state, shall be a corporation by the name of the President, Directors, and Company of the Bank, with the usual powers of corporations; and may loan and negotiate their moneys and effects by discounting on banking principles.

Sec. 3. No bank, except such as are now incorporated, shall go into operation, until fifty per cent. of its capital shall have been paid in specie, and existing in its vaults, which shall have been examined by three commissioners, appointed by the Governor. No loan shall be made to any stockholder until the amount of his shares shall have been paid in; and no bank shall have owing to it, on a pledge of its own stock, more than fifty per cent. of its capital actually paid in; and no part of the capital shall be sold or transferred, until the whole amount shall have been paid in.

Sec. 4. The amount of bills issued by any bank, shall not at any one time exceed twenty-five per cent. of the capital paid in; and no bank shall make any loan or discount, or issue any bill or note, except at the bank.

Sec. 5. The debts due from any bank at any time shall not exceed twice the amount of its capital paid in, exclusive of sums due on account of deposites; nor shall there be due to it at once more than double the amount of its capital actually paid in. In case of excess of debts so due from said bank, the directors under whose administration it shall happen, shall be liable for

the same in their private capacities. But this shall not exempt the bank from being also liable for said excess. Directors absent when said excess is created, or who dissent from the creation of the same, may exonerate themselves by forthwith giving notice to the Governor and Council, and to the stockholders at a general meeting.

Sec. 6. No bank shall engage in trade. Every bank may hold real estate, not exceeding twelve per cent. of its capital, exclusive of what it may hold on mortgage, receive on execution, or take as security for, or in payment of debts.

Sec. 7. No person but a member of a bank, being a citizen of, and resident in, the Commonwealth, shall be eligible to the office of director; and a majority of directors shall be residents within the county where the bank is located; and no person shall be a director in two banks at once. No bank shall have less than five, nor more than twelve, directors. The directors shall choose one of their own number president. A majority of the directors shall constitute a quorum for business.

Sec. 8. The Directors shall be chosen by ballot annually, on the first Monday in October, by the stockholders. Each stockholder shall be entitled, for one share, to one vote, and for every two shares above one, to one vote more; but no one shall have more than ten votes. Absent members may vote by proxy.

Sec. 9. The directors shall make half yearly dividends of profits; and shall have power to appoint a cashier, clerks, and other officers, and fix their salaries.

Sec. 10. The cashier shall give bonds for the faithful performance of the duties of his office: in no case for less than twenty thousand, nor more than fifty thousand dollars.

Sec. 11. If any bank shall refuse or delay payment in gold or silver money of any note or bill of said bank presented for payment, the said bank shall be liable to pay additional damages at the rate of twenty-four per cent. per annum for the time during which such payment shall be delayed or refused.

Sec. 12. In case of any deficiency of capital in any bank, arising from the mismanagement of the directors, the stockholders shall, in their individual capacities, be liable to pay the same. But no stockholder shall be liable to pay a sum exceeding the amount of his stock.

Sec. 13. The stockholders in any bank, when its charter shall expire, shall be chargeable in their individual capacities, for the payment of all bills of the bank remaining unpaid, in proportion to their stock.

Sec. 14. Any stockholder of any bank, who shall have been personally obliged to pay any demand against said bank, shall have a bill in equity, to recover the proportional parts of such sums as he may have paid, from the other stockholders.

Sec. 15. Every bank shall be kept in the city or town in which it is originally established, and in such part of such city or town as is prescribed by its charter.

Sec. 16. Each bank shall be bound to loan the state a sum not exceeding five per cent. on its capital at once, reimbursable by five annual instalments, or at any shorter period, at the election of the Commonwealth, with interest payable annually, not exceeding five per cent. But the state shall never be indebted to any bank, without its consent, for a larger sum than ten per cent. of its capital. The Treasurer of the Commonwealth whenever he shall have occasion to borrow money of any bank by virtue of any act or resolve of this Commonwealth, shall give notice in writing to the president or cashier, of the amount which he wishes to borrow, demanding of said bank a loan of the same. And if any bank shall neglect or refuse for thirty days to loan the sum demanded, said bank shall forfeit and pay into the state treasury two per cent. per month upon the amount of the sum, so long as said neglect or refusal continues. This forfeiture is recoverable in a suit to be brought by the Treasurer, for the Commonwealth.

Sec. 17. Any committee appointed by the legislature for the purpose, shall have a right to examine into the doings of any bank, and if on such examination, it shall be found, and, after a full hearing of said corporation thereon, be determined by the legislature that said corporation have exceeded the powers granted them, or failed to comply with the laws relating to them, their charter may be declared forfeit. And if any officer, or other person having charge of the books and property of any bank, shall refuse or neglect to exhibit them, or shall obstruct said examination, the party so offending shall be punishable by a fine not exceeding ten thousand dollars, or imprisonment not exceeding three years.

Sec. 18. Beside the capital of any bank authorized by its act of incorporation, the state shall have the right to become a stockholder to an additional amount not exceeding fifty per cent.

Sec. 19. Beside the directors chosen by the stockholders, the legislature may appoint a number of directors in any bank, in such proportion as the sums paid by the Commonwealth bear to the whole amount of the stock paid in.

Sec. 20. Every bank shall be liable to pay the original amount of any note of said bank, altered in the course of its circulation to a larger amount.

Sec. 21. Every bank shall within ten days after the first Mondays in October and April annually, pay to the Treasurer of the State, a tax of a half per cent. on the amount of such part of their stock as shall have been paid in. Every bank which shall be incorporated after the first Monday of October, 1831, shall furnish the Treasurer of the Commonwealth, on or before the first Mon-

days in October and April, with an abstract of the amount of stock paid by the stockholders, together with the time when the several instalments were paid. And if any bank shall neglect to pay the tax for thirty days, the Treasurer shall collect the same by a warrant of distress against the bank.

Sec. 22. The directors of the several banks once in five years shall have all the weights used in their respective banks compared, proved, and sealed by the Treasurer of the Commonwealth, or by some person authorized by him. And no tender of gold by any bank, weighed with weights other than those sealed as aforesaid, shall be legal.

Sec. 23. Shares in any bank shall be liable to be attached on mesne process, and taken and sold in execution.

Sec. 24. The real estate of any bank may be taken in execution and sold at public vendue. All the right, title, claim, and interest of any bank in any real estate mortgaged to such bank, shall be liable to be seized and sold at public auction, in the same manner. And any debt secured by such mortgage, shall pass by the deed of the officer to the purchaser.

