ELEMENTS OF JURISPRUDENCE.

PART I.

CODIFICATION.

ELEMENTS OF JURISPRUDENCE,

BEING SELECTIONS FROM

DUMONT'S DIGEST

OF THE

WORKS OF BENTHAM.

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EDITED, WITH AN INTRODUCTION AND NOTES,

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PREFACE.

The publication of this work has originated from the provision made for the teaching of Jurisprudence in the Queen's Colleges. When I commenced lecturing on the subject in Belfast College, I was compelled, from the want of a good text book in English, to devote a number of my lectures to selections from Dumont's Digest of Bentham. I recommended the work in the original to the more advanced students. At the end of the course, I was much surprized to learn from one of the students, that he had translated the entire of the selections from Dumont which I had recommended to be read. This work is extremely creditable to the industry and ability of Mr. Ingram, the translator, and is likely to be very useful to the students. I have, therefore, added an introduction and notes, and joined with him in preparing it for publication.

W. N. H.

INTRODUCTION.

To give a clear conception of the true nature and limits of the science of Jurisprudence, it will be necessary, in the first place, to explain the distinction between the study of law as an art, and as a science ; and further, to point out the principle of division by which the boundaries of the social sciences are distinguished.

Those who, as advocates, as writers, or as judges, study law as an art, confine their attention almost exclusively to ascertaining what the law of their own country is. They seldom investigate the principles on which the laws are framed, except when such an inquiry is necessary to remove a doubt as to the construction of a particular statute. In like manner, they never read the laws of foreign countries except as a matter of curiosity, or for the purpose of some case involving a branch of foreign law.

The course of study thus pursued is quite suited for the purpose intended, but it is wholly inadequate for the much higher and more important purpose of laying the foundation of those wise and compre-

hensive changes in human laws, which the progress of man in wealth, in knowledge, and in civilization renders indispensable. For this purpose, it is requisite to know not only what the law is, both at home and in foreign countries; but what it has been, and what its effects have been. From the consideration of a branch of law under these aspects, it is often manifest that a change is required; and if so, it is necessary to discover what the new law ought to be. What has been thus described, is Jurisprudence, or the study of law as a science.

In using Jurisprudence as the name of a branch of science, I am quite aware that, from inattention to the distinction I have pointed out, that word is not invariably used in the sense in which I propose to use it. It sometimes means a distinct branch of law; thus, we have the phrase "Equity Jurisprudence," instead of the more correct phrase, "the law administered in Courts of Equity." Again, Jurisprudence is sometimes used to signify a distinct branch of knowledge connected with law. Thus the term, "Medical Jurisprudence," really comprises that portion of medical knowledge which is necessary for medical men, to enable them to give skilled evidence when called on in a court of law. The most correct phrase for this branch of knowledge would be, "Forensic Medicine." The most usual signification of Jurisprudence is "the Science of Human Laws;" and as the knowledge of that science advances, this will, no doubt, come to be

the sole signification in which the word will be used.

Having thus ascertained the nature of Jurisprudence, and the objects for which it is studied, it will be necessary in the next place to point out the limits of the science. For this purpose, I may quote what I have elsewhere said respecting the limits of Political Economy:—"The most correct view of the peculiar province of [Jurisprudence, as of] Political Economy can be obtained, by applying to the social sciences the principle of division by which the boundaries of the natural sciences are marked out. Each of the natural sciences is distinguished by the class of natural phenomena which is taken as the subject matter to be observed and explained. Thus, the movements and other phenomena of the stars and other heavenly bodies constitute the matter to be explained by Astronomy. In the other natural sciences, in like manner, such as Physiology, Botany, Mineralogy, and Geology, the phenomena to be observed and explained are those which are exhibited by the structure of the human frame, by plants, by minerals, and by the crust of the earth, respectively."*

Now, if we apply this principle of division to the three social sciences, we shall find that the social phenomena to be observed and explained may be divided into three leading classes: 1st. those transactions in which men are actuated by the desire to

* "*Introductory Lecture on Political Economy.*" 1849.

exchange articles of wealth with their fellow-men ; 2ndly, the portion of human affairs connected with the making, deciding on, and enforcing of human laws ; and 3rdly, that part of human conduct which arises from a sense of duty, as distinct from any desire of gain, or any notion of the utility of obedience to human laws. The sciences corresponding to these classes are Political Economy, or the science of Exchanges ; Jurisprudence, or the science of Human Laws ; and Moral Philosophy, or the science of Duty.

The error which writers on these sciences have been most liable to is, an attempt to reduce the three social sciences to one, by ignoring the fundamental principles of two of them. Thus, Mr. M'Culloch, in his treatise on Taxation, a branch of Jurisprudence intimately connected with Political Economy, and involving a great many economic considerations, endeavours to solve some of the difficulties of the subject by treating all government as a trade. He says, "Governments have, therefore, precisely the same interest as their subjects in facilitating production ; inasmuch as its increased facility affords the means of adding to the quantity of produce at their disposal, without really adding to the weight of taxation." (p. 6.) In other words, he reduces the considerations of utility, or attention to the general welfare, which should guide a government in taxation as in other branches of law, to the test of a money exchange.

How is a government to get the largest sum for whatever kind of protection to life and property they choose to sell!

Bentham, again, has committed a similar error with respect to Moral Philosophy, into which Hume and Paley also fell. They have all extended the principle of utility, on which Jurisprudence is mainly founded, into Moral Philosophy; and have attempted to ignore conscience, or the sense of duty. This error of Bentham has justly attached a certain amount of opprobrium to himself and his followers, indicated by the unpopularity of Benthamites, or Utilitarians, as they are sometimes called; and indicated also by the epithets applied to what is called Benthamism. It pervades the entire of his writings on Moral Philosophy, and those portions of his writings on Government which involve the principles of both Moral Philosophy and Jurisprudence. It does not, however, affect his writings on pure Jurisprudence, as the conclusions he deduces in them are rightly based to a great extent on the principle of general utility.

The three social sciences are, however, so connected together in a large class of human transactions where men act from mixed motives, that no one of these sciences can be brought to perfection without an intimate knowledge of the principles and suggestions to be derived from the others.

The advantages which Adam Smith possessed in this respect, enabled him to write the great work

by which he founded the Science of Political Economy. As Professor of Moral Philosophy in Glasgow, he taught not only the principles of Ethics which he afterwards published in his *Theory of Moral Sentiments*, and the principles of Political Economy which he developed in his *Wealth of Nations*; but he also gave, in his lectures, "an account of the general principles of law and government, and of the different revolutions they had undergone in different ages and periods of society." In other words, he taught Jurisprudence both analytically and historically. What he taught on this subject he would have published, had the liberality of the British Government been bestowed on him in such a form as to admit of authorship; instead of being conferred by an appointment as Commissioner of Customs, which wasted on detail duties those powers of mind that would in all likelihood have made him the founder of Jurisprudence as well as of Political Economy.

Having thus indicated the nature and limits of Jurisprudence, I propose in the next place to explain the position which the following treatise occupies in the science.

The most satisfactory way of teaching or studying a science is, in the first place, to learn what may be called the history of the science; by whom and in what manner it has been developed; what are the views which have been from time to time held on the leading points; what principles of the science

are now generally received as established. Now, this has been done for Jurisprudence by Mr. Reddie, in his *Inquiries, Elementary and Historical, in the Science of Law.* It would therefore be quite unnecessary to attempt any cursory account of what is contained in Mr. Reddie's book.

Next to the history of the science, a student desires to read selections from the most eminent writers on it, especially those of his own country. The works on Jurisprudence which demand attention for this reason are those of Lord Bacon and of Jeremy Bentham.

Lord Bacon, in his "Advancement of Learning," has given a specimen of a treatise on the general principles of Jurisprudence.* He has also, in his "Proposal for Amending the Laws of England," and his "Offer to King James of a Digest to be made of the Laws of England," given outlines of his views on Jurisprudence. He has more perfectly than any preceding writer indicated the real nature and objects of the Science of Law, and has shown how the system of Inductive Philosophy which he raised to such influence amongst mankind, may be applied with as great success to the social as to the natural sciences. Lord Bacon's writings on Jurisprudence are, however, mere outlines, and do not contain a

* This extract from Lord Bacon's works has been translated by the Professor of Jurisprudence and Political Economy in Queen's College, Galway, and published by him, with notes, for the use of the students of the Queen's Colleges.—*Lord Bacon's Tract on Universal Justice*, translated by Professor Heron: Hodges and Smith, Dublin, 1852.

development or practical application of the principles of the science to any large part of the subject.

The next English writer who followed Lord Bacon in treating Law as a Science was Jeremy Bentham. His writings, unlike those of Bacon, are most voluminous. The collected edition of his works extends to eleven large volumes ; and they embrace the entire of the science, treating of most of the questions that have been raised or are likely to be raised for some years.

Bentham's writings are, in their collected state, wholly unsuited for educational purposes, as well from the bulk of matter contained in them, as from the intermixture of political opinions and disquisitions; and also from the prevalence, in some portions of them, of his very erroneous views on Moral Philosophy. Besides, his style, except in one or two of his earlier works, is singularly defective. The selections from Dumont's Digest contained in the present treatise are free from these objections; and at the same time introduce the student to the best parts of Bentham's views on Jurisprudence.

After the study of English writers on the science, the student will naturally turn his attention to selections from the most distinguished foreign Jurists of modern times, such as Savigny* and Charles Comte.†

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* One of Savigny's latest works, *System des Heutigen Römischen Rechts*, has been translated into French by M. Guenoux.

† His principal work is called *Traité de Legislation.*

The history of Law, and the comparison of the laws of European nations, can be most readily studied by taking the Civil or Roman Law as the basis, and investigating its history and progress from the foundation of the Republic to the time of Justinian; and then, by tracing its effects on the formation of English Law, and of the laws of other European nations. which are in a great measure derived from the Roman Law. It is in this manner, and with this object, that the Civil Law is taught in the second year's course of the Law Faculty in the Queen's Colleges.

The effects of existing laws can be most successfully learned from the Reports of Commissions, and from the papers from time to time published on Law Reform by private individuals, or by societies such as the "Society for Promoting the Amendment of the Law,"* in England, and the "Social Inquiry Society of Ireland."† Such publications

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* The reports of this society are noticed or republished in the Law Review.

† The following reports have been published by this society:—

1. On the Laws respecting the Occupation of Land. By R. Longfield, Esq.

2. On the Patent Laws. By J. A. Lawson, Esq., LL.D.

3. On the Law of Debtor and Creditor. By W. D. Ferguson, Esq.

4. On the Foreign Systems of Registering Land. By E. G. Mayne, Esq.

5. On the Laws respecting Partnerships of Limited Liability. By Henry Colles, Esq.

6. On the Law and Practice respecting Wills and the Administration of Assets in Ireland. By J. A. Lawson, Esq., LL.D.

7. On Taxes on Law Proceedings. By John O'Hagan and Arthur S. Jackson, Esqrs.

are, however, except for the purpose of illustration, only suited for the more advanced students, who have mastered the elements of Jurisprudence, and have acquired a respectable knowledge of the laws of their country.

I have explained at some length the position which the following treatise occupies in a complete course of study of Jurisprudence, to guard against being involved in the controversy between the Analytical and Historical Schools of Jurists. Bentham, and his followers of the Analytical School, have, as it seems to me, been justly charged with neglecting the study of the history of the law ; and with disregarding the lessons to be learned by a careful consideration of the manner in which changes in the law are brought about, according to a certain system of progress amongst mankind. With them, every change should be immediate and absolute, and every one who opposes their propositions must be actuated by ignorance, prejudice, or some unworthy motive.

