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A
COURSE
OF
649
LEGAL STUDY,

ADDRESSED TO
STUDENTS AND THE PROFESSION GENERALLY;

BY
DAVID HOFFMAN,
JUR. UTR. DOCT. GÖTTINGEN.

Second Edition,
RE-WRITTEN AND MUCH ENLARGED.

IN TWO VOLUMES.
VOL. I.

BALTIMORE:
PUBLISHED BY JOSEPH NEAL.

1836.

Entered, according to the Act of Congress, in the year one thousand eight hundred and thirty-six, by DAVID HOFFMAN, in the Clerk's office of the District Court of Maryland.

JOHN D. TOY, PRINTER.

TO THE HONOURABLE

JOSEPH STORY, LL.D.

ONE OF THE JUSTICES OF THE SUPREME COURT OF THE
UNITED STATES, AND
CHIEF JUSTICE OF THE CIRCUIT COURT OF THE UNITED STATES,
FOR THE FIRST CIRCUIT.

DEAR SIR:

IN dedicating this work to you, I make the spontaneous though inconsiderable offering, of a grateful heart, for the many services which your distinguished labours in legal science have conferred on me, in common with all who have noted the progress of philosophical jurisprudence in our country.

It has often been remarked, that every subject has its peculiar science; and no one better knows the fact than yourself; as also, that the art of study may be greatly assisted, by imparting to it the portion of philosophy which really belongs to it. The life of

all study is method; next to which is a judicious selection of the various sources of knowledge. These are truths familiar to you, who have explored every department of that great science which it is the main object of the following pages, not to teach, but to point out the method of acquiring.

I pray you, sir, to accept this dedication as a feeble testimony of the sincere respect, and great admiration in which an able lawyer, an eminent judge, a valuable citizen, and, above all, the most amiable private worth, are held by

Dear sir, your most obedient,

And very humble servant,

DAVID HOFFMAN.

BALTIMORE, *March*, 1836.

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ADVERTISEMENT

TO THE SECOND EDITION.

A CAREFUL examination into the history of the jurisprudence of every country, will, perhaps, justify the conclusion that this science is stationary or progressive, nearly in the ratio of the intercourse which subsists between nations; of the extent of political and civil liberty enjoyed by their people; and especially, of the equality of individuals, and the degree of social communication existing between all the parts of an empire. Nations, no less than individuals, are the mere creatures of habit. The prejudices of early education adhere to them with wonderful tenacity; and this too, after enduring ages of inconvenience, and even of suffering; until circumstances arise which, in a degree equalize their condition; bring them into closer communion with each other; produce a freer comparison of thought; and finally terminate in a full conviction of their errors, and in an anxious desire to devise the requisite schemes for their amendment. Society among nations, and especially among the people of each nation, is pecu-

liarily and most happily characterized in the present age. No other period in the history of man is marked by such a condition of national intercommunication, and of individual social intercourse. Legislation, science, arts and literature, are no longer even national, but are fast becoming the common right and possession of the world. This remarkable melioration of the physical, moral and intellectual state of man, (which is as strikingly visible in the philosophical and equitable character of the legislation and jurisprudence of nations, as in any other thing,) may be referred primarily to the numerous facilities which have overcome time and space, and brought together states and people of various conditions, pursuits, languages, and acquirements; so that individual, local, and national habits and prejudices are fast disappearing, and the day approaching when the world may know but one homogeneous system of constitutions, laws, science, literature, and manners; and when morals, and even religion, shall so harmonize with the highest intellectual attainments, as to elevate our species far beyond the conceptions even of poets, or the imaginations of philosophers in their ideal republics. The sturdy barons of the thirteenth century, have in vain declared 'Nolumus Leges Angliæ mutare;' for even from that very period a regularly progressive change is observable; and within the present age it has become so rapid and thorough, that all former example, and, indeed, the aggregate improvement of all past ages, seem to fall short of what has been accomplished within the last half century. So great has been the change in the legal science, even of England, (and altogether for the better,) that it has