Sec. 25. All bills issued from any bank shall be signed by the president and cashier. Provided, however, that all bills which shall get into circulation signed by either the president or cashier through the agency or neglect of any officer of the bank, shall be binding on the bank. Every bank may issue bills under five dollars to the amount of twenty-five per cent. of its capital paid in, and no more: but no bank shall issue bills for less than one dollar, under a penalty of one hundred dollars for each offence. No bank shall issue any note, bill, or check, draft, or certificate, payable at a future day or bearing interest. No bank shall take any greater rate of interest or discount than six per cent. per annum, but such interest or discount may be calculated according to the rules of banking. But in discounting drafts or inland bills, the bank may charge beside the interest the existing rate of exchange. Every bank which shall issue any bill, note, check, or draft redeemable in any other manner than by specie on demand, or payable at any place other than the place where such bank is by law established, shall be liable to pay the same in specie to the holder thereof on demand at said bank, without a previous demand at the place where the same is made payable. And if the bank which issued the same shall neglect or refuse to pay the same on demand, such bank shall be liable to pay to the holder thereof two per cent. per month damages. But this does not extend to any check or draft drawn by the president or cashier of any bank on any other bank, for any sum exceeding one hundred dollars: but on all such checks or drafts, if dishonored by non-payment of the bank on which they are drawn, the holder shall recover against the bank which issued the same, the amount

of such check or draft, with two per cent. per month on the amount, from the time when such check or draft shall have been refused payment at the bank issuing the same.

Sec. 26. Any officer or servant of any bank who shall embezzle, or fraudulently take or secrete, with intent to convert to his own use, any money, note, bill, obligation, or effects of such bank, deposited in such bank, and every person assisting and aiding therein, shall be deemed guilty of larceny, shall be punished by solitary imprisonment not exceeding one year, and by confinement afterwards to hard labor not less than three, nor exceeding ten years.

Sec. 27. The cashier of every bank shall every year make a return of the state of such bank as it existed at two o'clock afternoon of the first Saturday in such preceding month as the Governor may direct, and shall transmit the same within fifteen days to the Secretary of the Commonwealth, in the following form.

State of — Bank, on the first Saturday of —, 18 . 2 *o'clock, P. M.*

DUE FROM THE BANK.		RESOURCES OF THE BANK.	
Capital Stock,		Gold, Silver and other coined metals in its Banking House,	
Bills in Circulation,		Real Estate,	
Net Profits on hand,		Bills of other Banks incorporated in this State	
Balances due to other Banks,		Bills of other Banks incorporated elsewhere,	
Cash deposited including all sums whatsoever, due from the Bank not bearing interest, its bills in circulation, profits and balances due to other Banks excepted,		Balances due from other Banks,	
Cash deposited bearing interest,		Amount of all debts due, including notes, bills of exchange, and all stocks and funded debts of every description, excepting the balances due from other Banks,	
Total amount due from the Bank,		Total amount of the resources of the Bank,	
		Rate and amount of the last dividend,	
		Amount of reserved profits at the time of declaring the last dividend,	
		Amount of debts due to the Bank, secured by a pledge of its stock,	
		Amount of debts due and not paid and considered doubtful,	

which return shall be signed and sworn to by the cashier and a majority of the directors of each bank.

Sec. 28. The Secretary of the Commonwealth is directed to furnish four printed copies of the above form of return to the cashier of every bank in March or April, annually.

Sec. 29. The Secretary of the Commonwealth shall cause to be printed a true abstract of the returns of the banks, and transmit by mail one copy thereof to the cashier of each bank.

Sec. 30. Any bank, on application within one year, shall be authorized, with the assent of the legislature, to continue its operations under this act twenty years from the first Monday of October, 1831.

Sec. 31. If during the continuance of any bank charter granted or renewed under this act, any new privileges shall be granted to any other bank, each and every bank in operation at the time shall be entitled to the same.

Sec. 32. No bill or note for one hundred dollars or less, shall be issued by any bank, unless the same shall be impressed from Perkins's stereotype plate.

Ch. 97.—This act is chiefly a transcript of parts of the preceding act, and intended to apply to existing banks.

Ch. 112.—*Survivorship of Civil Actions.* Suits for injuries to real property which now abate by the death of the parties, shall survive to the executor or administrator. The executor or administrator of the plaintiff or defendant dying may either become a party voluntarily, or be made such by being summoned in by the other party.

Ch. 114.—*Notice of suit to defendants out of the state.* Where the defendant does not reside in the Commonwealth, or his residence is not known to the plaintiff, no judgment shall be given against him until he has notice of the action given him in such manner as the court may direct.

Ch. 120.—*Marriage of feme sole pending suit.* Suit brought by a *feme sole* shall not abate on her marriage, but the husband may become a party on motion.

Ch. 134.—*Suppression of Lotteries.* Additional Act.

Sec. 1. If any person shall exhibit any sign, symbol, or other emblematical representation of a lottery, or in any way indicating where lottery tickets may be purchased or received, or shall in any such manner entice others to purchase or receive lottery tickets, he shall forfeit not less than thirty dollars, and not more than one hundred dollars, for every offence, for the use of the Commonwealth, if prosecuted for by the Attorney or Solicitor General, or either of the County Attorneys; and if prosecuted for by any other person, one half to the use of the prosecutor, and the other half to the use of the Commonwealth.

Sec. 4. Repeals the laws making *purchasing* or receiving lottery tickets penal, except in cases where they are purchased or received for sale.

Ch. 137.—*Amendment of the law relating to Real Actions.*

Sec. 1. No writ of right or writ of entry, brought by any minister or other sole corporation, on the seizin of his predecessor, shall be barred by lapse of time, provided the same be brought within ten years after such predecessor's death, resignation, or removal.

Sec. 2. In writs of *entry on intrusion*, and other writs on entry, founded on the seizin of a remainder or reversion, it shall be

sufficient to allege and prove such seizin of the remainder or reversion within thirty years; and the demandant need not allege or prove an actual seizin of the land.

Sec. 3. Joint-tenants, tenants in common, and coparceners, when disseized, may all, or any two or more of them, join in a suit for their right of property or possession; or any one may sue alone for his share.

Sec. 4. All pleas which show that the action is misconceived, may be pleaded in bar as well as in abatement. The court may allow amendments which do not materially change the nature of the action.