Savigny and the Historical School, on the other hand, undervalue the lessons to be learned from a careful inquiry into the effects of existing laws in our own and in foreign countries. They undervalue the discoveries to be made in Jurisprudence, as in other sciences, from observations suggested by general considerations, brought forward in the first instance as mere hypotheses. In short, both analytical and historical investigations are neces-

sary to the complete development of every science. And as Botany includes not only the history of the plants that have existed on the earth's surface, but also the consideration of how they can be adapted to the use of man: so Jurisprudence comprises not only the history of human laws, but also the inquiry, how our laws can be framed to secure in the best manner the sustenance, the happiness, and, above all, the moral well-being of the human race.

It remains for me to say something of the work itself; and of the writer to whom Bentham is so much indebted for having his views and writings brought before the European public.

As to the work itself, it will include

1. The Treatise on Codification.

2. Selections from the Treatise on the Organization of Tribunals.

3. Selections from the Treatise on the Law of Evidence.

In investigating the entire subject matter of law, it is natural to consider, first, the structure of the law itself, what qualities it should possess, how it should be framed, and how it should be promulgated. But Law, however skilfully framed, would be of little use, unless tribunals to apply it in cases of dispute, and officers to enforce the decisions of the tribunals, were efficiently constituted. Hence, the next most important branch of Jurisprudence is that which treats of the principles on which tribunals should be constructed, the proceedings in

them regulated, and the duties of their judicial and executive officers defined and enforced. Next to tribunals, the most important branch of law is that which relates to evidence ; as all proceedings in Courts of Law must rest on evidence of the transactions to be decided upon. These subjects form the most general part of pure Jurisprudence. They apply to all human transactions that can become the subject of legal investigation ; and the principles involved in them depend almost entirely on the considerations proper to Jurisprudence alone, and do not involve the principles of either Moral Philosophy or Political Economy.

The more extensive and much more difficult part of Jurisprudence, is that which relates to the different departments of human affairs. In this branch of the science, it is necessary to consider not only the elementary principles of Jurisprudence, but also the convictions of mankind with respect to the affairs to which it is applied. Thus, the laws which ought to be framed with respect to marriage, the guardianship of infants, and the succession to property, must depend on the convictions of mankind with respect to the duties arising from the fundamental relations of husband and wife, and parent and child. Again, the laws with respect to trade must depend on the general reception or rejection of the Free Trade principle of non-interference with private enterprize. The laws respecting land must depend on the duties which the owners of property are expected

to discharge, whether they should be mere passive recipients of whatever rent they can obtain, without the performance of a single duty to society ; or whether they are to be considered as the class who are endowed with the surplus produce of the land for a high purpose, and who have therefore the largest duties towards society cast upon them. And so in every other branch of law, the principles which ought to guide human conduct in the transactions to which it relates must be fully considered in legislation.

To many it will appear strange that the present work, instead of being composed of extracts from Bentham, should be a translation of selections from Dumont's Digest. The reasons which make the latter more suitable for my purpose are so well explained by one who was the friend of both, and whose eminence as a lawyer, as a jurist, and as a statesman gives weight to his opinion, that I shall quote his words. In a review of Bentham's writings on Codification,* Sir Samuel Romilly says :—" The duty of impartial criticism would be ill-discharged, if, after having spoken as we have in this article, of Mr. Bentham's extraordinary merit, we were to say nothing of his defects. We are fully sensible of them ; and we have observed them with deep regret ; for we can regard in no other light than that of a public misfortune whatever prevents his

* Edinburgh Review, 1817, vol. xxix., p. 236.

writings from being known, and their utility and importance from being universally acknowledged. What principally obstructs their circulation is the style in which they are composed. Unlike most authors, Mr. Bentham's first publications are, in point of writing, the most perfect; and long habit and frequent exercise, instead of improving his language, seem only to have rendered it perplexed, obscure and uncouth. English literature hardly affords any specimens of a more correct, concise, and perspicuous style than that of the "Fragment on Government," which was the first of Mr. Bentham's works; or the "Protest against Law Taxes," and a great part of the "Defence of Usury," which were early productions of his mind. Since those publications, he seems, by great effort and study, to have rendered his style intricate and his language obscure. His frequent inversions, his long parentheses, the novelty and harshness of many of the terms which he has so often, and, we must say, on many occasions so unnecessarily invented, and the length and complication of his periods, have rendered some of his compositions illegible to all who will not, in spite of their repulsive forms, persevere in the difficult task of studying rather than reading them.

"It is indeed when he speaks by another's lips that he appears to most advantage, and it is to the grace of style* which Mr. Dumont has given him

* No one who has not compared the Digest of Dumont with the

that he owes the reputation which he has acquired. and which is from that cause much greater in foreign countries then in his own. Notwithstanding, however, all the untoward circumstances which have prevented the genius of Bentham from being justly appreciated by his contemporaries, it must be accounted an instance of rare good fortune that such a man as Dumont became his acquaintance and his friend. If it very seldom happens that to such extraordinary talents as Bentham possesses, is united an ardent desire to devote them totally and exclusively to the service of mankind; it is no less uncommon to find a writer possessed of the eloquence, the power of developement, and the perspicuity and vigour of expression which so eminently distinguish Dumont, contented, instead of applying his great endowments to some original work which might immortalize himself, to submit, from no other motive but that of benefiting his fellow-creatures, to the humble office of setting forth another's ideas to advantage, and of advancing another's fame. As the merit of the greatest philosopher of antiquity would have been little known

works of Bentham, as published since his death, would suppose from the modest account given by Dumont of his labours, that the arrangement and language of these treatises are so entirely his own. No selections from Bentham, unless similarly remodelled by some Englishman of equal talent, could be compared in style and expression to a translation of Dumont's Digest. In making selections from Dumont for this work, I have, however, exercised great freedom in omitting not merely sentences but entire sections, when their contents seemed to me to be unimportant at the present day or unsuited for the purposes of instruction.

to posterity, but for the sublime writings of his eloquent disciple; so it is possible that, but for Dumont, Bentham's reputation might never have emerged from obscurity."

The merits of Bentham's writings on pure Jurisprudence rest on a more lasting basis than the testimony of individuals, however eminent. His life was spared to see the commencement of the spirit of Law Reform in England, which has led to so many of the suggestions contained in these treatises being adopted. When thus tried by experience, they have been found in most instances perfectly successful, and have secured for many of his followers a high reputation. The extent to which his views have been carried out, or are contained in the changes now under public consideration, can be most satisfactorily shown in the notes to the different sections.

It appears, then, that these treatises are calculated to serve the great end of all teaching of Jurisprudence. They show the principles on which the great reforms in our laws for the past twenty years have been made, and they suggest those changes which are still required. Thus they enable us to understand the law as it is, and to learn what it ought to be.

ELEMENTS OF JURISPRUDENCE.

PART I.

CODIFICATION.

DUMONT'S PREFACE.

THE different writings which were published by Bentham relative to codification may be divided into two distinct classes. The one includes the different proposals made by him to foreign powers, to the President of the United States of America, to the Emperor of Russia, the Cortés of Spain and Portugal, &c., for the purpose of obtaining from them a formal request to undertake the preparation of a civil and penal code ; with the single condition, that the result of his labours should be laid before competent judges for examination.

The other class is of a quite different character. It consists of writings in which the author exposes all the inconveniences of an unwritten law, and developes his own views respecting the compilation of a complete and universal code.

I have availed myself of the materials contained in both these classes, and have endeavoured to make a digest of these different publications ; borrowing from some what was wanting in others, and developing at length parts which their conciseness rendered obscure.

The following is the order of the contents :—

In the first section, I have given a general idea of the qualities desirable in a complete body of laws.

In the second, an explanation of what is meant by the expression, *integrality* of the code.

The third is devoted to an exposition of the means which must be adopted for the purpose of giving to the law the greatest capability of being known.

In the fourth is shown the advantage, or rather the necessity, of accompanying each law with a justificatory commentary.

The fifth treats of the many and great inconveniences which arise from an unwritten law, known in England by the name of the "common law," and in France as the *Jurisprudence des Arrêts.*

The sixth consists of a critique of Bentham's first work on Codification, taken from the Edinburgh Review. The reader will see with pleasure the same subject handled by one of the most accomplished of English jurists.

The seventh contains an abridgment of the proposal of the celebrated Lord Bacon, which he made to James I. on the necessity of consolidating the statutes, that is, reducing all those which refer to the same subject to a single statute ; and on the means of improving the unwritten law. At the time he made this proposal, he was solicitor-general and privy councillor. James would willingly have been the Justinian of England, but he dreaded the

hostility of the lawyers ; and even Bacon himself, when he became chancellor, did not dare to renew his projects of reform.

In the eighth will be found a summary of the speech delivered by Sir Robert Peel, on the occasion of introducing his bill for the consolidation of different statutes in 1826. I do not mean to assert that the reforms proposed by this statesman were radical, or such as were required by the state of English law ; but I say that it is unjust to represent them as insignificant, or to reproach him with having made use of a fly-brush to cleanse the stables of Augeas. It is only fair to presume that he did all that could be done, considering the state of public opinion, and that a more sweeping reform was impossible at that juncture. It was a task of great daring to expose boldly the imperfections of the criminal law, and to lay the first foundations of a better system. If we only continue to consolidate the statutes, we cannot fail to perceive the many advantages which must arise from a complete codification. The jurist in his study may aim at perfection ; but the statesman, who has to overcome the passions and prejudices of those who oppose him, must only aspire to do the best he can.

[The tendency of the public mind towards a strong conviction in favour of the importance and feasibility of codification, is shown by the recent conference held in London for the promotion of a uniform code of Commercial Law for the three kingdoms. This conference was the result of a movement commenced by the publi-

cation of Mr. Leone Levi's great work on Commercial Law. The same tendency is indicated by Lord St. Leonards' speech on Law Reform. He stated that the adoption of the Criminal Code prepared by the Criminal Law Commissioners, was amongst the measures of Her Majesty's government; so that this most important branch of our laws, which has been so ably codified, will, on the adoption of the code, be no longer subject to the defects and inconveniencies of unwritten law. Under these circumstances, it is almost unnecessary to notice the arguments against codification. But one source of much of the opposition to it has arisen from an ambiguity of language which will long survive the controversy. The word "Codification" has two meanings entirely distinct; first, the introduction of a foreign code of laws into a country, without any regard to the previous laws and legal institutions; and secondly, the classification, arrangement, and simplification of an existing body of national law. Now, it was chiefly against codification in its first sense that Savigny and the German jurists contended, being naturally alarmed at the proposition of introducing the Code Napoleon into Germany. But in favour of codification in the latter sense, the reasonings of Lord Bacon, Bentham, Sir Samuel Romilly, and Sir Robert Peel will be found perfectly valid.]

CHAPTER I.

QUALITIES DESIRABLE IN A BODY OF LAWS.

The qualities which, taken together, constitute perfection in a body of laws, are so intimately connected with each other, that it is difficult to separate them even in thought. In explaining one, it is almost absolutely necessary to anticipate the others; and it is for this reason that it is more convenient to present them all at once.

I shall not stop here to consider the principle which should animate the code in all its parts, viz., the principle of general utility; or, in other words, "the greatest good of the greatest number." This is the grand aim and end of the legislator, to which all his efforts should be directed. I have said, "the greatest good of the greatest number," for we cannot go farther than this. We cannot *maximise* good equally for all. We cannot assure the same rights or the same enjoyments to all; there are some necessary obligations which weigh more heavily on some than on others; and, again, obedience to the law is secured only by means of

penal sanctions, which constitute, if I may so express myself, the price paid by society in exchange for general security.