been said, were lord Coke, with his immense learning, suddenly restored to Westminster Hall, he would find himself compelled to become a close and methodical student of law, before he could venture to take a stand among his professional brethren. But the improvements, actual, and contemplated, to which we principally allude, are the growth of, perhaps, the last fifteen years. The first edition of the present work took up the science as it existed at that day. It was designed to meet the wants of law students, to whom it was then exclusively addressed, with the humble expectation that it would serve as a sufficient and faithful guide for a much longer period. So vast, however, have been the improvements and additions to the science; and so prolific has been the press, in works of superior excellence, that a new edition seems to be demanded,—especially as the flattering approbation extended to the work, entirely exhausted it within the first two years after its publication. The author, moreover, has not been insensible to the fact, that the volume has been extensively countenanced by the Profession; so that, perhaps the larger number of students have obtained a knowledge of it through the medium of those for whom it was by no means originally intended. Could that gratifying reception have been at all anticipated, the work would have been rendered more worthy their attention,—and now seems to justify the author in presenting it in a more enlarged form; so that it may possibly aid the studies of the more matured scholar in the law, *whilst its strictly elementary and practical character*, has in no degree been lessened. This alteration in the character and object of the work,

has been made at the suggestion of some learned, but perhaps, too kind friends, who believed that it might be rendered of some use even to the Counsellor, the Judge, and the Statesman; at least, as a depository occasionally to be consulted, in order to refresh their recollections of the numerous sources of information in the respective divisions of the law; and also, the better to enable them to direct, with facility, the studies of those who might happen to be under their immediate care. With these several views, the author has so arranged the entire scheme of direction and instruction, as to enable the student, at once, to perceive the elementary outline designed for his guidance; and to free himself from any confusion or despondency, that might arise from a superficial examination of a volume comprehending, apparently, too scientific a course, addressed to one who is a mere tyro, when he first takes the book in hand; whilst at the same time the counsellor, or the judge may find in its pages such useful details, (the result of no little research,) as are ordinarily to be found only by consulting a very extensive, and well selected library.

In addition to the various means, adopted throughout the volume, to preserve simplicity, and a purely institutional character, it may be well, at this time, to suggest to the student, a few remarks as to the mode of using it; so that he may derive from its contents all the contemplated advantages.

FIRST.—As the volume professes to be a guide, it, like his dictionary, or any other *vade mecum*, should be constantly on his table,—not only for occasional consultation during the progress of his studies, but

that many portions of it may be carefully read, in advance of his studies; so that by frequent reference, and deliberate reading, the entire volume may become, in time, perfectly familiar to him. This is recommended from a thorough conviction that no one, however highly gifted, need ever hope to treasure in his mind, as actual knowledge, the minute details of such a science as law. The truth is, that this science, like that of numbers, can only be attained by a careful study of its *principles*. It were, indeed, as vain an attempt to master its details, as those of Algebra, or of Logarithms. In a library of only five hundred volumes, Mr. Park estimates that there are probably not less than 2,625,000 points;* and Mr. Preston, in his recent learned Treatise on the Law of Merger, computes that his volume contains at least 3,000 propositions on subjects of daily occurrence. Students, therefore, need feel no despondency, when they see learned and experienced lawyers constantly referring to their books, on questions which they are apt to suppose ought to be entirely familiar to them; and the anecdote of the complaint made by his late majesty, George III. that 'he had occasion to consult the best lawyers in his dominions, and not a man of them could do more than refer,' is no disparagement to either him or them. The *sources*, therefore, of accurate information, become extremely important to be familiarly known; and an accurate acquaintance with legal bibliography, and, indeed, with the analysis, or general outline of every volume of the law, is among the most valuable means

* Park's Contre-Project, 51.

possessed by the lawyer of rendering his positive knowledge efficient. We, therefore, recommend, (when time will serve,) that the student, as he occasionally reads portions of this volume, should carefully peruse the table of contents, or other synopsis, of every book recommended in it; so that subsequently, when he comes to study the various volumes, &c., and also at all after times, the analysis, and general contents of each, may not fail to be so familiar to him, as to enable him to refer to it with some confidence that he will find the particular information sought.