Sec. 6. When judgment shall be rendered for the plaintiff in any action on the case for a nuisance, the court may, on motion of the plaintiff, besides the execution for damages and costs, issue a warrant to the sheriff or his deputy to abate and remove the nuisance at the expense of the defendant.

Ch. 138.—*Lyceums.* This act allows any twenty or more persons in any county or town associating together as a Lyceum, to have corporate privileges, like the proprietors of social libraries.

Ch. 139.—*Inheritance of Illegitimate Children.* This law makes every illegitimate child an heir to its mother, and the mother heir to the child, where he dies intestate, without lawful heirs.

Mississippi.

We make the following brief notice of the acts passed by the legislature of Mississippi, session of 1829, partly from an abstract furnished by a member of the General Assembly of Mississippi for the 'Statesman and Gazette' of that state, and partly from an examination of some of the acts which have come to our hands.

Criminal Law.—An additional punishment of imprisonment, not exceeding six months, besides the fine imposed by former laws, is enacted, for living in open adultery or fornication.

Runaway Slaves.—All county and corporate towns are offered the use of runaway slaves, committed to the respective jails, to labor upon the streets and highways, on providing a superintendant, and giving security for their safe keeping; the slaves to be secured by a chain and ball or otherwise while at work, and returned to the jail every night. The former acts offered the use to the *county* towns, but required them to *maintain* the slaves, which is not required by this act.

Notice in suits against Corporations need only to be served upon the *principal officers*, instead of being served, as before, upon all the members.

The Poor.—The provisions of former acts on this subject are extended to the children of poor free people of color, the court of probate being authorized to bind out such children as apprentices.

Notice to absent Defendants may be given by publication in some newspaper, instead of personal service, in cases depending in the supreme court, where the court is satisfied that the defendant in error is non-resident, and has no attorney in the state.

The education of Deaf and Dumb Children is provided for at the expense of the state.

The dividing line between Mississippi and Tennessee, being the 35th degree of N. latitude is made the subject of correspondence between the executive of the former, and the authorities in Tennessee, it being supposed on the part of Mississippi that Memphis will be included in that state on an accurate settlement of the northern boundary.

An act to incorporate the Mississippi Fire and Marine Insurance Company provides that the stock shall pay the same tax as is paid by the banks, and that the state may at any time elect to take a certain number of shares at par.

[We cannot but think that the principle of this act is objectionable, unless the wants of the state compel a resort to any species of taxation which will yield a revenue, though it should be unequal and partial, which appears not to be the case, since another act provides for the investment of the superfluous funds of the state. The act operates as a tax upon a particular species of contracts, and a species, which, instead of being discouraged, ought to be promoted, and every facility granted for its encouragement. The effect of this act is to make premiums higher.]

Certain elections are to be held for *two* days.

The superintendence of Public Roads in Mississippi is by one of these acts to be vested in *commissioners* appointed by the county courts.

Education.—A loan of $5000 by the state, is provided for, to the Mississippi Academy, situated at Clinton, which is described by a member of the legislature from Natchez to be a flourishing seminary.

Power to grant licenses to Physicians and Surgeons is granted to a medical society, organized by the same act, concurrently with the Board of Medical Censors, who have a similar power. An unsuccessful attempt was made to abolish the Board of Medical Censors.

Descents.—In all cases where there is a widow or husband surviving any decedent, whose property would escheat to the state by defect of heirs, the widow or husband, as the case may be, shall be entitled to the estate.

Attorneys and Counsellors.—The former act requiring two years

study and six months' residence as a requisite to the admission of attorneys and counsellors to the bar, is repealed.

Lotteries.—A proposition is made to reciprocate with Louisiana the privilege of selling the lotteries of literary, religious, and charitable institutions, without paying any tax therefor in either state.

Sale of Property of Minors or Deceased Persons to pay Debts.—It is provided that when the county and probate court shall be of opinion that it will be for the benefit of the estate of a person deceased, or a minor, to sell real instead of personal estate to pay debts, they may authorize such sale, and the estate sold shall be pledged for the payment of the purchase money when the sale is on credit, in the same manner as if the same had been mortgaged for this purpose.

A General System of Education.—The governor is authorized to appoint three commissioners to report on the subject of a general system of education, to the next General Assembly; and also to appoint an agent to confer with the trustees of Jefferson College, and ascertain what arrangement can be made between them and the state.

Militia Laws.—A resolution was passed requesting the Hon. John A. Quitman to report a system of militia laws to the next General Assembly.

Internal Improvement.—The governor and three other commissioners are constituted a Board of Internal Improvement, and a loan of $200,000 is authorized as a permanent fund for this object. And the board is authorized to make surveys of the principal roads and rivers, and cause reports and estimates of improvements to be made.

Application is made to Congress for a grant of lands for purposes of internal improvement, and by another resolution the governor is authorized to open a correspondence with the executive of Louisiana, inviting that state to a co-operation in measures for improving the roads and rivers common to both states.

[A member from Natchez, whose abstract we are using, remarks, 'these three measures are together the commencement of a system replete with interest to the community.']

INTELLIGENCE.

Mr. Metcalf's Law School at Dedham.

It is already known to the public that a Law School was opened at Dedham by Theron Metcalf, Esq. in October last. This pleasant village is situated ten miles from Boston, on the Providence road, a circumstance which we mention on account of our distant readers. The different courts are in session there about eight weeks in the year, the average aggregate period of the session of the Supreme Court and that of the Common Pleas being about the same. The price of board is $2 50 per week. Mr. Metcalf's charge for tuition is at the rate of $100 per annum. He began his lectures to students October 1st, 1828. Each lecture occupies about seventy-five minutes. He delivers them twice a week at present, but intends, after October next, to give a lecture three times a week.

Mr. Metcalf is already well known to the public as a lawyer distinguished for talent and learning. We give our readers a hasty sketch of Mr. Metcalf's lectures on some of the titles of the law, as they are sometimes called, or subjects, in doing which we shall partly use his own words; though we ought, perhaps, to premise, that he probably did not expect us to make this use of them. The lectures are written pretty fully, and with some care; but the manuscript is used only as a *guideboard*. The matter is *chiefly* oral, the illustrations wholly so. Where precise points are given, it is done in the words found on the paper.