The first condition of the code, then, should be, that it should have for its end the general interest; and if this condition has been satisfied in the political code, that is, in the code which establishes the different powers of the state, it will be easy to follow it up in all the other branches of legislation.

The second condition, which I only glance at here, but to which I shall soon return, is *integrality;* that is to say, it ought to be complete, or, in other words, embrace all the legal obligations to which a citizen should be subjected.

The third condition is imperfectly expressed by the word *method.* I mean by this, not only precision of language and clearness of style, but such an arrangement as would allow all those interested in it easily to acquire a knowledge of the law. If the genius of our language were favorable to the introduction of new words, I should express all that is included under this comprehensive head by the word *cognoscibility;* that is to say, the law should have a great *aptitude to be known.* It is not easy to say how many different merits are comprised in this.

There is no one word which can express the fourth condition to be satisfied by a body of laws. We must convey our meaning by a periphrasis. Each law should be accompanied by a commentary

or exposition of the grounds on which the law is founded, showing what relation it bears to general utility. This commentary is, as it were, a justification of the law ; *justifiability* of the law would, perhaps, be the proper word to express this characteristic of good laws ; since those only are good for which we can give good reasons.

CHAPTER II.

INTEGRALITY OF THE CODE.

I TOUCH upon this subject merely for the purpose of referring the reader to the General View of a complete body of laws, contained in the "Traités de Legislation Civile et Penale,"*—the only work in which the different parts of the law are presented in their relation to the whole; in which their points of separation and coincidence, their proportional extent and their limits, can be easily perceived. In that work may be seen the plan of a penal code, with its division into private and public offences; the plan of a civil code, and its division into titles general and particular; and an analysis of political powers: the first attempt of the kind ever made. The other branches of the law, maritime, military, ecclesiastical, and financial, are arranged according to their relation to the penal and civil code, and to political and international law.

* This was the first work which Dumont digested from the manuscripts of Bentham. It is printed in three volumes, and it is the third volume which is here referred to. See the third edition, published in 1830.

The laws of procedure and of judicial organization, which are only the modes of carrying the positive law into execution, follow next, and complete the system. We have thus the entire body of the laws digested in the same spirit, all having reference the one to the other, embracing all the rights and all the obligations of citizens, which constitutes a universal code, or what may be called a *pannomion*, a word which unfortunately does not admit of translation.

" A compilation of laws made on this plan would be a vast undertaking ; but that is no reason for omitting any portion. Whether a law be written or not, it is equally necessary to know it. Closing our eyes upon an immense burthen which we have to carry, does not lessen the weight of it. Besides, what part can be excluded ? To what obligations can we fairly subject a citizen when he knows nothing of them ? Laws of which he is ignorant are only a snare for him. This would be the greatest of crimes on the part of a government, if it were not the result of incapacity or folly. Caligula hung up the tablets on which his laws were written, so high that no one could read them. In how many states are matters managed still worse ! The laws are not even on tablets ; they are not written at all. The same thing is now done through indolence, which the Roman emperor did through tyranny.

"Completeness, then, is the first essential requisite. Nothing must be law which is not in the code.

Nothing must be left to be decided by custom, or by foreign laws, or by the pretended law of nature or nations. The legislator, for example, who adopts the Roman law, does he know what he is doing? can he know it? is not this enough to give rise to eternal disputes? does he not by a single word render again arbitrary all that he has pretended to make absolute? Is not this intermixture enough to vitiate his whole code? If two quantities, the one finite and the other infinite, be added together, will not their sum be infinite?

"It may be objected to a code, that it is not possible to provide for all cases. I admit that we cannot provide for them *individually*; but we can *in kind;* for instance, we may be certain that all classes of offences are comprised in the tables which I have given elsewhere, although we could not be certain that we have foreseen all possible particular offences.

"A good method enables us to be in advance of events, instead of following them; we rule them, instead of being ruled by them. A narrow-minded and timid legislator waits until certain evils arise before he takes precautions against them; whilst, on the contrary, an enlightened legislator knows how both to foresee and prevent them. It was, doubtless, natural at first to enact civil or penal laws only as circumstances proved their necessity. The breaches were filled with the bodies of victims. But this mode of proceeding, however suitable for

a barbarous age, ought not to be a precedent for an age of civilization."*

Several nations have codes. Denmark, Sweden, Austria, Prussia, Sardinia have for a long time enjoyed this advantage. France has obtained it more recently and more completely. But there is not one of these codes, or collections of codes, which presents a perfect whole. I do not speak of their respective merits or demerits; we shall be better able to judge of these when we shall have considered the qualities necessary to constitute a good code. I avail myself of the example of these nations only to prove to those who still live under a system of unwritten laws, the possibility of their obtaining the same advantage, and thus escaping from chaos.

England has no code, but she possesses the richest materials for the formation of one. Traverse the continent of Europe, examine all the libraries of legal treatises, all the archives of the different tribunals, and you will never obtain from them a collection of products, which, for variety, extent, clearness, or force of argument, can be compared with the abundant store contained in the English law reports, with the numerous abridgments and treatises written to facilitate the study of them in an order more or less methodical.

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* These passages are taken from the *Traités deLegislation*, Vol. III., chapter XXXI. The reader may refer to the same work for two chapters which relate to Codification—On the purity of the composition of a body of laws—and, On the style of Laws.

From these materials, the stately edifice of a complete body of laws could be raised, if we could only find the architect who could make the proper use of them, rejecting whatever is useless, and preserving what is valuable. What a relief to the human mind to be no longer compelled to load itself with false science ! How much time would be gained for useful work and the real sciences ! But this is only one of the thousand advantages which would follow from a complete code. We shall afterwards see that, until we arrive at this result, no solid guarantee for the liberty or safety of citizens can exist.

CHAPTER III.

COGNOSCIBILITY OF THE CODE.

By this word, I mean such an arrangement as would give to the universal code *the greatest aptitude for being known.* It is necessary that an idea be present to the mind in order to produce an effect. This is true throughout the whole range of human affairs; and, consequently, it holds with respect to law. Weak creatures that we are! it is in an age which boasts to be an age of enlightenment that it is necessary to recal truths of this kind; nay, to recal them without hope of having them applied to practice. Yes, it is only in so far as the law is known, understood, firmly and clearly fixed in the mind, that it can become a rule of action, give to each individual a just idea of his rights, and put him in a proper position to defend or recover those rights. Laws which are not known surround a man with perils; every one of his actions exposes him to the danger of violating a law, and thereby incurring a penalty.

In England, for instance, a mass of new laws is each year thrown as it were on the heads of the people, like a heap of rubbish ; and it is the business of each one to select from this what concerns him individually ; and, if he can, to preserve it in his memory.[1]

There are certain means of making the laws known to the people, which would be easy in practice, and which present themselves at once ; such as publishing authorised editions of them at low prices, distributing them at the different public offices, posting them in certain places, &c. But these means of notification, which depend on processes which are so to speak *external*, would have but little effect, unless the matter of the law itself were clearly and compendiously arranged.[2]

The first principle of division consists in separating laws of universal interest from those of special or individual interest.

There are some laws with which every man should always be acquainted, and there are others which are only required on certain occasions ; in other words, there are laws of a permanent, and others of a temporary and occasional interest.

The penal code is the first in importance ; all human actions which are the object of law are necessarily included in it. What is called the civil law is only a collection of explanations, or, in other words, an exposition of what is contained in the penal.[3] Thus, the penal code prohibits you from

taking an article of property to which you have no right; the civil code explains to you the different circumstances which give you such right, or make anything your property. The penal code forbids adultery; the civil treats of all that concerns the marriage state, and the reciprocal obligations of man and wife.

But how could a penal code be drawn up according to this rule of universal interest? By distributing crimes in an order as easy to understand as to remember. What are the objects which we have to defend?—our person, our reputation, our property and our condition. This would be the natural division of the subject matter of the penal code; and this distribution would present to each individual a catalogue of those actions which he should forbid himself with regard to his neighbour. The simplicity of this arrangement would be as favourable to right understanding of the laws as to their being remembered. I will not carry these details farther; it would require a code to be made, to show how a code ought to be made; my object at present is only to explain the principle.

Every one will perceive that the laws by virtue of which a man is enabled to defend his person and property, are of the number of those which he ought to know, and of which he cannot remain ignorant without danger to himself; but the laws relating to the procedure in a civil case have only a temporary and transient interest for him; he may spend

his whole life without requiring to become acquainted with them in detail.

I take for granted the existence of a code which embraces the whole subject matter of law. Detached from it, there will be special codes corresponding to the different peculiar situations an individual may occupy ; these codes will be of greater or less extent, as the military, the maritime, the commercial codes, the police laws, the game laws, &c

But, it may be said, what is the object of this notoriety of the law ? Would you have every one his own lawyer ? Certainly, I would ; for the care and interest which we take in our own affairs is always greater and more sincere than what we can expect from a stranger ; besides, we are not always in a position to pay for the services of a lawyer, nor have we him always beside us to consult when we wish. But however useful this *high* degree of independence would be to each individual, we cannot expect what is impossible. Lawyers will always be necessary to those who are deficient in talent, or who have not time or sufficient confidence in themselves.[4] Important and difficult cases will always require experienced lawyers ; but there is the same difference between those who have a competent knowledge of the laws and those who are entirely ignorant of them, as there is between the clear-sighted and the blind ; and it is the number of blind that I would wish to diminish. Let the code be made, and well made, upon the principles

which I have pointed out ; and there is no man of ordinary attainments who could not in his leisure hours acquire a knowledge of law, superior even to that of experienced lawyers in a country where customary law prevails. When this knowledge shall have become general among a people, there will be upon the whole fewer unjust actions, fewer crimes, and fewer faulty and erroneous contracts, than among a people whose ignorance in matters of law makes them an easy prey to fraud and cupidity.

[1. The difficulty of ascertaining what the law is in Ireland, is greatly increased by the mode of legislation now adopted. When any reform in the law is introduced in England, the operation of the act is generally limited to that country. But in the next or some subsequent session an act is passed to effect the same reform in Ireland. As the laws of the two countries are so nearly alike, springing from the same common law, and having similar judicial institutions, the measures requisite to carry out the same reform in each country must be very nearly alike. But in consequence of the necessary provisions not being prepared by the same person, included in the same bill, and passed at the same time, a number of minute differences are perpetuated or created, exceedingly embarrassing to Irish lawyers and judges; who have to use English text books, and to refer to English decisions, to guide them in interpreting the new legislation.

The Acts for the Abolition of Fines and Recoveries afford a simple illustration of what takes place even under the most favourable circumstances. These acts were framed by the same eminent conveyancer, Mr. Brodie, and yet there are differences between them. The English act was passed in 1833, to come into operation on the 31st *December*, 1833. The Irish act in the next session, to come into operation on 31st *October*, 1834.

And yet these acts only "correspond in *most* particulars," and not in all. In the interpretation clauses, the word "estate" is defined by a different set of phrases in one act and in the other. How is it possible to carry such minute distinctions in the memory? Suppose an English conveyancer examining an Irish title, how could he act with safety on his knowledge of the English act; or how could he be expected to recollect that the one act came into operation on 31st *October*, 1834, and the other on 31st *December*, 1833? Or suppose an Irish lawyer to find an English decision in the meaning of the word "estate" in any section, how could he be expected to recollect that the word was defined differently in the Irish act.