SECONDLY.—As the first inspection of this volume may possibly impress the student with an idea that it will be difficult for him to extract from it the precise information he desires as to the order of his studies, and the books to be read by him; and as the contents of any work are only to be known after some examination of it, we recommend, before he has taken a book in hand, that he should read in this volume, first, the **TABLE OF CONTENTS**, and the **PRÔÈM**; and then, with great care, the whole of the **FIRST TITLE**, with its **NOTES**. After this, and at his leisure, whilst studying the works recommended in the first title, he should read cursorily in anticipation, the whole of the **SECOND TITLE**. The studies of the first title being completed, the student should then, for the second time, read carefully the second title, with its notes; and whilst engaged in studying the books, &c. therein recommended, he may proceed to a cursory reading of the **THIRD TITLE**; which, like the preceding, is to be again carefully read, just before the student engages in the studies prescribed

in it. The foregoing remarks, apply equally to the other titles of the Course.

THIRDLY.—If the student undertakes either of the *short courses*, viz: that which remains after omitting the works designated by either of the letters E, e, he should, nevertheless, read with care, the notes on all of the omitted works; and also, (if accessible to him,) examine each of them in a cursory way, and read carefully the table of contents, and such other synopsis, as each may contain. Such a general idea of the contents of valuable treatises, which cannot be elaborately studied, often proves of great importance to the practitioner, in the course of his legal researches.

FOURTHLY.—The works enumerated in the respective titles of the Course, should be studied in the order therein designated; and those which come under the heads of ‘Auxiliary Subjects,’ ‘Books of Occasional Reference,’ ‘Miscellaneous,’ &c., must be considered, with certain qualifications hereafter mentioned, as integral and essential parts of the full course, and be carefully studied or used by him, in the modes therein prescribed.*

FIFTHLY.—No part of the Course is of more value to the student, than the selected cases in *lord Coke’s Reports*. We mention this, *in limine*, because we have remarked that many students, from very erroneous impressions, have shrunk from this portion of their prescribed course,—and because we have uniformly found

* Should the student be unable to obtain any particular work, stated in the syllabus, as belonging to his course,—he must exercise his own judgment in selecting another out of the syllabus, to supply its place.

that students who have diligently read these cases, with the added references of leading cases from lord Coke's time to the present day, have expressed the greatest satisfaction at the result, and have even dated it as the period of their triumph over the perplexities of their novitiate.

SIXTHLY.—When the student has gone through the studies of the course selected by him, we advise him to read the whole volume, and to select from each title such works as he may desire to study, with renewed ardour, after he has come to the bar. Let him still regard this volume as his guide for retired study, at such hours as he can spare from his professional duties; taking special care, however, to guard against contracting the character, or gaining the reputation of being a *mere student*,—nothing being more fatal to professional success than this species of public estimation! This indisputable, and alarming fact evinces the great importance of methodical and persevering study during the allotted period of the student's novitiate; for, after that has passed, such is the inconsistency of man, that clients, though they may insist on learned speeches and opinions, will not tolerate a man of books. The whole of a practitioner's visible time is claimed by them as their own; so that, whatever study can be snatched from their grasp, must be silently and unostentatiously accomplished. Still something may be done, even in the way of regular study, not only by the young practitioner, but by one of long standing, at such times, and in such ways as shall attract no particular attention; and whilst a careful economy of 'particles of time' will enable the lawyer to add daily to his store of know-

ledge, and thus retain his standing with clients, as a man of business; he will greatly augment his reputation among them, by the manifestation of an increasing familiarity with a science which they would not suffer him openly to cultivate.