'I wish,' Mr. Metcalf says, 'my pupils to work, and to work hard; that they should examine carefully and almost with a skeptical turn, all the authorities cited in one lecture, before another is given. Elementary books never made a thorough lawyer. Reports, I hold, ought to be attentively examined. *Juvat accedere fontes.* I do not intend the hearers shall find much time to read anything but on the subjects discussed in the lectures. If they have other time, I advise how it should be employed.'

He insists that questions arising from the subject of the lectures, or closely connected with them, shall be argued by the students before him. He selects these questions, and they are put into the form of *real life* at the bar; thus affording some practical and *formal* information. Such discussions much interest and improve the pupils.

'It is not my object,' says Mr. M. 'so much to have my pupils acquire a great deal of legal knowledge on various subjects, as to have them *learn, mark, and inwardly digest* a few of the most important legal topics. In short, to teach, by a pretty thorough and severe analysis of the most prominent and constantly recurring subjects in practice, how to investigate other subjects for themselves. Like all other education, my notion is that the proper object of anxiety and effort in teaching the law, is to teach pupils how to learn—how to make themselves lawyers; to drill them severely in *elementary principles;* to make them think closely and discriminate narrowly, but not so refinedly as to make them mere carpers and disputants.'

During the two first years Mr. Metcalf does not make his students attend to the law of real property, or the mysteries of the feudal system, any farther than reading the Introduction to Robertson's Charles V. and, perhaps, Sullivan's Lectures, and the parts of Hallam's Middle Ages which relate to the subject.

Mr. Metcalf commences with the subject of *Contracts*, because it is least removed from the course of study which every educated young man is presumed to have pursued, viz. ethics, and national and natural law, &c.; and because it is that about which three-fifths of a lawyer's business, in Massachusetts, is connected; and (though last, not least,) because there is no treatise, except Powell's 1st volume, that is fit for a beginner, or from which anything but the veriest *smattering of principles* can be obtained. And Powell is bad enough, and defective enough, and ill-arranged enough, and 'dry-as-dust' enough—as we all know.

'I begin,' says Mr. M. 'with the definition, which I nowhere find correct, generically, except in Judge Marshall's opinion in New Jersey v. Wilson, and Sturgis v. Crowninshield—Blackstone's being true only of *simple* contracts. Taking Chitty junior's extended definition, or description of a simple contract, (p. 3) I consider at length every part of it, after considering *express and implied* contracts, beginning with *mutual assent*, (which is nowhere at all explained) showing that assent must be *mutual, concurrent*, &c.—that it must be *free* (and here of *duress* at large) *without mistake as to the subject*, (what civilians denominate *error in re) and fairly obtained*, (and here of fraud that avoids a contract *as between the parties to it)* &c. Next of *parties* competent to contract—lunatics, drunken persons, &c. naturally incompetent—infants, (and here the whole doctrine of infancy, as to contracts, minutely) outlaws, and persons attainted, excommunicated, femes covert, (very *generally*) slaves, legally incompetent—agents and attorneys, partners, executors, administrators, and guardians, partners, &c. I do not mention these parties in the order, probably, in which I have them on *other papers*. *Consideration* is then very fully considered, showing *inter alia* that *executed* consid-

eration, and all that is found about it in the books, is a mere rule of pleading,'—a *fact* which no student could ever 'find out by his learning,' and which no instructer has, to our knowledge, ever suggested.

The thing to be done or omitted—and here of illegal contracts—a field wide, but very easy to be inclosed—the 'fencing stuff' being on the ground, but never yet put up, by any laborer whose works have met our eye.

Then *lex loci contractus*—an important doctrine, in this country especially. *Construction*—generally. *Obligation of contracts*—and here of course of the Constitution of the United States and the adjudications. *Rescinding of contracts.*

Lectures on the different kinds of contracts—*bailment, sales of personal property*, &c. more generally—as there are good treatises on these subjects.

Then *contracts by specialty*—with the different incidents of these and simple contracts.

Remedies on contracts—debt, assumpsit, covenant, &c.—with the rules of pleading and evidence peculiar to each.

He assumes that pupils know nothing of law; 'but have need to be taught what are the first principles.'

Mr. Metcalf proposes to discuss the subject of *Pleading* very thoroughly, intending that the pupil may be able to say, as Lord Hobart does, after a long unintelligible talk about *traverses*, 'See how clear this is.' If a man is well versed, thoroughly versed, in pleading, he must be a good lawyer. The converse is not necessarily true.

How extensive his course will finally become, he cannot, as yet, foresee. It is not his plan to go over a great deal of ground; but, as Paul Allen used to say, 'to harrow it fine' as far as he goes.

Insurance.—We understand that Mr. Phillips is collecting materials and making preparation for an additional volume on the subject of Insurance, of smaller size than that already published by him, and comprising all the decisions made since its publication; and also the legal proceedings upon policies, and including very considerable additions on the subject of insurance against fire, and a pretty full collection of examples of adjustments of losses for practical use. The arrangement of subjects will correspond to that of the former volume, and the proposed additional volume will contain an index to that and the preceding one. It is intended to be ready for the press in the course of the year.

Kentucky Court of Appeals.—It appears from the Kentucky papers that two nominations have been made by the Governor of Kentucky to the Senate for filling the vacancy of the office of Chief Justice of the Court of Appeals. One, of J. J. Marshall, Esq. which was rejected by a vote of yeas 16, nays 21: Joseph B. Underwood, Esq. was then nominated, and the Senate postponed the consideration of the subject until June next, and refused to reconsider this vote by a majority of one.

Thomas B. Monroe, Esq. is re-appointed Reporter of the Decisions of the Court of Appeals for a term of two years.

Complaint against Judges in Alabama.—We learn from the Law Intelligencer, that on a complaint made by William Kelly, Esq. in January 1828, against three of the judges of the Supreme Court of Alabama, namely, Judges Crenshaw, White, and Safford, stating that a minority of that court, in the absence of a part of the judges, had given a judgment in a case of usury affecting Mr. Kelly's client, in opposition to what was known by these judges to be the opinion of a majority of the whole court, including the judges absent, as well as those present. A question was, thereupon, proposed in the Senate of that state, whether to address the governor for the removal of those judges, and decided in the negative by a large majority; and a question is thus put at rest, which, it seems, has caused great excitement in Alabama.