When the English and Irish acts are not prepared by the same person, the differences are no longer minute, but are still very inconvenient. Thus Mr. Whiteside's Common Law Procedure Bill, introduced in the present session, contains much more extensive changes than the English act of last session; yet the general object of the two acts is the same. If all the new principles contained in the English act had been applied to Ireland last year, and the new principles in Mr. Whiteside's Bill applied to England this year, the cotemporaneous text books and the decisions in both countries would be available for the interpretation of these statutes, and for facilitating a thorough understanding of the new principles involved in them.

2. The preparation of Acts of Parliament affords one of the most important fields for the application of the principles of Jurisprudence. In order that they may be applied, it would be very desirable to change the present system of legislation. The Houses of Parliament should confine themselves, in the first instance, to the adoption of principles or heads of legislation. These should then be referred to jurists, or eminent lawyers skilled in special departments, and they should be employed to report on the existing state of the law respecting the subjects affected by the new principles which had been adopted, and also to prepare the provisions necessary to carry them into full operation. They should be allowed to suggest any extension or modification of the heads referred to them, which would make the branch of law more simple and complete. The Bill so prepared, with the report and suggestions, should then be printed

and published, and any proposals of changes in it which received the approval of either House of Parliament should be referred to the framer of the bill to incorporate in it; the bill, however, being finally passed by each House at one reading, which would correspond with the third reading at present.

The reports thus rendered necessary would disclose the complicated and uncertain state of our law, and the suggestions of the provisions necessary to make each branch simple and complete would make manifest to the legislature and to the public the advantages of Codification in such a palpable form, that a codified system of legislation would alone be tolerated. And if this process were pursued for some years, the laws of England would gradually be formed into a perfect code.

3. Bentham in this section takes too narrow a view of the Civil law. It has an important purpose to discharge quite distinct from that of being the basis of the Penal law. To take a simple illustration: The civil law has, with respect to the entire of human affairs, to make provision for the manner and form in which various contracts shall be entered into, and the occasion on which obligations and duties which can be legally enforced shall be presumed to arise. It has further to provide for all those cases, such as intestacy, where acts or contracts are wanting or defective. The simpler way to see how much Bentham has overlooked, is to consider the large class of breaches of contract and neglect of obligations, and other civil injuries for which redress is provided in nations of advanced civilization, whilst such injuries are not considered as deserving of punishment.

4. The effect of improvements in the law on the business of the legal professions is a subject referred to at greater length in a subsequent part of this work. Bentham seems to have confined his attention to the immediate effect of such improvements, without allowing for the change in legal business which they would give rise to. Under a system of uncertain laws, it is extremely difficult to make provision beforehand and guard against future evils. The great occupation of the members of the legal professions is, therefore, in litigation respecting the consequences of evils that have arisen. Under a system of certain laws, on the other hand, legal ingenuity would be exercised in making wise arrangements beforehand, and in guarding against evils before

they arise. This is a much higher and nobler exercise of the powers of the human mind, and would, in such a state of society, give as extensive and as valuable employment to a legal class as the present kind of law business gives to the legal classes of the present day.]

CHAPTER IV.

JUSTIFIABILITY OF THE CODE.

Every portion of a universal code should be accompanied by an explanatory commentary, which would give the reasons of its enactment. The motive of each law should appear upon the face of it; I mean by this, its relation to the principle of general utility, the good which results from it, and which ought to win for it the approbation of the public.

Let us consider in detail the different classes of persons for whom such a commentary would possess particular advantages.

First. If you take the inhabitants of a country generally, they do not require to be acquainted with the whole code; but there are certain parts of it which concern them habitually, and there is no one part which may not concern them specially on particular occasions. The commentary would be useful to explain to them the true meaning of the law, especially if the wording of it were such as to leave

any doubt on their mind ; and, still more, it would serve to fix it in their memory; for we remember without difficulty whatever we thoroughly understand ; whilst that which is unintelligible to us, like the words of an unknown tongue, is easily forgotten. The commentary would thus be at once a compass and an anchor.

Secondly. With respect to the judges themselves, this commentary would be both a guide and support to them, whenever they would be required to explain the grounds of their decisions. They would only have to develope and apply those reasons on which the law is founded; and the more closely they would conform to these reasons, the more secure their judgments would be from all imputation of arbitrary conduct or of partiality.

Thirdly. The commentary would not be less useful to the legislative body. Temporary circumstances have often an undue influence upon large assemblies, and frequently dispose them to allow of exception after exception to existing laws, until the principle involved in them is completely lost sight of. The commentary would be an admirable safeguard to preserve the code from all innovations resulting from rashness, ignorance, and caprice; and even to restore it to its primitive state, should it ever become changed for the worse.

Fourthly. If we regard this commentary as furnishing instruction to the community at large, it is favorable to the general well-being, by improving

the character of men as moral and intellectual agents.

One word more on the necessity of this commentary. Can a law that is not founded on good reasons be beneficial, and what confidence is to be placed on that for which no good grounds can be produced ?

We may add, that this work would be a sure criterion of the fitness of legislators for their office; as ignorance would be sure to betray itself from the first in this trying task.

But, it may be said that this commentary would add greatly to the bulk of the code, and would entirely destroy that brevity so necessary to a body of laws. The objection is founded on false notions; the farther we advance in legislation, the more we perceive that general principles govern every part of it ; and that as the same reasons apply to a vast number of details, there is no necessity to repeat them. We cannot judge of a commentary by the length of the debates each particular law gives rise to: this would be to compare the waters collected in a regular canal to the flooding of a river over a vast plain.

CHAPTER V.

DISADVANTAGES OF UNWRITTEN LAWS.

The two following chapters refer only to those countries which do not enjoy the advantages of a written code, particularly to England and America.* The law in these countries is divided into two very unequal portions, one of which is called the "common law,"—a singular expression to denote a system of laws essentially vague and undetermined; from which the successive judges have drawn a vast number of decisions, giving rise to a set of judicial rules, and which they profess to follow in all subsequent cases.

The other portion is made up of statutes, or positive laws, enacted by the parliament in England, and by the congress in America.

The common law is not then a written law, a

[* The laws respecting Civil Procedure have recently been codified in the State of New York. Mr. Whiteside, the Solicitor-general for Ireland, in his recent speech introducing his bill for Amending Proeedure in the Superior Courts of Common Law in Ireland, referred to this Code as having afforded him some valuable suggestions for legislation.]

law *in terminis*. In each case the judges assert that they give a decision similar to that given before in a case of the same kind ; they do not profess to judge arbitrarily; on the contrary, they are anxious to keep themselves clear of this imputation as injurious to their character ; being, as they say, only the interpreters of that law which has been extracted from all the prior decisions.

The readers are now in possession of the question at issue, and can judge for themselves of the arguments which may be brought forward against this manner of deciding.

The law ought to be known. This is the principle from which we set out ; but to be known, it must be in existence. Does the common law exist? When we say, "so the common law wills," "the common law prohibits this," we have here an imposing phrase. Well ; look for the common law ; ask them to point it out; it is nowhere to be found ; no one can tell you where it is, or what it is ; it is a fiction, an unreality, an imaginary law.

Would you know what a law, a real law is? Open the book of the statutes, look at it existing before you—the reality, not the counterfeit and false resemblance of it, which the English legislator passes off for the reality by means of a delusive word. I say, word, for it is nothing more ; and the English language is perhaps the only one which, in this case, uses the same term to express the reality and the counterfeit ; the name has no small

influence in making this imaginary law to pass under favor of the real.

What answer do the defenders of the common law make to this ? "It is true that we cannot cite any one individual law ; the common law exists only as a whole ; but when we have once obtained a true conception of it as a whole, we are able to see the relation of its component parts to each other, and the result is a complete system."

All this is very plausible, but what does it mean ? What is the meaning of a whole, if it be not made up of component parts ? What is a body of laws, if it be not a collection of individual laws ? We might as well speak of a city without houses, or a forest without trees, as of a common law in which a single positive law could not be found.

The defenders of the English system have another and a better answer ; there is no positive law in the common law ; but there is that which is as good, and which comes to the same, namely, rules of law ; that is to say, the decisions of the judges, delivered in certain cases, which serve to guide their successors, and according to which they must decide in all similar cases.

Let us admit this ; the first inference which may be drawn from it is, that by this system the judges are made legislators. In appearance, they decide according to a law enacted by the supreme authority ; whilst, in reality, they are themselves the authors of the rule which directs their decisions.

But it will be said that this matters not; if the judicial rule is constantly followed, if there result from this fictitious law decisions as certain and as uniform as those resulting from statute law, the security of the citizens will be equally provided for under both systems; it is only a dispute about words.

There is nothing more gratuitous than to suppose that stability, certainty and uniformity could result from decisions based on an unwritten law.

Is the common law now what it was formerly? Certainly not; it yields, changes, or is influenced by events and circumstances. The statute law, on the contrary, is a tangible substance, which no doubt may be mutilated or disfigured, but which remains always substantially the same, to be compared with the decisions of the judges.

I wish to take the opinion of a lawyer. I ask his advice; what judgment I may expect from the court according to its antecedent decisions; how the law bears upon my particular case. He examines and compares the decisions, and gives as his opinion that the law is clearly in my favour. I consult other advocates, and they likewise have the same opinion.

Ought I on this account to entertain no doubts of gaining my cause? No. I have only a favourable presumption on my side. My adversary has also consulted counsel; his advisers have found out decisions having quite a contrary bearing, and more numerous than those which are favourable to

me. Probability, greater or less, is the whole result of the most learned and judicious consultation.

Decisions have given rise to rules of law, and the rules in turn give rise to decisions ; thus both become alternately cause and effect. Such is the essence of this system.

These rules and decisions are contained in an infinite number of abridgments and treatises, which are themselves only extracts from the reports, which contain not only the decisions in particular cases, but also a summary of the arguments on both sides ; in a word, the opinions of the judges on the rules of law applicable to each particular case.

Now, relatively to the decision which has appeared so favourable to you, how many objections, how many means of invalidating it can be raised on the part of your antagonist, or in the mind of the judge! I can convey here but a feeble idea of the technicalities of legal argument ; they are innumerable. A practised lawyer passes his life at the bar without becoming acquainted with all of them ; and his science in the greatest number of cases is purely conjectural.

You will be told, for instance, that the report upon which you rely was drawn up by a reporter who was not at all correct ; that another report of the same case presents considerable variations ; that in that decision sufficient regard had not been paid to an antecedent one ruling the contrary way ; that there had not been unanimity among the judges ;

that the most distinguished and experienced of them had held a different opinion ; that it is notorious that the opinion of the bar was against it ; that the published report which you cite is contradicted by another not published, contained in an authentic manuscript in the possession of your antagonist's counsel ; in fine, you will be told, and it will be proved to you, that there are grave judicial authorities on the same point, some for and some against you ; and that in this conflict of different opinions, all that can be alleged in your favour is more than counterbalanced by what is advanced on the part of your adversary.

This, I repeat, gives only a feeble idea of the arguments founded on the prior decisions of the judges; but it will be sufficient to show that an action may be commenced with every hope of success, founded on the confident opinion of a learned and judicious advocate, and may yet, after all, end in defeat on a field of battle so dark and so little known.

Uncertainty is not the only evil of unwritten laws ; it is to be observed, that from their very nature they are incapable of correction. If the ancient decisions are still to be the foundation of the law, though they should be in opposition to the manners, the interests, and the necessities of the present times, these inconveniences must still be submitted to ; for there is no means of remedying

them, since we could not adopt new decisions without overthrowing the old ; and the whole system, deprived of its foundation, would fall to the ground.