From the foregoing directions, as to the mode of using the present volume, the student will perceive that we have enjoined on him one cursory, and two attentive perusals of its pages. Let him not think this an unreasonable requisition in an author. We desire to exclude from our mind all other considerations than those of utility to the student, for whom we have aimed, with the best intentions, to be a legal mentor, during three or four years, and, perhaps, of as many more, after he has come to the bar. Whatever may be the deficiencies of the work, the author still ventures to hope that it will not fail to prove, to earnest followers, a faithful guide 'through the depths of the learning of the law.' And with M. Dupin, he presumes to add: 'Ce volume est vraiment un ouvrage de famille, une œuvre de communauté. Ce n'est point un livre à moi; c'est un recueil où chacun aura fourni son contingent. L'antiquité s'y trouve concourir avec les temps modernes; les auteurs morts avec les auteurs vivans; mais c'est toujours la *profession d'avocat*, immuable dans ces vieilles maximes d'honneur au sein desquelles elle est née, et hors desquelles il ne serait plus possible de la concevoir.'*

In conclusion, we have only to state that, although in the syllabus of every title and division of the work,

* Profession d'Avocat, par M. Dupin, aîné. Pref. iv.

as also in the notes on them respectively, we have directed the attention of students to numerous works, they will still find we have made a much more ample enumeration of the titles of books appertaining to nearly every department of the law, especially under the heads of Legal Bibliography, and the Roman or Civil Law. Lest this extensive array of the sources of legal knowledge might create some uneasiness, we now desire to apprise students that these enumerations have not been designed so much for them, as for those much more advanced,—and that, even for such, they are intended mainly as books of reference. The researches of the learned, as well as of students, are sometimes retarded by the want of even this species of acquaintance with books: a law student, therefore, can scarce begin too early to familiarize himself with the sources of knowledge in every branch of his science. To know even the existence of a book, and its general object, is a greater approximation to knowledge than may at first appear obvious. This subject we have sufficiently remarked on in the course of the volume,—and, it is hoped, in such a manner as to fully vindicate the importance we have attached to legal bibliography,—a study eminently compensative, in proportion to the little time and attention which need be gradually bestowed on it.

PRÒÈM.

'The noblest employment of man, is to assist man.'

Sophocles.

In the various pursuits of man throughout life, method is no less important than industry. If the latter bring us with certainty to the contemplated end, the former facilitates our progress, designates the paths which are the least incumbered, and leads us directly, and often without fatigue, to the object of pursuit.

In the moral, as well as the natural world, we perceive that infinite intelligence, undeviatingly acts upon the principle of order, which is nothing more than the pursuit of that plan or system which attains a desired end, by the most direct path; and in all the endeavours of man, either to acquire or use knowledge, we find his success to be strictly proportioned to the regularity by which he has been directed; and he who has been uniformly the most methodical, though he may not have seen, heard, read, and reflected more than another, has certainly acquired more, both in extent and quality. Like the minute division of labour, method greatly increases its productive powers; but with the superadded advantage, that whilst the division of labour is apt to enfeeble the mind, method, on the con-

trary, strengthens and expands it, by imparting the choicest and most nutritious food, and this in such time, place, quantity and kind, as are respectively, the most suitable. Method places in our hands both a torch and clue, to guide us through the surest and easiest ways: it agreeably impresses the mind with confidence, amidst the greatest difficulties, and presents the most distinct and lively pictures of all that is worthy of notice in our path; and finally brings us to the end of our journey, improved, invigorated, and delighted.

In the *Arts and Sciences*, as lord Bacon emphatically expresses himself, *it is the architecture*; in *argument*, it may be compared to the 'discipline of modern nations; it corrects, in some measure, the unequalities of controversial dexterity, and levels on the intellectual field, the giant and the dwarf.'* In *reading*, as lord Bolingbroke says, 'we may acquire by it less learning, but more knowledge; and as this is collected with design, and cultivated with art, it will be at all times of immediate and ready use to us and others.'

'Thus useful arms in magazines we place,
All rang'd in order, and dispos'd in grace;
Nor thus alone the curious eye to please,
But to be found, when need require, with ease.'

If we reflect on the shortness of human life, compared with its legitimate objects, the importance of systematic selection appears in a very forcible point of view; but in the acquisition of knowledge, through the medium of books, it is still more manifestly displayed.

* Mack. Vind. Gall. Intro.