Contempt of Court.—We learn from the Detroit Gazette, that John P. Sheldon, Esq. editor of that paper, was sentenced by the Supreme Court of Michigan Territory, on the 5th of March last, to pay a fine of one hundred dollars, and to be committed to jail until he should pay said fine, on account of a publication in the Gazette of the 22d of January last, respecting the proceedings in a trial of one John Reid, in the Circuit Court of Wayne county in said territory, in June preceding; which publication is described by the rule against Mr. Sheldon, to be 'manifestly scandalous and contemptuous of and concerning this court, its judicial proceedings, and the judges thereof.' We have not seen the publication which is thus described by the court, nor the opinions of the judges in which the grounds of the sentence are set forth.

On sentence being pronounced, Mr. Sheldon stated that in the publication for which he was arraigned, he had only availed himself of what he considered to be his rights as a freeman: 'and with these impressions he had formed the determination to go to prison, and to remain there until his hairs were white, before he would pay any part of the fine.' He was attended to prison by a great number of his friends, and a meeting was held soon after at a public house, said to have been attended by three hundred citizens, at which sundry resolutions were passed disap-

proving of the decision of the court. Arrangements were made for a public supper, on the same evening, at the jail, at which various toasts were given implying very pointed censure of the court. A subscription was subsequently raised among the citizens to pay the fine, and Mr. Sheldon was discharged.

Thomas J. Pen, editor of the New Orleans Mercantile Advertiser, was sentenced to an imprisonment of six hours, for a contempt of court, for publishing some remarks upon the trial of one Gayarre for murder, while the case was still pending.

The Hon. JOHN M'LEAN, of Ohio, has been appointed by the President of the United States, with the consent of the Senate, an Associate Judge of the Supreme Court.

Other Appointments.

JOHN M. BERRIEN, Attorney General of the United States.
JOHN W. CAMPBELL, District Judge of the District of Ohio.
WILLIAM TRIMBLE, Judge for Arkansas Territory.
BENJAMIN JOHNSON, ' ' '
ETHER SHEPLEY, Attorney for the District of Maine.
WM. A. GRISWOLD, ' ' ' Vermont.
ANDREW DUNLAP, ' ' ' Massachusetts.
NATHAN SMITH, ' ' ' Connecticut.
ALEXR. BRACKENRIDGE, ' ' W. Dist. of Penn.
NATHL. WILLIAMS, ' ' ' Maryland.
THOMAS SWANN, ' ' ' Columbia.
JOHN GADSDEN, ' ' ' South Carolina.
JOHN N. SMITH, ' ' ' E. Dist. of Lou.

NOTE.

Since the preceding review of Jackson on Real Actions was printed, we have been informed, by a professional friend, of a decision of the Supreme Judicial Court upon the subject of *Waste*. We understand that in this case, which was an action against a tenant in dower, the court gave judgment for the place wasted, and *single* damages—on the ground that our statute 1783, ch. 40, must be considered as having repealed all prior laws relating to it; and as that statute speaks only of '*damages assessed*,' &c. the court would not extend it by reference to the pre-existing law. See also Sackett v. Sackett, 5 Pick. 191.

QUARTERLY LIST OF LAW PUBLICATIONS.

Reports of Cases Argued and Determined in the Supreme Judicial Court of Massachusetts. By Octavius Pickering. No. 3. Vol. 5. Boston. Hilliard, Gray, & Co. 1829, 8vo.

Reports of Cases Argued and Determined in the Supreme Judicial Court of the State of Maine. By Simon Greenleaf, Counseller at Law. Vol. 4. Portland. James Adams, Jr. 8vo. pp. 562.

Reports of Cases Argued and Determined in the English Courts of Common Law. With Tables of the Cases and Principal Matters. Edited by Thomas Sergeant and John C. Lowber, Esqs. of the Philadelphia Bar. Vol. 13. Philadelphia. P. H. Nicklin. 1828. 8vo. pp. 520.

A Digest of the Decisions in the Supreme Court, Circuit Courts, and District Courts of the United States. By Richard S. Coxe. Philadelphia. P. H. Nicklin. 8vo. pp. 752.

Reports of Cases Determined in the Court of Appeals of Maryland. By Thomas Harris and Richard W. Gill. Annapolis. Vol. 2, being a continuation of the four volumes, by Harris & McHenry; the seven volumes by Harris & Johnson, and the first volume by Harris and Gill, commencing in 1658 and ending in 1828.

Reports of Cases Argued and Determined in the Supreme Judicial Court of Massachusetts. By Octavius Pickering. No. 1. vol. 6. Boston. Hilliard, Gray, & Co. 8vo.

The Reports of that Reverend and Learned Judge, the Right Honorable, Sir Henry Hobart. First American Edition from the fifth English Edition. With Notes and References to prior and subsequent Decisions. By John M. Williams. Boston. Hilliard, Gray, & Co. 8vo.

Reports of Cases Argued and Determined in the Supreme Court of Errors of the State of Connecticut; prepared and published in pursuance of a Statute Law of the State. By Thomas Day. Volume VI. Hartford. George F. Olmsted. 8vo. pp. 603.

Trial of the Case of the Commonwealth *versus* David Lee Child, for publishing in the Massachusetts Journal a Libel on the Honorable John Keyes, before the Supreme Judicial Court, holden at Cambridge, in the County of Middlesex, October Term

1828. Reported by J. W. Whitman. Boston. Dutton & Wentworth.

Considerations upon the Expediency of Abolishing Damages on protested Bills of Exchange, and the effect of establishing a Reciprocal Exchange with Europe: to which are annexed the Report made to the House of Representatives of the United States, March 22, 1826, and an Examination into the Nature and Operation of Bills of Exchange. New-York. Elliott & Palmer.

United States Law Intelligencer and Review. 'Multo utilius est panca idonea effundere, quam multis inutilibus homines gravari.' Edited by Joseph K. Angell,—Nos. I, II, III, for January, February, and March, 1829. Providence, Smith & Parmenter.

Strictures on Professor M'Vickar's Pamphlet, entitled 'Considerations upon the Expediency of abolishing Damages on Protested Bills of Exchange. And the effect of establishing a Reciprocal Exchange with Europe.' By Publicola. New-York, Elliott & Palmer.

Legal Outlines, being the Substance of a Course of Lectures, now delivering in the University of Maryland. By David Hoffman. In three volumes. Vol. I. Baltimore. Edward J. Coale.

Trial of the Commonwealth *vs.* Origen Bacheler, for a Libel on the character of George B. Beals, deceased, at the Municipal Court, Boston, March Term, A. D. 1829: before Hon. P. O. Thacher, Judge. Reported by John W. Whitman. Boston. John H. Belcher.