What can be expected of a system of law which is unalterable, irremediable, incapable of and inaccessible to all the improvements of experience and reason ?

But the English judges, whilst they defend themselves from the imputation of innovation, have been obliged to yield to necessity ; and for this purpose they have had resort to two means of mitigating the rigour of the common law—*forced constructions*, and *distinctions*.

By the words "forced constructions," I mean those cases where the antecedent decisions having been expressed in words of a certain defined meaning, the judge finds in them a new signification, by which he escapes all embarrassment, when the prior decision is evidently contrary to common sense, and when he wishes to get rid of it while he appears to follow it. But who does not see that such a remedy only tends to increase uncertainty, and give rise to a new evil ? The more we study the language of the common law, the more we perceive how numerous these forced constructions are, and that its whole domain is full, as it were, of pit-falls.

The art of "distinctions" is no less convenient to conceal that which we do not like to avow ; that is,

the absolute necessity there is to correct, modify, and adapt the common law to the necessities of society, without the change being perceived.

What is a distinction ? It is an exception which removes a particular case from under a general rule. Now these exceptions have never been determined beforehand ; they spring from occasional circumstances ; they depend on the subtlety of the advocates or judges ; it is, then, impossible to take precautions against them, and as we cannot fix a time when these exceptions will be exhausted, and as there is no general rule without them, it follows that this way of removing the inconveniencies resulting from antecedent decisions only adds to the uncertainty of the common law.

It will be said that statute law, from its nature as a fixed rule, would present the same difficulties, and would of necessity require the same system of forced constructions, distinctions, and exceptions. To this I answer that there is nothing more common than to accompany a law with a number of exceptions, which being all known beforehand come upon no person unawares. The more experienced the legislator is, the wider range will these exceptions embrace. But whilst I acknowledge that a written code will have its imperfections, these will at least be palpable and consequently easy to correct ; whilst the admirers of the common law are continually praising the goddess of their idolatry ; they will not recognise any fault in her, nor

consent to any confession which could diminish her glory.

But does not such a system, so subject to these forced constructions and distinctions, present dangerous temptations to those who are charged with its administration as judges or advocates ?

I request the reader to consider well this assertion, "In the majority of cases which have been decided according to the principles of the common law, the judge might have given a verdict directly contrary to what he did give, without the slightest imputation on his honesty or judgment." I do not find this maxim written anywhere ; but there is not a lawyer in England who has not heard it from the mouth of his colleagues ; nor one who has not verified it by his own experience. Yet there is not one perhaps who perceives what a censure it implies on a law, which offers to the judges a sure protection for the most contradictory decisions.

"There is no case which ought to be given up as desperate." What are we to think of such a saying as this? Yet these very words were used by a most distinguished lawyer, Mr. Wedderburn, who was then in office, and who, being raised to the bench under the title of Lord Loughborough, became finally lord-chancellor of England.

I now ask, is not a power so arbitrary capable of being made an instrument of oppression ? If there were a judge disposed to allow himself to be corrupted, the imagination could not conceive nor the

heart of man desire a system better suited to throw an impenetrable veil over his actions than this; and if there be no corruption, this is not to be attributed to the law, but to the virtue of the judges ; above all, to the government which presents so many other guarantees of justice, especially to that publicity which is a happy antidote to the faults of a system so uncertain and conjectural.

Nevertheless, let us not exaggerate ; let us never forget that this common law, which appears to me an evil and a disgrace in our present advanced state, was originally a safeguard and a blessing.

If we go back to the primitive ignorance which prevailed at the commencement of the Anglo-Saxon government, we shall see that the decisions of the judges, whence these general rules have sprung, although they had not received the sanction of a legislator, presented nevertheless some important advantages. These decisions and rules served for a light to direct their successors; they also restrained them within certain limits, and prevented them straying beyond them. Thus were, in fact, already secured some of the good effects of law. Originally, each decision was arbitrary; each judge had to make a path for himself; there was no science, as there was no experience. Progress only became apparent when the habit was adopted of collecting the various decisions, and the reasons upon which these were founded ; thus has arisen that immense compilation of reports, that rich treasure of legislation, that

inheritance of the collected wisdom of the most profound lawyers, to which nothing among other nations can be compared, and which furnishes all the materials which could be desired for the construction of a new code. But whilst I acknowledge this advantage of the common law, of guiding and settling decisions in a great number of cases, it is no less true that in the majority of cases it leaves questions to be discussed, doubts to be resolved, and changes which cannot be provided against; and that all the good which results from it, and which no person disputes, might be doubled or even increased ten-fold by a written code, in which all the acquisitions of this long experience should be incorporated.

CHAPTER VI.

SIR SAMUEL ROMILLY ON THE EVILS OF UNWRITTEN LAWS.

[This chapter contains the passages which Dumont selected for his treatise from an article* in the Edinburgh Review, written by Sir Samuel Romilly, when nearly at the close of his career, after he had been for years at the head of the Chancery Bar in England. It may, therefore, be taken as the opinion of one who was no less distinguished as a lawyer than as a law reformer.]

In spite of the panegyrics which have been so often pronounced upon our laws, and upon the administration of them, no person who is practically acquainted with our English system of jurisprudence, and who will speak of it ingenuously, can deny that it is attended with great and numerous mischiefs, which are every day becoming more intolerable. The difficulties, the expense, the tedious

* Edinburgh Review for Nov. 1817, vol. 29, no. 57, art. X. "*Papers relative to Codification and Public Instruction, including Correspondences with the Russian Emperor, and divers constituted Authorities in the American United States.* Published by Jeremy Bentham. London. Printed by J. M'Creery, 1817."

length of litigations, the uncertainty of their issue, and, in many cases, the lamentable delay of decisions, are but too well known to the great number to whom all this is a source of profit, and to the far greater number on whom it brings down calamity and ruin. What are the causes of these evils it would be rash in any one to pronounce, before he had fully and anxiously examined every part of the subject. They are evils, however, of such magnitude, that every discussion which affords a chance of leading us to the discovery of their causes, and consequently to the providing against them an effectual remedy, must be regarded as highly beneficial. Considered in this point of view, the question whether the common or unwritten law be better calculated than a written code to provide effectually for the security of men's persons and properties, in a state as far advanced as England is in civilization and refinement, is one of very great public interest; and we shall therefore make no apology for proceeding to the discussion of it, or for mixing arguments of our own with those which either we have found in the work before us, or have been suggested by its perusal.

The first step to be taken in this inquiry, is to ascertain the nature of the unwritten law by which England is at this moment governed. We are not then to understand that the rules by which property is to be distributed, and the conduct of men to be regulated, really exist only in oral tradition, and

the imperfect recollections of individuals. What is called with us unwritten law is, in truth, to be collected from a great number of written records and printed volumes; and, according to old Fortescue and to Blackstone, it is only by a twenty years' study of them that a perfect knowledge of it can be gained. It is by reading, and by reading only, that the *lex non scripta*, as well as the statute law, is to be acquired; but, in the one case, we find the law expressing its commands in direct and positive terms; while, in the other, we can arrive at a knowledge of it only through its interpreters and oracles, the judges.

The common law is to be collected not from the plain text of a comprehensive ordinance, which is open to all men to consult, but from the decisions of courts of justice, pronounced in a great variety of cases; and which have disclosed small portions of it from time to time, just as the miscellaneous transactions of men in a state of society may have chanced to require or give occasion for its promulgation.

Of a law so constituted it must necessarily happen, that a large portion must always remain unpublished. The occasion for declaring it never having occurred, it must rest (as all that is now published once did) in a latent state, till some event happens to call it into use and into notice. Of a statute law we know with certainty the whole extent, and we can at once discern what it has not,

as well as what it has provided; but under the common law there is no case unprovided for, though there be many of which it is extremely difficult, and indeed impossible, to say beforehand what the provision is. For the cases on which no decision has yet been pronounced an unknown law exists, which must be brought to light whenever the courts are called upon for their decision. For all practical purposes, a law so unknown is the same as a law not in existence. To declare is substantially to enact it; and the judges, though called only expounders of law, are in reality legislators. Of what importance is it that, by a legal fiction, the law is supposed to have had pre-existence, since, being unknown till it was promulgated by some tribunal, it was not possible that men could have conformed to it as the rule of their conduct. And yet, in this very circumstance, have some most eminent lawyers discovered a superiority in the common law over all written statutes. Lord Mansfield, for example, when pleading as an advocate at the bar, is reported to have thus expressed himself:—"Cases of law depend upon occasions which give rise to them. All occasions do not arise at once. A statute very seldom can take in all cases; therefore the common law, that works itself pure by rules drawn from the fountains of justice, is superior to an act of parliament."—(Atkyn's Reports, vol. 1, 32, 33.)

The law thus unknown to others till it was pro-

mulgated in some decision, can hardly be said to have been previously known, even to the judges themselves. When some new question is brought before them to decide, those oracles of the law do not, like the oracles of old, (the supposed sources of all wisdom and knowledge) immediately pronounce their authoritative and unerring responses ; neither do they retire to their chambers, as if to consult some code of which they are the sole possessors, and then reveal in public, to the contending parties, the text which they have discovered. They profess themselves unqualified immediately to decide ; they require to be themselves informed. It is necessary that they should hear, and compare, and examine, and reason, and be assisted by the arguments of others, before they are prepared to pronounce what the law has declared. They even call upon the litigant parties themselves to state, by their advocates, what they conceive the law to be, and to support their statements by reasoning, and authorities, and analogous decisions ; and it sometimes happens that even with all this assistance the judges find themselves unable to declare what the law is, and require the assistance of a second argument, and by other counsel.

That all these deliberations, and this laborious process, should be necessary, will not appear surprising to those who reflect what is the nature of the operation to be performed, when we would discover what the common law is upon some point

upon which it has never yet been declared. Dr. Paley calls it, and not unaptly, a competition of opposite analogies. "When a point of law," he says,* "has been once adjudged, neither that question, nor any which completely and in all its circumstances corresponds with *that*, can be brought a second time into dispute ; but questions arise which resemble this only indirectly, and in part, and in certain views and circumstances, and which may seem to bear an equal or a greater affinity to other adjudged cases ; questions which can be brought within any fixed rule only by analogy, and which hold an analogy by relation to different rules. It is by the urging of the different analogies that the contention of the bar is carried on ; and it is in the comparison, adjustment, and reconciliation of them with one another, in the discerning of such distinctions, and in the framing of such a determination as may either save the various rules alleged in the cause, or, if that be impossible, may give up the weak analogy to the stronger, that the sagacity and wisdom of the court are seen and exercised."†

* Paley, Mor. Phil. vol. II. p. 259.

† It is very extraordinary, that, with such accurate notions as Paley appears to have had on this subject, he should not have seen that this "source of disputation," as he calls it, was peculiar to an unwritten law. He strangely supposes it to belong equally to the statute as to the common law. "After all the certainty and rest," he says, "that can be given to points of law, either by the interposition of the legislation, or the authority of precedents, one principal source of disputation, and into which, indeed, the greater part of legal controversies may be resolved, will remain still ; namely,

The common law was covered with a veil of antiquity ; that veil has been, by the decisions of the judges, in part removed : what it is that still remains concealed from the public view, no one can with certainty tell. Nothing is left to us but to conjecture, and our conjectures are wholly founded upon those various analogies of which Paley speaks. The best supported of those analogies is that which generally prevails ; it is acknowledged, from that moment, as the law of the land, and as a point from which other analogies may in future be drawn.