If a man should calculate on living to the age of sixty years, and should appropriate forty of them to the study of books, the most that could be accomplished in this time, would be the careful study of about *sixteen hundred* octavo volumes of *five hundred* pages each. What is this number, compared with the millions out of which he has to select? How important is it, therefore, that the choice should be judicious, and that after it is made, the whole should be studied with method; and how much more necessary is it to those, who instead of forty years' devotion to books, appropriate not more than a fourth part of that period. We are aware that such calculations cannot be made with mathematical accuracy, but an approximation is sufficient for our purpose, which is to illustrate the great importance of system and judicious selection, in the attainment of knowledge through the channel of books.

It is observed by Dr. Watts, that 'the world is full of books, but there are multitudes which are so ill written, they were never worth any man's reading; and there are thousands more which may be good in their kind, yet are worth nothing when the month, or year, or occasion is past for which they were written. Others may be valuable in themselves, for some special purpose, or in some peculiar science, but are not fit to be perused by any but those who are engaged in that particular science, or business; it is, therefore, of vast advantage for the improvement in knowledge, and saving of time, that a young man should have the most proper books for his reading, recommended by some judicious friend.'

Martin Luther, who, by uniting method with industry, attained an eminence in learning, unknown to the age in which he lived, compares indiscriminate and immethodical readers to such as have no fixed habitation, who dwell every where, reside in no place, and cannot be said to belong to any country. He advises students to confine their attention to the most learned, methodical, and well selected authors, and by no means, to distract themselves with too great a variety of books. Indeed, a judicious selection of nutriment seems no less requisite to the enlargement and invigoration of the mind than of the body; for, as lord Bacon quaintly observes, 'some books are to be tasted, others to be swallowed, and some few to be chewed and digested; that is, some books are to be read only in part, others to be read, but not curiously, and some few to be read wholly, and with diligence, and attention. Some books also may be read by deputy, and extracts made of them by others; but that would be only in the less important arguments, and the meaner sort of books.' *

But whilst the student is judicious in his selection, there is another consideration no less worthy his attention. Books are not only to be the best on the subject of which they treat, but they are also to be read in that progressive succession, and each is to be studied with that method, which the gradual enlargement of the mind, on the particular subject, requires. It is not only requisite, therefore, that certain books be designated as most worthy of perusal, but the *order in which*

* Bacon's Essays, 'Of Studies.'

they are to be read, and the particular manner in which they are to be studied, should receive an earnest attention. If, in the common concerns of life, and in our studies generally, method is of so great importance, there surely is no department of knowledge in which it is so imperiously requisite as in the science of jurisprudence. The subject which treats of human conduct, must necessarily be as extensive and various as human action; we consequently find that the law, in its most extensive signification, has occupied the pen of the learned to a greater extent than, perhaps, any other science. An infinite deal has been written on the rights and obligations of man in all his various relations; and as the one thousandth part cannot and ought not to be read; the selection of such legal matter, as has the stamp of authority, and is most distinguished for its learning, method, and style, cannot but be an undertaking of the first importance.

He who aspires to a thorough acquaintance with legal science, should cultivate the most enlarged ideas of its transcendant dignity, its vital importance, its boundless extent, and infinite variety. As it relates to the conduct of man, it is a moral science of great sublimity; as its object is individual and national happiness, it is, of all others, the most important; as it respects the moral actions of men, and of nations, it is infinitely varied; and as it concerns all his rights and obligations, either derived from, or due to his God, his neighbour, his country, or himself, it must necessarily be a science of vast extent. To an elevated and dignified view of this august science, cultivated and fostered, perhaps, through a whole life, we may attribute the astonishing

progress made in it by a few; whilst, on the other hand, those who have attained even a sciolous knowledge, have accorded to it the homage of their profoundest respect, and considered it, as of all others, the most noble.