Cases Argued and Adjudged in the High Court of Chancery, originally published by order of the Court, from the Manuscripts of Thomas Vernon, late of the Middle Temple, Esq. With References to the Proceedings in the Court and to later Cases, and of the Cases cited in the Notes; also of the principal Matters and of the Matters contained in the Notes. By John Raithby, of Lincoln's Inn, Esq. Barrister at Law. First American from the third London edition. With References continued to the present time. In two Vols. Brookfield. E. & G. Merriam.

Report of the Trial of Gen. Theodore Lyman, for an alleged libel on the Hon. Daniel Webster. By John W. Whitman. Boston. Putnam & Hunt. 8vo. pp. 76.

INDEX.

A.

Abbott, Charles, Lord Tenterden, review of Story's edition of his work on Shipping, 321; history of previous works on commercial law in England, 322; want of a better work, 323; this work well arranged and digested, 323; remarks on, 326; improvements in the new edition, 327; style not sufficiently condensed, 327; value of the new edition by Story, 328.

Aliens, disabilities of, with regard to real property, 87; in some of the states do not exist, 88.

American Jurist, Address of the Editors, to the Public, i.; want of such a publication, i., iii.

Animals, prosecution of, 223. See *Chassanée*.

Appeals, improvement in the system, proposed by Mr. Brougham, 317; evils of in England, 317; in the United States, 317.

Appraisement of property taken on execution, impolicy of laws for this purpose, 40.

Assignments for benefit of creditors, evils of, 45; bankrupt law preferable, 46.

Attachment laws, impolicy of, 40, 42.

Average general, can it arise where the peril is not averted, 336.

B.

Bailly, Gaspard, his work on prosecutions against animals, 226.

Bankrupt law, national, remarks in favor of, 35; frequently proposed in Congress, 35; propriety of discussing, 35; rendered necessary by variety of laws as to debtor and creditor in different states, 36; by relief laws, 37; by laws for appraising property, 40; by attachment laws, 40; by other defects in law of debtor and creditor, 41; by unconstitutionality of insolvent laws, 43; necessity of discharging honest debtors, 44; evils of assignments, 45; bankrupt law proper in justice to foreign nations, 47; objections to, 48; expenses, 48; answered, 49; jealousy of general government, 49; not sufficiently extended, 50; classes who ought to be liable to, 51; improvements in English bankrupt system, 52; recommended for this country, 52; act of bankruptcy, 52; assignment when an act of bankruptcy, 53; relation to act of bankruptcy, 54; composition contract recommended, 55; set off, 56; notice of act of bankruptcy, 57.

Banks, law of Massachusetts, to regulate them, 369.

Bacon, his Lines of a Good Judge, 126.

Beawes's Lex Mercatoria, 322.

Berriat-Saint-Prix on the prosecution of animals, 223; note on the same subject, 236.

Blackstone, his canons of descent, 79; account of his life and writings, 116; birth, 117; enters commoner at Oxford, 118; his 'Farewell to his Muse,' 118; enters in the Middle Temple, 121; is called to the bar, 122; publishes Essay on Collateral Consanguinity, 122; reads lectures at Oxford, 122; chosen first Vinerian Professor, 123; elected member of parliament, 123; publishes his Law Tracts, 124; publishes his Commentaries, 124; appointed Judge of King's Bench, 124; of Common Pleas, 124; his act to provide penitentiaries, 125; his observations in favor of them, 125; death, 126, character, 126; his Reports published by his executor, 127; critical remarks on the Commentaries, 127; effect of on legal education, 128; objection that they tend to make lawyers superficial answered, 129; their faults, 130; plan defective, 131; undue praise of English institutions, 131.

Brougham, Henry, extract from his speech, 71; objects to Fines and Recoveries, 71; his speech on the present state of the law in England, reviewed, 310; merits of the performance, 311.

Britain, Great, account of statutes passed in 1828, 363.

Bull, hung for killing a man, 233.

C.

Caterpillars, proceedings against, 225.

Chassanée, Barthelemi, defender of rats, 223; his *consilia*, 227; account of his treatise *de Excommunicatione Animalium Insectorum*, 227; inquiry into Latin name of *hurebers*, 227; propriety of prosecuting animals, 228; how to be summoned, 228; may be represented by proctors, 228; the ecclesiastical courts have jurisdiction, 228; animals may be excommunicated, 228; sentences against, 231.

Chorier, Nicholas, his story of proceedings against caterpillars, 225.

Codification, remarks on, v.; in a modified form recommended, 31.

Conveyance, lease and release most common in England, 89; deed recorded the common mode in the United States, 90.

Corn, importation of, statute regulating in Great Britain, 365.

Coxe, Richard S., review of his Digest of Decisions in the United States Courts, 330; list of volumes digested, 331; gives no table of cases 331 : makes no subdivision of general titles, 332; does not arrange decisions methodically, 333.

Crimes, new statute in Great Britain, respecting, 363; in Mississippi, 375.

D.

Dane, Nathan, extract from his Digest, 61.

Davis, Daniel, notice of his work on Justices of the Peace, 181.

Debtor and creditor, defects in the law of in the United States, 37; all debtor's real estate can be taken on execution, 93; distribution of property of deceased debtor, 93.

Decisions of Courts, proper subjects of discussion, vi.

Deeds, registry of, in the United States, 90.

Descent, law of in the United States compared with that of Eng-

land, 79; land descends to lineal ancestors in the United States, 79; primogeniture and distinction of sex abolished in the United States, 80; rules as to representation, 80; various rules as to blood of first purchaser, 81; half blood relations inherit in the United States, 82; preference of paternal line not usual in the States, 83; law in Massachusetts, 85; Pennsylvania, 86; North Carolina, 86; descent to husband or wife in Mississippi, 376.

Deserters from foreign vessels, may be apprehended, 367.

Digest of recent decisions, 339.

Divorce, provision for women divorced in Massachusetts, 369.

Dower, writ of, in Massachusetts, 214.

E.

Ejectment, history of the action, 186, 187.

Eldon, Lord, merits as an equity judge, 7.

English decisions, too much respected in the United States, iii; uses of, iv.

Entry, writs of, what in use in Massachusetts, 194; *plea of land* a semi-barbarous expression, 218.

Equity, jurisdiction, in Massachusetts, iv.; deserves attention of American lawyers, 28.

Estates tail, in England, fine or recovery necessary to bar, 70; barred without fine or recovery in the United States generally, 73.