It is not a little amusing to hear what Blackstone (who is, upon almost all occasions, the apologist for what he finds established) says of this unwritten law : —" The moment," these are his words, " that a decision has been pronounced, that which was before uncertain, and perhaps indifferent, becomes a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from ;" and he accordingly tells us, that it is " an established rule to abide by former precedents, where the same point comes again in litigation."* How, indeed, should it be otherwise ? Where the authority of a written text cannot be referred to, it is from decisions alone that the law can be collected ; and it should seem

the competition of opposite analogies." Difficulties undoubtedly often arise in the application of written statutes, and Paley himself has well pointed them out ; but they are quite of a different nature from those which attend the administration of the common law, and certainly cannot be surmounted by that competition of opposite analogies which he mentions.

* Commentaries, vol. 1, p. 69.

to be as necessary for those who administer the law, to follow those decisions implicitly, as to obey the plain injunctions of a statute: and yet, according to Blackstone, "this rule admits of exception, where the former determination is most evidently contrary to reason; and much more, if it be clearly contrary to the divine law." Here are other sources, then, from which we are to collect the written law—namely, the dictates of reason, and the declared will of God. But, unfortunately, the dictates of reason, which are at all times sufficiently uncertain as a positive rule of conduct, are rendered much more uncertain by the learned commentator's explanation. For, in many cases, he tells us—the reason of a law cannot be discovered by any sagacity, and yet must be presumed to exist; and he proceeds to lay it down as a maxim of English jurisprudence, that it is only where a precedent, or the rule which it has established, is flatly absurd or unjust, that its authority may be disregarded.* The Cambridge professor, who has commented upon these Commentaries, controverts even this position, and most satisfactorily proves that absolute demonstration of the absurdity and unjustice

* "The particular reason of every rule in the law cannot, at this distance of time, be always precisely assigned; but it is sufficient that there be nothing in the rule flatly contradictory to reason, and then the law will presume it to be well founded. The doctrine of the law is, that precedents and rules must be followed, unless flatly absurd or unjust; for though their reason be not obvious at first view, yet we owe such a deference to former times, as not to suppose that they acted *wholly* without consideration." Commentaries, vol. 1, p. 70.

of a rule is not alone sufficient, at the common law, to detract from its binding force.* By the law of England, till the legislature interposed to alter it, every statute had a retrospective operation to the first day of the session in which it passed; and acts, therefore, which were done after the session had commenced, and before the law was made, fell under the animadversion of its *ex post facto* enactments, and subjected the author of them to the penalty of having disregarded prohibitions which had no existence. A stronger instance to prove that absurdity and injustice are not incompatible with a rule of the common law, could not have been adduced.

This source of uncertainty becomes the more formidable, from the consideration that the judges are themselves to determine whether the former decision was or was not contrary to reason; or, in other words, whether it shall or shall not be binding on them. It must always therefore be in the power of the judge, (notwithstanding the oath which we are told he takes, "to determine not according to his own private judgment, but according to the known laws and customs of the land,") to relieve himself from embarrassing precedents which may be cited; he has only to declare that those precedents are contrary to reason, and were therefore themselves deviations from the common law; and

* The absurdity of Lord Lincoln's case is shocking. "However, it is now law," said Lord Mansfield, in Doe *v.* Pott, Dougl. 722.

to profess, in the language of Mr. Justice Blackstone, that he is "not making a new law, but vindicating the old from misrepresentation."

This doctrine, that former determinations are of authority only as they are consistent with reason, affords, in the opinion of the same writer, good ground for those high strained panegyrics of the law which are so often pronounced by our judges. "Hence," to use his own words, "it is, that our lawyers with justice tell us, that the law is the perfection of reason and that what is not reason is not law;"—an aphorism which is, however, involved in such a cloud of mystery, that we are at the same time told that not even the judges can, upon all occasions, discover in what that reason, the test of genuine law, consists; and that they are bound to hold everything which they find decided by their predecessors to be law, and consequently the perfection of reason, unless it be "flatly absurd or unjust." In contemplation of law, there is no medium, it seems, between the perfection of reason and gross absurdity.

Not to deceive ourselves, however, we ought to understand, that this supposed bringing to light of the ancient law, which had been for ages unrevealed, is at best but a fiction. The law so declared in many cases had no existence till the declaration was made, although the judges do not "pretend to make new law," but "to vindicate the old from misrepresentation." It has already been observed,

that where the whole law is embodied in written statutes, cases may occur on which the law is silent; but where an unwritten law prevails, this can never happen. That the law is not already disclosed, is only because the particular occasion for declaring it never before occurred. The judges being unable, therefore, to predicate of any case that it is one which the law has not foreseen, are under the necessity, with the aid of Dr. Paley's analogies, of supplying what is wanting; and of *discovering* the ancient law, which is supposed to have been once expressed in statutes that have long since mouldered away, or to have been pronounced in judgments of which no record has been preserved. In name, this differs from making laws,—but it is only in name. Whether the chasm has been made by the ravages of time, or was left in the *original* fabric of our law, it is precisely by the same process that it must be filled up. The same recourse must be had to Paley's analogies, whether the object of the judges be to conjecture what the lost law must have been; or to make a new law, which will best quadrate and harmonize with the relics of the old.

The ingenuity to be exercised on these occasions is not very unlike that of the statuary, who is called upon to restore the deficient parts of some mutilated remnant of antiquity. From that which remains, he conjectures what, in its original perfection, must have been the entire statue; and he supplies such a feature or a limb as will give its

proper form and attitude to the whole. In the same manner, the lawyer, having made himself master of all that remains of the ancient common law—having imbibed its spirit and studied its principles—endeavours to restore what is wanting, in such a mode as may best symmetrize and combine itself with the rest. In this respect, however, the artist and the jurist differ; the former gives the result of his labours for what it really is, a humble attempt to supply a loss which he acknowledges to be irreparable; while the magisterial lawyer does not hesitate to publish his ingenious conjectures as the genuine remains of antiquity. In another respect, too, the comparison fails. With our restoring jurists, it is often not the best but the first artist that tries his hand, whose essay, however crude and imperfect, must be united for ever to the beautiful original to which it has been once attached; whereas, in the arts, the first awkward attempt at restoration will give place to the happier efforts of a more skilful statuary.

Considering, then, these judicial declarations or expositions of the law as that which in every new case they to all practical purpose really are, the making of law; let us next consider what is the peculiar character of this species of legislation. The first thing to be observed upon it is, that laws so made are necessarily *ex post facto* laws. The rule is not laid down till after the event which calls for the application of it has happened. Though new

in *fact*, yet being of the greatest antiquity in *theory*, it has necessarily a retrospective operation, and governs all past as well as all future transactions. Property, which had been purchased, or transmitted by descent to the present possessor of it, is discovered by the newly declared law to belong to others; actions which were thought to be innocent turn out to be criminal; and there is no security for men's possessions, their persons, or their liberties.

It is another objection to this mode of legislation, that the legislators being ostensibly called on to discharge very different duties, are forbidden to entertain any of the considerations which ought most to influence the judgments of those who are avowedly employed in making laws. What will most tend to promote the general good, or what is best adapted to the present habits and modes of thinking of mankind, the judicial legislator is bound to disregard. He is to consider, not what would be the best law on any given subject that could now be made, but what law was most likely to have been made upon it at the remote period when the common law is supposed to have had its origin. All his researches tend to discover, not how the evil which has occurred may best be remedied, but in what manner it is probable that, in a very different state of society, the matter would have been ordered. The reasons upon which he proceeds are not reasons of utility, or of general expediency,

but reasons of analogy, or, as they are properly termed, technical reasons. Thus, when it was first decided that a man who had killed himself, and of whose crime it was deemed no small aggravation, that he had left destitute a wife whom he was solemnly bound to protect and provide for—when, for such an offence, it was first decided that, by the common law, there was a forfeiture to the Crown, not only of all the chattels which the offender possessed, but even of leasehold estates which he held jointly with that wife, or which he possessed in her right; it was on mere technical arguments, which set all reason and common sense at defiance, that such a decision proceeded.

Not only is the judge, who at the very moment when he is making law is bound to profess that it is in his province only to declare it,—not only is he thus confined to technical doctrines and to artificial reasoning; he is further compelled to take the narrowest view possible of every subject on which he legislates. The law he makes is necessarily restricted to the particular case which gives occasion for its promulgation. Often, when he is providing for that particular case, or, according to the fiction of our constitution, is declaring how the ancient and long-forgotten law has provided for it, he represents to himself other cases which probably may arise, though there is no record of their ever having yet occurred, which will as urgently call for a remedy, as that which it is his

duty to decide. It would be a prudent part to provide, by one comprehensive rule, as well for these possible events as for the actual case that is in dispute ; and while terminating the existing litigation, to obviate and prevent all future contests. This, however, is to the judicial legislator strictly forbidden ; and if, in illustrating the grounds of his judgment, he adverts to other and analogous cases, and presumes to anticipate how they should be decided, he is considered as exceeding his province ; and the opinions thus delivered are treated by succeeding judges as extrajudicial, and as entitled to no authority.

A still further evil inherent in this system is, that the duty of legislation must often be cast on those who are ill-qualified to legislate upon the particular subject which accident may allot to them. In a mass of jurisprudence so extensive, and consisting of a such variety of parts as that which at the present day prevails in England, it must necessarily happen that even the most learned and experienced lawyers will not have had occasion, in the course of the longest study and practice, to make themselves complete masters of every portion of it. It is usually to some one or more particular branches that they have severally directed their researches. One man is distinguished as deeply learned in the law of real property ; another in what relates to tithes and the rights and possessions of the church ; a third is most skilled in

criminal law ; a fourth in the forms of actions and the rules of procedure. And accordingly, when it is important to private clients to be informed of the law, they consult the most eminent jurists only upon those subjects with which they are known to be most conversant. If the task of compiling a complete code of laws were now to be undertaken, the subject would probably be divided into its different branches, and each would be assigned to those who were understood to have devoted to it almost exclusively their attention and their care. But in legislation by means of judicial decisions, it is chance, not the qualifications of the legislator, which determines upon what he shall legislate. In theory he is alike qualified for all subjects. He is presumed to be master of all branches of the law, and to be capable, whatever may be the matters that are brought before him, and in whatever order accident or the humour of litigant parties shall present them to his view, of declaring what the law is which applies to them.

Another objection to this mode of legislation, and which, in a free state, cannot surely be of little account, is that the people have no control over those by whom the laws are made. The magistrates, filling the high stations to which is attached the most important duty, and the most dangerous power that men in a state of society can be invested with, are nominated by the sole pleasure of the Crown ; and, during the long period when the

largest portion of the common law, by which we are now governed, was produced, they were also, if the laws which they made were unpalateable to the Crown, removable at its pleasure.

It is supposed to be a maxim of our constitution that we are to be governed by no laws but those to which the people have, by their representatives, given their consent. No man, however, will assert that the consent of the people was ever obtained to the common law, which forms so large a portion of our jurisprudence. Our legislators here have been not the representatives of our choice, but the servile instruments of our monarchs; at one time, the great delinquents who presided in our tribunals in the days of Richard II.; and, at another, the corrupt judges of the Jameses and the Charleses, who suffered themselves to be practised upon by the king's law officers, and met in secret cabals to decide the fate of the victims of the Crown, before any accusation was openly preferred against them —the men who, by their abject obedience to the dictates of their master, when they were his hired advocates, and by the keenness with which, as his bloodhounds, they hunted down the prey he had marked out, had sufficiently proved how well disposed they were to do him good service in the high and sacred office of a judge.