Those, among the ancients and moderns, who have paid a tribute of respect to this science, appear to have been at a loss to find in the language of eulogy and eloquence, terms sufficiently expressive of their great admiration. Hence, the enthusiasm of Hooker vented itself in the following sublime strain, 'Of Law no less can be said, than that her seat is the bosom of God, her voice the harmony of the world; all things in heaven and earth do her homage, the very least as feeling her care, and the greatest as not exempted from her power; both angels and men, and the creatures of what condition soever, though each in different sort and manner, yet all with uniform consent, admiring her as the mother of their peace.*' And though the learned author may have alluded to Law in its most enlarged sense, and rather as the scheme or system of order which regulates all things, celestial as well as terrestrial, than as a mere human science; still the eulogium is applicable, and has always been so regarded, to the system which regulates the moral relations of man; and which, considered *lato sensû*, extends its domain much beyond the narrow limits of municipal regulation, comprehending every conceivable duty, natural and conventional, no less of nations, than of individuals.

* Eccle. Pol. book i.

How restricted, therefore, is that view which estimates jurisprudence in the light of a mere collection of positive rules and institutions! How different the language of Burke, when he denominates it the 'pride of the human intellect; the collected reason of ages, combining the principles of original justice with the infinite variety of human concerns:'* And how unlike the sentiments of those distinguished luminaries, Demosthenes, Cicero, Hardwicke, Holt, Eden, Mansfield, Jones, and others, who placed law on the basis of moral rectitude, and the principles of eternal truth.

Sir William Jones, than whom no authority is higher, a man dear to the lovers of genius and learning, to whose comprehensive mind universal science bowed, and seemed to delight in yielding the rich abundance of her treasures, thus speaks of law; 'The great science of jurisprudence, like that of the universe, consists of many subordinate systems, all of which are connected by nice links, and beautiful dependencies; and each of them, as I have fully persuaded myself, is reducible to a few plain elements, either the wise maxims of national policy and general convenience, or the positive rules of our forefathers, which are seldom deficient in wisdom or utility. If law be a science and really deserve so sublime a name, it must be founded on principle, and claim an exalted rank in the empire of reason; but if it be merely an unconnected series of decrees and ordinances, its use may remain, though its dignity be lessened, and he will become the greatest lawyer who has the strongest

* Burke's Works, vol. iii. 134.

habitual or artificial memory. In practice, law certainly employs two of the mental faculties; *reason*, in the primary investigation and decision of points entirely new; and *memory*, in transmitting to us the reason of sage and learned men, to which our own ought invariably to yield, if not from becoming modesty, at least, from a just attention to that object, for which all laws are framed, and all societies instituted, the good of mankind.*

A science so liberal and extended, so dignified and important, should be cultivated by those alone, who are actuated by the principles of the purest and most refined honour. If the opinion of Quintilian, Cato, Longinus, and others among the ancients, be correct, that no one can be an orator who is not a good man, it may be applied with still more force to the lawyer, whose vocation is the protection of the injured and the innocent, the defence of the weak and the poor, the conservation of the rights and prosperity of the citizen, and the vigorous maintenance of the legitimate and wholesome powers of government, whose vocation, in the language of justice Blackstone, 'is the science which distinguishes the criterions of right and wrong; which teaches to establish the one, and prevent, punish, or redress the other; which employs in its *theory* the noblest faculties of the soul, and exerts in its *practice*, the cardinal virtues of the heart; a science which is universal in its extent, accommodated to each individual, yet comprehending the whole community?' To be great in the law, therefore, it is essential that we

* Essay on Bailments.

should be great in every virtue; skilled in many, and somewhat improved in most of the departments of knowledge, for 'it applies the greatest powers of the understanding to the greatest number of facts,' and embraces nearly the entire extent of human action and concerns. It is obvious, that to the just comprehension of the infinitely various points of litigation submitted to the judge, the lawyer, or the advocate, every species of knowledge may prove necessary; and as every passion and affection of the heart may be excited, how important is it that whilst the mind is enlarged, and strengthened, and refined, by all that is useful in knowledge, the heart should be purified by the choicest lessons of moral wisdom. Hence Quintilian, as we have previously intimated, is firmly of opinion, and maintains the position with much ingenuity, not only, that an orator *ought* to be a good man, but that no one *can* be an orator unless he be such. He urges, therefore, that 'morality should be the orator's favourite study, and he should be thoroughly acquainted with the whole discipline of honesty and justice, without which no one can be a good man, nor skilled in speaking.'* Paterculus, indeed, says of Curio, that he was ingeniously wicked, and eloquent, to the destruction of his country, (*ingeniosissime nequam, et facundus malo publico;*) and though the testimony of history and our own experience manifestly shew that that beautiful theory, which makes the want of virtue the want of efficient genius, is rather specious than true; yet we must ever maintain that genius and learning acquire