Evidence, remarks on the nature of, 141; science of very imperfectly understood, 142; expediency of allowing parties and persons interested to be witnesses, 318.

Exton's Dicæology, 322.

F.

Fee-simple, words of inheritance necessary to convey, 69; rule altered in some of the states, 70.

Fellows of colleges. See Story, Joseph.

Feme Covert. See married women.

Feudal tenures. See Tenures.

Feuerbach, a German writer, his opinion of jury trial, 289.

Fines and recoveries, necessary in England in certain cases, 70; Mr. Brougham shows the evils of the present system, 71; not necessary in the United States, 73.

France, history of juries in, 291.

Fugitives from justice, opinion of Chief Justice Reid, of Lower Canada, 297; case of larceny in Vermont where the thief fled into Canada, 298; question as to the legality of proceedings, 300; right of sovereign to deliver up the felon, questioned, 300; opinion in favor of the right of delivering up, 300; Grotius, Pufendorf, Vattel, Heineccius, Burlamaqui, Martens, recognise right, 301; English cases prove the same, 302; American cases, 304; extent of right to minor offences discretionary, 307; governor of province has the same right to deliver up offenders as the king has in England, 307; court cannot inquire what

claim has been made by the foreign government, where the executive has ordered the accused to be delivered up, 309.

G.

Gallison, John, eulogy on, 33.
Godolphin's Admiral Jurisdiction, 322.

H.

Hardwicke, Lord, his merits as a chancellor, 6.
Harvard University, Judge Story's argument on the claim of the resident instructers to be chosen fellows of the Corporation, 237 to 274; history of the claim, 237, note. See Story, Joseph.
Hobart, Sir Henry, new edition of his reports by Judge Williams, 334; notice of his life, 335.
Hog, hung for killing a child, 225.
Holt, Lord, value of his decision in Coggs v. Barnard, 6.
Humphreys, James, review of his work on real property, 58; merits of the work, 60; extracts from, showing what ought to be the characteristics of the law of real property, 62; remarks on tenures and trusts, 63; tenures, 64; trusts, 67; objections to having words of inheritance necessary to convey a fee-simple, 69; fines and recoveries for barring estates tail, 70; on tacking mortgages, 74; joint-tenancy, 76; lease and release, 89; distribution of property of deceased debtor, 93; limitations, 97.

I. & J.

Jackson, Charles, his treatise on real actions reviewed, 185; merits of the work, 191; introduces too many obsolete writs, 194; critical remarks on different parts, 196 to 222; exhibits great learning and industry, 222; opinion on a question of general average, 336.
Imprisonment for debt, unjustifiable, 43.
Inns, licensing, statute regulating, in Great Britain, 366.
Insolvent laws, defects of, 42; how far unconstitutional, 43, 44.
Insurance, opinion upon several questions of, 99; what constitutes seaworthiness in a ship, 102; depends on usage, 103; loss of anchors when a loss to be borne by underwriters on ship, 103; what constitutes *one* loss under a policy, 104; value of anchor for which underwriter is liable, 107; where insurers on ship not liable to losses under 5 per cent. of the value of the ship, the value includes premium, 109; where policy provides that 1 per cent. is to be deducted upon payment of any loss, the deduction is not to be made in order to ascertain whether the loss amount to 5 per cent. 111; expense of surveying cable not to be added to make up the 5 per cent. 111; anchor lost, and sometime after recovered, value included in the 5 per cent. 112.
Intelligence, 378.
Internal Improvement, statutes promoting, 367.
Joint-tenancy, survivorship in, 76; changed in the United States, 77.

Judges in England, improvement in law since Revolution of 1680 owing in a great degree to the permanent tenure of their office, 10, 11, 12.

Judges in some of the states, appointed by the legislature, 314; for limited terms, 314; can only hold till a certain age in some of the states, 315; small salaries, 316.

Jury, trial by, much praised in Great Britain and the United States, 274; absurdity of choosing judges by lot, 275; history, 276; in Athens jurors appointed by lot, 279; jury necessarily in most cases guided implicitly by the judge, 279; absurdity of this mode of trial in complicated questions, 281; good administration of laws in the United States does not arise from jury trial, 282; in Sweden of no use, 282; in India, opinion of judges in that country, 283; juries in France, 285; article in German Conversation Lexicon, 285; use of jury in the United States, to neutralize the influence of party, 287; advantages of a man's being tried by his *equals* doubted, 288; Feuerbach thinks jury trial only of use in popular governments, 289; objections of Conversation Lexicon to jury trial, 289, 293; history of juries in France, 291; objections to juries, cannot understand cases, 294; liability to prejudice, &c. 295; expensive mode of trial, 295.

L.

Law, increase of works relating to, ii.

Law, *commercial*, nearly the same throughout the commercial world, 15; foreign deserves attention here, 29; history of in England, 321.

Law, *civil*, should be studied in the United States, 29.

Law, *the common*, history of, 3; 1st epoch from William the Conqueror to the Reformation, 3; characteristics of this epoch, 3, 4; second epoch from Elizabeth to the Revolution of 1688, 4; this epoch marked by the statutes of Wills and Uses, 4; the statute of Habeas Corpus, and abolition of tenures, improved Chancery practice, 5; other improvements, 5; third epoch from the Revolution of 1688 to the present time, 5; this epoch marked by growth of commercial law, and improvement in equity, 6; principal improvements stated, 8, 9.

Law, in the United States, 12; few great lawyers before American Revolution, 12; great progress of law since the Revolution, 13; laws of the different states, differences and coincidences of, 14; as to remedies, 16; as to land titles, 18; slavery, 21; equity jurisdiction, 21; extent of the science in the United States, 23: constitutional law, 25; pleading less attended to than in England, 27; immense increase of law, 31; constantly changing, 59; causes of uniformity in different states, 61.

Laws, under arbitrary governments remain unimproved for ages, 1, 2; under free governments are constantly improving, 2; nations attached to ancient laws, 58; causes of this attachment in England, 59.