Such are among the principal objections to this species of legislation. But it is to be observed that, while this is going on, there is amongst us a

legislation of another kind, proceeding with equal activity, that of the avowed and acknowledged legislature, which every year sends into the world a cumbrous collection of new statutes. Between these two legislatures, there is no unity of design : their works are as unlike as the characters of the authors, and their modes of legislation. Of a law proceeding from such sources, it is not surprising that it is found to be uncertain, intricate, obscure, perplexed, inconsistent, full of refinement and subtlety, and subject to continual fluctuations. The law which is every term discovered and brought to light by the judges seems to vie in extent with that which is made by the parliament ; and the lawyer's library is every year enlarged by one bulky volume of statutes, and by several volumes of reported decisions. The new statutes of each year are swollen out to a bulk surpassing that of the year which preceded it; and every fresh term seems to be prolific of more judicial reports than the term that went before it. So considerable are the changes and augmentations which are thus continually taking place in English law, that the treatises, essays, and compilations which have been composed on various legal subjects require to be from time to time renewed, that they may not mislead those who consult them ; and, upon many heads, an old law treatise is of as little use as an almanack for a year that has expired. The duties of a justice of the peace were formerly comprised

in one small duodecimo volume: they are now to be searched for in five large octavos, containing altogether 4400 pages. To this size Burn's Justice has been gradually expanded, in the course of the twenty-two editions which, during a period of sixty years, it has passed through. So many new reports have been printed, and so many new statutes made, that, as the publisher tells us in the advertisement to the fifteenth edition, "Every new edition, in order to keep pace with the law, is in effect a new book."

CHAPTER VII.

LORD BACON'S PROPOSAL FOR CONSOLIDATING THE LAWS OF ENGLAND.

The author introduces his subject with all the usual precautions of orators. He professes the highest esteem for the system of laws prevailing in the country ; he says that they are just, wise, and moderate ; they give to God, to Cæsar and to his subjects all that is their due.

"It is true," he says, "they are as mixt as our language, compounded of British, Roman, Saxon, Danish, Norman customs. And as our language is so much the richer, so the laws are the more complete: neither doth this attribute less to them, than those that would have them to have stood out the same in all mutations: for no tree is so good first set, as by transplanting."

Bacon then proceeds to say that he does not propose to make innovations:—"I speak only by way of perfecting them, which is easiest in the best things: for that which is far amiss hardly receiveth

amendment; but that which hath already, to that more may be given. Besides, what I shall propound is not to the matter of the laws, but to the manner of their registry, expression, and tradition: so that it giveth them rather light than any new nature."

From this, Bacon passes to the objections which may be made to his plans, and answers them with the remarkable brevity so characteristic of his style, which resembles that of Seneca much more than that of Cicero.

"*Objection First.*—That it is a thing needless; and that the law, as it now is, is in good estate comparable to any foreign law: and that it is not possible for the wit of man, in respect of the frailty thereof, to provide against the uncertainties and evasions, or omissions of the law."

What answer does he make to this objection?

"For the comparison with foreign laws, it is in vain to speak of it, for men will never agree about it. Our lawyers will maintain for our municipal laws; civilians, scholars, travellers will be of the other opinion.

"But certain it is, that our laws, as they now stand, are subject to great uncertainties, and variety of opinions, delays, and evasions; whereof ensueth

1. That the multiplicity and length of suits is great.
2. That the contentious person is armed, and the honest subject wearied and oppressed.

3. That the judge is more absolute, who in doubtful cases hath a greater stroke and liberty.
4. That the chancery courts are filled, the remedy of law being often obscure and doubtful.
5. That the ignorant lawyer shroudeth his ignorance of law, in that doubts are so frequent and many.
6. That men's assurances of their lands and estates by patents, deeds, wills, are often subject to question, and hollow; and many the like inconveniences.

"It is a good rule and direction, (for that all laws, '*secundum majus et minus*,' do participate of uncertainties,) that followeth: mark, whether the doubts that arise are only in cases not of ordinary experience; or which happen every day. If in the first only, impute it to the frailty of man's foresight, that cannot reach by law to all cases; but if in the latter, be assured there is a fault in the law. Of this I say no more, but that, to give every man his due, had it not been for Sir Edward Coke's Reports (which though they may have errors, and some peremptory and extrajudicial resolutions more than are warranted, yet they contain infinite good decisions, and rulings over of cases) the law by this time had been almost like a ship without ballast: for that the cases of modern experience are fled from those that were adjudged and ruled in former time.

"But the necessity of this work is yet greater in the statute law. For first, there are a number of insnaring penal laws, which lie upon the subject; and if in bad times they be awakened and put in execution, would grind them to powder. There is a learned civilian that expoundeth the curse of the prophet, '*pluet super eos laqueos*,' of a multitude of penal laws, which are worse than showers of hail or tempest upon cattle, for they fall upon men. There are some penal laws fit to be retained, but their penalty too great; and it is ever a rule that any over-great penalty, besides the acerbity of it, deadens the execution of the law.

"There is a farther inconvenience of penal laws obsolete and out of use; for that it brings a gangrene, neglect, and habit of disobedience upon other wholesome laws, that are fit to be continued in practice and execution; so that our laws endure the torment of Mezentius,

'The living die in the arms of the dead.'

"*Objection Second.*—That it is a great innovation, and innovations are dangerous beyond foresight.

"*Answer.*—All purgings and medicines, either in the civil or natural bodies, are innovations; so as that argument is a common place against all noble reformations. But the truth is, that this work ought not to be termed or held for any innovation in the suspected sense. For those are the innovations which are quarrelled and spoken against, that concern the consciences, estates, and

fortunes of particular persons ; but this of general ordinance pricketh not particulars, but passeth *sine strepitu.* Besides, it is on the favourable part ; for it easeth, it presseth not ; and lastly, it is rather matter of order and explanation than of alteration. Neither is this without precedent in former governments.

"The Romans, by their Decemviri, did make their twelve tables ; but that was indeed a new enacting or constituting of laws, not a registering or recompiling ; and they were made out of the laws of the Grecians, not out of their own customs.

"In Athens they had Sexviri, which were standing commissioners to watch and to discern what laws waxed improper for the time ; and what new law did, in any branch, cross a former law, and so *ex officio* propound their repeal.

"King Louis XI. of France had it in his intention to have made one perfect and uniform law, out of the civil law Roman and the provincial customs of France.

"Justinian, the Emperor, by commissions directed to divers persons learned in the laws, reduced the Roman laws from vastness of volume, and a labyrinth of uncertainties, unto that course of the civil law which is now in use.

"*Objection Third.*—Labor were better bestowed in bringing the common law of England to a text law, as the statutes are, and setting both of them down in method and by tables.

"*Answer.*—It is too long a business to debate, whether 'lex scripta, aut non scripta,' a text law, or customs well registered, with received and approved grounds and maxims, and acts and resolutions judicial, from time to time duly entered and reported, be the better form of declaring and authorizing laws."—"Customs are laws written in living tables, and some traditions the church does not disauthorize. In all sciences they are the soundest that keep close to particulars; and sure I am, there are more doubts that rise upon our statutes, which are a text law, than upon the common law, which is no text law. But, howsoever that question be determined, I dare not advise to cast the law into a new mould. The work, which I propound, tendeth to pruning and grafting the law, and not to plowing up and planting it again; for such a remove I should hold indeed for a perilous innovation.

"*Objection Fourth.*—It will turn the judges, counsellors of law, and students of law to school again, and make them to seek what they shall hold and advise for law; and it will impose a new charge upon all lawyers to furnish themselves with new books of law.

"*Answer.*—For the former of these, touching the new labour, it is true it would follow, if the law were new moulded into a text law; for then men must be new to begin, and that is one of the reasons for which I disallow that course. But in

the way that I shall now propound, the entire body and substance of law shall remain, only discharged of idle and unprofitable or hurtful matter; and illustrated by order and other helps, towards the better understanding of it and judgment thereupon.

"For the latter, touching the new charge, it is not worth the speaking of in a matter of high importance; it might have been used of the new translation of the Bible, and such like works. Books must follow sciences, and not sciences books."

After having thus got rid of the principal objections, Bacon unfolds the nature of his plan. It embraces two things, a digest of the common law and a compilation of the statutes. For the digest of the common law, all the decisions which have been given since the time of Edward I. should be collected together according to their dates, and the following points should be observed: 1. All cases on which custom has changed should be omitted, in order that those rules which are actually in force may be the more closely adhered to. Such a multitude of obsolete cases only embarrass the student, and teach him what he is only too glad to forget afterwards. 2. Cases of pure repetition should be suppressed. 3. Too prolix cases should be curtailed. An experienced hand, which would prune away all that was superfluous, and retain only what was essential, would confer a great favor

on students, whose time would thus be much economised, and their dislike of the law overcome. With respect to those cases on which opposing decisions exist, it were too great a trust to be submitted to a body of lawyers. It would be necessary to assemble the judges, and decide what the law is, or solve the difficulty by an act of parliament.

In the reform of the statute law, as proposed by Bacon, there are four objects to be kept in view. 1. The suppression of those statutes which refer to things which are no longer in existence. 2. The repeal of such as have fallen into desuetude, but which have never been abolished; and which might in certain circumstances be revived, to take men unawares, and furnish dangerous instruments to malice or tyranny. 3. The mitigation of the penalties attached to a law, in cases where it may be advantageous to keep the law itself, but where, from the change in public opinion, these are considered too severe, and are never enforced, or, when they are, bring odium on the government. 4. But the principal and most important object should be to unite under a single title all statutes which refer to the same subject, and to render the law clear, uniform, and easy of execution.

This is a summary of Bacon's plan. He did not think it necessary to develop it more fully in his letter to King James I. He advised him not to entrust the undertaking to men chosen by himself, but, inasmuch

as it would require the sanction of parliament, to address himself directly to that body, and require it to appoint a commission for the purpose. Their compilation would be received with less distrust than if it came from commissioners appointed by the king. This proposition of Bacon was never carried out, but remained buried in his works for two hundred and twenty-five years. But we shall see in the following chapter that an able and public-spirited statesman revived the idea, and partly carried it into execution.

CHAPTER VIII.

SIR ROBERT PEEL'S CONSOLIDATIONS OF VARIOUS ACTS OF PARLIAMENT IN 1825 AND 1826.

Sir Robert Peel, in his legal reforms, does not go so far as Bacon. He does not touch the common law. He proposes even for the statute law only a partial reform. His progress is slow but sure. Zealots may undervalue such half measures; but those who consider all the difficulties which lie in a minister's way, will see only proofs of sagacity in these gradual ameliorations, which alarm no one, and which facilitate subsequent improvements. Sir Robert Peel's plan is to unite in a body all the statutes which relate to one subject; thus, all relating to bankrupts have been reduced to one. In the session of 1825, he introduced a bill to consolidate all those concerning juries. There were no fewer than eighty-five acts, among which the laws which regulated juries were dispersed; and as these modified, repealed, or explained one another, it was almost impossible to know what the aim of the latest was. Many of them, too, were included under titles which had no reference to juries, so

that it would appear that the intention was rather to conceal than publish them. It could only be by chance, for instance, that some of them could be discovered under the head of a statute for the recovery of small debts, or in one which had for its object the construction of prisons, or the incapacity of apothecaries to fill certain municipal offices ; or under one prohibiting the exportation of leather. Nothing could furnish a stronger instance of the absence of all method than these jury-laws, thus scattered pell-mell among statutes which had no reference to them or to each other. Any other than a lawyer would lose himself in such a labyrinth, and even he would find great difficulty in arriving at a just idea of them. Sir Robert Peel, while he proposed a consolidation of these statutes, did not think it necessary to limit himself to simply uniting them ; but he wished to take advantage of this circumstance to repeal some which had become obsolete through length of time, but which had never been regularly abrogated. Formerly, for instance, juries were responsible for their verdicts; and liable to severe punishments, as confiscation of goods, destruction of their houses, expulsion of their wives and children from their abodes. It is true that for the space of two hundred years none of these had been carried into execution ; but, nevertheless, they were remnants of barbarism which should have been done away with long since.