* *Quin. Inst. Ora. Lib. xii. Cap. i.* 'Non posse oratorem esse nisi virum bonum.'

much additional force, and derive their principal charm from virtue; and that he who desires to impart a lustre to the utility of his learning, must foster all the amiable affections of the heart.

The complaints of students, of the difficulty and embarrassment attending the study of English law, are not without reason. Before the publication of the Commentaries of Blackstone, to whose learning and research, comprehensive understanding, and methodical arrangement and treatment of the various topics of the law, every inquirer on that subject will gratefully acknowledge his obligations, the legal tyro was without any extensive, and at the same time philosophical and institutionary treatise, on that vast and mingled mass of custom, statute and judicial decision; unless that character be accorded to Wood's Institutes, and the voluminous and immethodical productions of Sir Edward Coke. Thus, by a strange fatality, in the study of a body of law, rendered singularly laborious and perplexing by the great extent of the subject; by the great variety of matter to which it applied; and by the vicissitudes which it had suffered at various times, from the various situations, necessities, and habitudes of the people for whom it was framed; whose principles, maxims and rules were dispersed through innumerable volumes, displeasing or obscure from the obsolescence of their style and language; the student was abandoned to a haphazard choice of the sources from which to draw the treasures of 'black-lettered wisdom,' and of the avenue by which he might penetrate, with least fear of stoppage or entanglement, into the maze of the law.

Though the extensive and elegant Commentary of Blackstone now forms the portal through which the student customarily passes to a more particular and laborious study of his profession, yet much time and labour are undoubtedly afterwards thrown away, for want of due method in taking up the topics of which he has only exhibited an outline; and however valuable his work as an induction to English law, it would certainly prove more pleasing and more profitable to him who had previously mastered the peculiarities of the feudal institutions and laws from which it arose, and of which the nature of his plan allowed but a brief and general notice. The same may be said of the study of Natural Law, and, in some degree, of Historical Jurisprudence, as preliminary to the reading of the 'Commentaries;' subjects too often neglected by the law student, and which, if properly attended to, liberalize the mind, and often result in forming learned and philosophical lawyers of those who would otherwise have probably been little else than able attorneys. It was the design of the author, in the following Course of Legal Study, to reclaim the time and labour thus often and unprofitably expended, by selecting what was valuable in legal learning, and so arranging as best to adapt it to the complete and ready comprehension of the student.

The value of method is, we acknowledge a trite topic of dissertation; but in the inquiries of the American law student, this method becomes indispensable: where the ideas and language are remote from common life; where the terms are, in an especial degree, peculiar to the science, and of various and singular derivation; and where the body of forms, as well as

principles, depends to a very great extent, on institutions and systems which have long since passed away. Instead of bewildering himself in works which presuppose a knowledge of these changes, and a familiarity with these terms, the student should descend to institutionary treatises; examine the early history of the people whose law is his study; detect this in its elements; trace it through all the modifications which time, circumstance and modes of thinking produce; discover the origin and reasons of the seemingly unmeaning forms with which it is environed; and thus proceed gradually, but with smoothness and certainty, over difficulties otherwise insuperable, and to the understanding of peculiarities otherwise inexplicable.