Lawyers, nature of professional reputation, 116.
Law journal, if well conducted, will produce good effects on legislation, iv.; other good effects of, v. vi.
Legislation, account of recent, 363.
Limitation, faults of English law, 97; American laws on the subject, 98.
List of Law Publications, 181, 383.
Literary Property, article on, 157; in America, 157; difficulty of legal questions relating to, 157; imperfectly protected, 158; what a fair abridgment, 159; extracts, what piratical, 161; case of an Itinerary, 161; intention when important in questions of piracy, 163; case of sea charts, 164; abridgments when piratical, 166; case of Johnson's Rasselas, 166; case of Life of George Ann Bellamy, 168; evasive abridgment of Law Reports, piratical, 168; copying from drawings, 169; doubts of Lord Eldon, 170; abridgments, rules respecting, 171; American cases, 174; case of pirating charts, 175; no copyright can be obtained for a price current, 175.
Livermore, Samuel, his Dissertations, reviewed, 132; extracts from, 133, 134, 135, 136, 137, 139; analysis of the work, 133; states difficulties arising from different laws in different countries, 133; subject but little studied in the United States, 134; importance in this country, 134; controverts opinion of Supreme Court of Louisiana, 135; explains difference between personal and real statutes, 136; effect of sale in one state of personal property in another, 137; effect of assignment under foreign bankrupt law of property in this country, 138; observations on comity, 139; merits and defects of the work, 140.
Lotteries, law to suppress them in Massachusetts, 374.
Lunatic Asylum, statutes regulating in Great Britain, 364.
Lyceums, may incorporate themselves in Massachusetts, 375.

M.

Magens, merits of his work on insurance, 323.
Malynes, account of his Lex Mercatoria, 322.
Mansfield, Lord, great value of his decisions, 7, 8; models of juridical learning and eloquence, 8.
Marriage of feme sole not to abate her suit in Massachusetts, 374.
Married women, in England cannot convey without fine or recovery, 73; but may in the United States, 73.
Massachusetts, laws before the constitution, what in force, 191, 192; account of laws passed at the January session 1829, 368.
Metcalf, Theron, his Law School at Dedham, 378.
Mississippi, laws passed by the legislature in the session of 1829, 375.
M'Lean, John, appointed a judge of the Supreme Court of the United States, 382.
Mortgages, English doctrine of tacking, 74; exploded in the United States, 75; land mortgaged descends to heir, and security to executor, in England, 76; changed in Massachusetts,

76 : actions on, 197; form of declaring on in Massachusetts, 198, 199, 200.

P.

Peters, Richard, Jr., review of his Reports, 177; statements of facts and arguments of counsel generally well made, 178; fault in repeating statements, 178; abstracts badly made, 178.

Policy. See Insurance.

Postlethwaite's Dictionary of Commerce, 322.

Promise in writing, required in various cases in Great Britain by 9 Geo. IV. c. 14, 363.

Property. See Literary Property.

Q.

Quakers, remarks on their right of testifying, 141; orign of the sect, 143; required to take oaths in England under penalties, 143; custom of wearing the hat, 144; Toleration act allowed them to take a declaration instead of an oath, 145; allowed to affirm in civil cases, 146; recently to affirm in criminal cases, 147, 364; allowed to affirm in all parts of the United States, 147; severe laws against them in Massachusetts, 147.

R.

Rand, Benjamin, notice of his edition of the 9th volume of Tyng's Reports, 182.

Rats, prosecution of, 223.

Real Actions, history of, 185; in Massachusetts, 186, 187; pleadings loose in American practice, 189; causes, 190; many appendages not used in Massachusetts, 193; pleadings, 201, 210; law to amend, 374.

Real Property, law of, what ought to be its characteristics, 62; history of in England, 63; improvements in the United States, 98.

Reid, Ch. J. of Lower Canada, his opinion in a case respecting fugitives from justice, 297.

Relief laws, 37; impolicy of, 38; unconstitutionality of, 39.

Replevy laws, 37.

Right, writ of, little used in England, 210; practice with regard to in Massachusetts, 211; proceedings in, 212; general issue, how framed, 213.

S.

Snails and caterpillars, excommunicated, 226.

Stearns, Asahel, his work on real actions, 191; merits of, 196.

Story, Joseph, his address before the Suffolk Bar, 1 to 34; his argument before the Overseers of Harvard College on the claim of the resident instructers of the college to be chosen *Fellows* of the Corporation, 237 to 274; only examines legal right, 237; introductory remarks, 240; *meaning* of the word *fellow*, 242; means associate, 243; same applied to colleges as any other bodies, 243; no technical meaning as used in English colleges, 243; *qualifications* of fellows not the same in all colleges, 246; residence not a necessary qualification, 247; nor

instruction, 248; nor government, 249; English fellows are persons who go to study, 251; are not perpetual, 252; summary of preceding remarks, 253; answers the argument that there were *fellows* in the college before the charter, 256; answers argument from formula admittendi, 257; *fellows* and tutors not identical after charter, 258; could not have been fellows on foundations in English sense, before 1650, 258; examines preamble of the charter, 259; expression, '*fellow of the corporation*,' 263; fellows named in the charter not all residents, 265; case of Samuel Danforth, 265; meaning of grants for maintenance of president and fellows, &c. 267; rights of having non-resident fellows settled by usage, 271; effect of the constitution in confirming the college charter, 272; answer to the argument that the corporation is local, 273; review of his edition of Abbott on Shipping, 321; value of his notes, 328.

Stay laws, 37.

Stop laws, 37.

Supreme Court of the United States, adjournment of regulated, 366.

Survivorship of civil actions relating to injuries to real property in Massachusetts, 374.

Swine hung for murder, 234.

T.

Test acts repealed in Great Britain, 363.

Tenterden, Lord. See Abbott, Charles.

Tenures, Feudal, in England, 63, 64; not in force in the United States, 65.

Trimble, Robert, Justice of the Supreme Court of the United States, memoir of, 149; birth, 149; account of his father's first settling in Kentucky, 149; his education, enters Bourbon Academy, 151; commences practice of law, 152: elected member of House of Representatives of Kentucky, 153: appointed Judge of Supreme Court of Kentucky, 153: appointed Chief Justice, but declines, 153: appointed District Judge of the United States, 153: Justice of the Supreme Court of the United States, 154: character from the Columbian Centinel, 155.

Trusts, history of in England, 63; Mr. Humphreys' remarks on, 65.

Tyng, Dudley Atkyns, notice of Rand's edition of the 9th volume of his Reports, 182.

U.

United States, account of the statutes passed at the last session of Congress, 366.

W.

Waste, action of in Massachusetts, 215: is statute of Gloucester giving triple damages, adopted in Massachusetts, 217.

Weskett on Insurance, 323.

Williams, John M., review of his edition of Hobart's Reports, 334: his notes valuable, 334.