The same process naturally tended to disclose those omissions which become visible when the law is viewed as a whole, and to settle those points in which the opinions of lawyers were divided. Thus, Sir Robert Peel proposed general modifications of the manner of choosing juries, particularly special juries, the nomination of which had become liable to so many abuses that all chance of impartiality was destroyed, and the very essence of the institution completely altered. In this way, the consolidation of statutes tends to disclose their defects; their faults betray themselves on a nearer approach, as soon as they are submitted to a good method, and an attempt is made to build them up into a whole. Precisely as, in taking a machine to pieces for the purpose of mending it, it becomes evident what parts have been injured by rust or time, and steps are taken to remedy the evil.

In the session of 1826, he made some advance in the same path, by proposing a consolidation of all the statutes relating to theft. Whether he feared a strong opposition from the lawyers, or from the prejudices of the assembly he addressed, I do not know; but he introduced this measure by a speech of great length and extraordinary erudition, in which he exposed forcibly and clearly the opinions of the most distinguished writers on criminal legislation. It might be supposed that, in the case of a project like this, founded on reasons so clear and so evident, it would not be necessary to quote

authorities; yet Sir Robert Peel thought it necessary to appeal to that of Lord Bacon; nor did he limit himself to quoting him only, but read word for word the greater part of that proposal from which I have taken some extracts, and accompanied it with a commentary, in which he proved that all his arguments had acquired fresh strength from the accumulation of the statutes of two hundred years, and from the increasing difference between the laws of a barbarous age and the opinions of the present time.

After having taken refuge under the authority of so great a man, Sir Robert Peel called attention to two attempts more practical and parliamentary, which had been made. After the Restoration, the necessity of revising the statutes was felt so strongly, that a committee composed of the most distinguished lawyers was named by the House of Commons, to take into consideration the abolition of obsolete statutes, and the union of all those relating to the same subject; in a word, the suppression of all useless complications. But after many conferences, the committee was dissolved without effecting anything. Another attempt of the same kind which was made in 1796, that is to say, 130 years later, was not more successful. The committee appointed to examine whether a consolidation of statutes would be advantageous, made a most favourable report; and after a declaration so decided, and founded on such strong reasons, we

have only to wonder at the almost lethargic indolence which paralyzed this project.

After having thus shewn what his aim was, Sir Robert Peel gave it to be understood that he had a more comprehensive scheme in contemplation, and that it was merely as a trial that he proposed the consolidation of the laws relating to theft. He said:—"I select the laws relating to theft in the first instance, because I consider the crime of theft to constitute the most important class of crimes. There are acts, no doubt, of much greater malignity, of a much more atrocious character, than the simple act of robbery ; but looking to the committals and convictions for crime, it will at once be seen that those for theft so far exceed the committals and convictions for any other species of offence, that there can be no question of its paramount importance in the catalogue of offences against society ; and that, if the laws relating to this class of offence can be simplified and united into one statute, we shall have made a most material advance towards the revisal of our criminal statute law. By a reference to the criminal returns for England and Wales, it will be found that in the last year, the year 1825, 14,437 persons were charged with various crimes ; of this number, not less than 12,500 persons, amounting to six-sevenths of the whole number, were charged with the crime of theft. If any other offence be taken, it will be seen that the number charged with that offence

bears a very trifling proportion to the numbers charged with theft.

"In 1825, the same year in which 12,500 persons were charged with theft, were committed, for the crime of arson, 22; for murder, 94; for manslaughter, 122. If a longer period be taken, the result will be nearly the same.

"In the last seven years there have been convictions for forgery, 331; for murder, 121; for perjury, 43; for arson, 50; while for simple larceny alone there have been in the same period not less than 43,000 convictions. I need say no more to demonstrate the immense importance of the crime of theft, considered as a class of crime, and to shew the necessity of establishing, with regard to it, as clear and intelligible a law as it is possible to establish. The number of statutes at present in force relating to this offence amounts to about ninety-two; they include a period of time extending from the reign of Henry III., from the statute called the *Charta Forestæ*, passed in the ninth year of that king's reign, to the last year of all, the sixth of his present majesty. The number of these laws, the remote and various periods at which they were passed, will probably create an apprehension that the attempt to simplify their language, to classify their provisions, and to condense them into one statute, is a hopeless undertaking. But I hold in my hand the visible proof that the undertaking is not hopeless. Here is the draft of a bill which has

been printed for the purpose of facilitating the consideration of its details previously to its introduction; and in the short compass of thirty pages, without making any rash experiment to curtail the phraseology of the existing laws, without the omission, I believe, of a single clause which it is fitting to retain, are included all the provisions of the statute law relating to the offence of larceny.

"This reduction of the bulk of the law has been effected by selecting, in some instances from an heterogeneous mass of legislation heaped together in one statute, upon matters perfectly unconnected and dissimilar, those enactments that relate to the protection of property from theft; and in other instances, by extracting from various statutes which have been passed in particular cases, the principle upon which each was founded; substituting, in lieu of various scattered enactments giving protection to individual articles of property, one general enactment affording protection to the class of property to which those individual articles belong.

"It is clear that criminal legislation has been heretofore left to the desultory and unconcerted speculations of every man who had a fancy to legislate. If an offence were committed in some corner of the land, a law sprung up to prevent the repetition not of the species of crime to which it belonged, but of the single and specific act of which there had been reason to complain. The new enactment, too, was frequently stuck into the middle of a sta-

tute, passed probably at the latter end of a session: to the compounding of which every man who saw or imagined a defect in the pre-existing law was allowed to contribute.

"To give an instance or two of legislation of this kind: some member has been injured, or he has a constituent who has been injured, by the stealing of madder roots, and a provision is forthwith made for the special protection, for the future, of madder roots—not by a single statute, but by including the enactment directed against the stealer of madder roots, in a law of which the following is the comprehensive title:

"'An Act to continue several laws therein mentioned for granting liberty to carry sugars of the growth, produce, or manufacture of any of his majesty's sugar colonies in America, from the said colonies directly into foreign ports, in ships built in Great Britain, and navigated according to law; for the preventing the committing of frauds by bankrupts; for giving further encouragement for the importation of naval stores from the British colonies in America; and for preventing frauds and abuses in the admeasurement of coals in the city and liberty of Westminster; *and for preventing the stealing or destroying madder roots.*'

"There are on the statute-book twelve statutes relating to the offence of receiving stolen goods. They are so numerous, because they are founded not upon some definite principle, but because they

refer to individual articles of property. One statute punishes the receiver of stolen lead, iron, copper, brass, and bell-metal. Then follows a statute to punish the receiver of stolen pewter. Another refers to jewels, plate, and watches. Then comes the general act as to all goods and chattels. But even this was not considered general enough to apply to bank notes and negotiable securities, and therefore an act was passed in the present reign for their special protection. Now I shall expunge from the statute-book all these special provisions, and substitute, in lieu of this legislation directed to particulars, one simple and general enactment, founded on this plain principle, that he who receives, knowing it to have been stolen, anything whatever, the stealing of which amounts by law to felony, shall himself be deemed guilty of felony. Surely this is the enactment which common sense suggests, as the fit enactment against the wilful receiver of stolen property, whether that property be lead or pewter, jewels or bank notes. The example to which I have last referred will sufficiently explain the mode in which I have attempted to proceed in simplifying and compressing the law, in all other cases of a similar nature.

"I now come to a subject of at least equal importance; the supplying of those omissions in the law which insure the impunity of guilt. Of those omissions I will give some examples. Under the law as it stands at present, it has been decided that

it is not an offence—at least, not an offence in the eye of the law—to rob a ready furnished house, notwithstanding that it is a very serious offence to rob a ready furnished lodging. It is upon record, that after the conviction of a man who robbed of some articles of plate the house which he had hired, the sentence was respited upon a doubt whether the case were within the statute which uses the word' 'lodging' and not 'lodging-house.' It was agreed by all the judges that the case was not within the statute, and Chief Baron M'Donald ordered the prisoner to be discharged, saying, 'I am sorry the laws of England have not provided for your case, for I have no doubt whatever of your guilt.'

"Again, the statute which makes it an offence to steal or destroy fish in streams expressly refers to such streams as pass in or through an estate. If, therefore, the stream, as is frequently the case, neither passes in or through an estate, but passes between two estates, being the boundary to each, the owner of the fish forfeits his protection under the statute."

Sir Robert Peel, at the end of his speech, a very remarkable one in the mouth of a minister, and one which would have done honour to the most distinguished jurists in Europe, modestly acknowledged the assistance he had received in the execution of his project. Many of the judges, and particularly the Lord Chief Justice of the King's Bench, had zealously helped him. "I will go still

farther and say," he added, "that in the profession of the law generally, I have found the utmost readiness to co-operate in the work which I have undertaken. It is the fashion to impute to that profession an unwillingness to remove the uncertainty and obscurity of the law, from the sordid desire to benefit by its perplexity. This is a calumny which I know to be unfounded ; for I have never made, in the progress of this work, a single application for assistance to any member of the profession of the law, which has not been received in the spirit which becomes a generous mind, rising above the narrow prejudices of habit, and the paltry view to private gain."

[The necessity of consolidating the English Statute Law cannot be better illustrated than by the titles of two statutes which are given in the notes to Bentham's Works. In framing acts of parliament, the two errors which create the greatest difficulty in having the law known are, First, to pass too many acts on the same subject; and, Secondly, to include too many subjects in the same act. As an illustration of the first, I may quote the title of the 57th Geo. III. c. 101:—"An act to continue an act intituled, An act further to extend and render more effectual certain provisions of an act passed in the 12th year of His Majesty King George the First, intituled, An act to prevent frivolous and vexatious arrests; and of an act passed in the fifth year of the reign of His Majesty King George the Second, to explain, amend, and render more effectual the said former act; and of two acts passed in the nineteenth and forty-third years of the reign of His present Majesty, extending the provisions of the said former acts."

As an illustration of the second defect, I may quote the title of the Act 23 Geo. III c. 26: "An act to continue several

laws for the better regulating of pilots, for the conducting of ships and vessels from Dover, Deal, and Isle of Thanet, up the rivers of Thames and Medway: and for permitting rum or spirits, of the British sugar plantations, to be landed before the duties of excise are paid thereon: and to continue and amend an act for preventing frauds in the admeasurement of coals within the city and liberty of Westminster, and several parishes near thereunto: and to continue several laws for preventing exactions of occupiers of locks and weirs upon the river Thames, westward: and for ascertainiug the rates of water-carriage upon the said river: and for the better regulation and government of seamen in the merchant service: and also to amend so much of an act made during the reign of King Geo. I. as relates to the better preservation of salmon in the river Ribble: and to regulate fees in trials at assizes and Nisi Prius, upon records issuing out of the Office of Pleas of the Court of Exchequer: and for the apprehending of persons in any county or place, upon warrants granted by justices of the peace in any other county or place: and to repeal so much of an act made in the twelfth year of the reign of King Charles II., as relates to the time during which the office of excise is to be kept open each day, and to appoint for how long time the same shall be kept open each day for the future: and to prevent the stealing or destroying of turnips: and to amend an act made in the second year of His present Majesty, for better regnlation of attorneys and solicitors."]