The Common Law of England, which forms the great body of our own law, has its principal foundation in the feudal institutions. After acquiring the general principles of morals and politics, the next step is, therefore, to inquire minutely into these; and, after examining how far they were mingled, in the law of England, with a portion of the old Saxon constitutions, to pursue them through all the successive alterations which resulted from a change of men's opinions in matters of religion, government, or commerce: in this investigation, the authors recommended under the second title of the Course, will be the best guides. The student may then contemplate these revolutions more nearly and critically in his consideration of the doctrine of *Real and Personal Rights*, and their respective *Remedies*, (which two titles comprehend the great body of the English common law,) and of the law which obtains in the courts of *Equity*; which last, together

with the *Lex Mercatoria* and the *Law of Crimes and Punishments*, are only great branches or divisions of the general law of England. Next succeeds the *Law of Nations*, followed by the *Maritime and Admiralty Law*, which is connected with National Law on the one hand, and with the next title, the *Roman Civil Law*, (from which it draws many of its principles and procedures, and which consequently becomes of importance to the English lawyer,) on the other. Thus master of English Jurisprudence, the student may proceed to inquire in what points it is altered or modified in the *Constitution and Laws of the United States*, or in those of the respective states, particularly his own; and having fortified his mind with the principles of *Political Economy*, and borne these with him in his review of the natural and political resources of his own country (a study essential in a nation where the lawyer and politician are so frequently combined) should close his studious career with a due attention among other things, to *Rhetoric and Oratory*, legal *Biography* and *Bibliography*; and lastly, to the topic of *Professional Deportment*.

Notwithstanding the seemingly great extent of this course, (and certainly we cannot flatter the student with the hope of mastering it with the degree and kind of attention which are usually bestowed on it,) let him not be discouraged. What necessarily proves difficult to the desultory and immethodical reader, who comes to his books in the intervals of idleness or dissipation only, and resumes with reluctance what is willingly abandoned on the first call of pleasure, on the first apology for relaxation, may, by a temporary

exertion of method and attention, be converted, first into a habit, and eventually into a pleasure.

Study and research are not without their attractions; the mere exertion of mind is productive of pleasure, when the difficulties are not conceived too formidable or too numerous, and the student does not advance to the investigation hopeless of success, or unfurnished with the means, and ignorant of the sources of information. In short we conceive that, to an intellect of ordinary capacity, the Law, instead of that guise of difficulty and perplexity in which it for the most part appears, would assume no small degree of interest, and offer no inconsiderable gratification, were the student initiated, so to speak, in its *geography*; were he instructed in the nice connections and dependencies which unite its many minute divisions, and conduct him naturally and easily from one topic to another; instead of being set down in the first instance in the midst of difficulties of which he has had no previous explanation, and of which he knows not whither to apply for a solution. These minute connections, this natural order and arrangement, it was the aim of the author (in which he hopes to have succeeded in some imperfect degree) to exhibit in the following pages.

As the Law of England is not a fabric begun and completed by a single legislator, nor has ever been digested by authority which had the power to lop its excrescences, and reduce it to symmetry, its forms will often seem absurd and complicated, its modes of redress (in theory at least,) circuitous, and its distinctions, in some few cases, unfounded and unjust. But however it may be wanting somewhat in unity

and regularity, it possesses an interest of a higher description. Its history is the history of the manners and opinions of a people advancing from barbarity, through many modes of thinking, under the impulse of many circumstances, some of a temporary and particular, and others of a more general and durable influence, to a high degree of civil and political liberty, of physical and intellectual improvement. In all the grand revolutions of the law is to be discovered, not the variations arising from accident, or the contradiction of individual opinion in its makers and interpreters, but the gradual expansion of men's minds on the subjects most allied to their felicity as men, and their freedom as citizens. In the authors who have delineated these changes, (some of whom will be found enumerated under the second title of our Course,) the reader will discover how these revolutions of opinion, as regarded the relations of monarch and subject, the ends of society, the pursuits and avocations of life, have changed also the law in the points of *tenures*, the alienation of property, the succession to *inheritances*, &c. and in his investigation of the origin of the various modes of *conveyance*, besides detecting the science of these seemingly awkward and irrational *formulas*, will have occasion to observe that even the superstitions of mankind have sometimes conduced to their benefit, and how ineffectual are the provisions of legislatures when popular prejudice and ingenuity once combine to elude them. This is strikingly illustrated in the origin and history of Uses; of Estates in Tail; of the alienation of lands; and the growth of the jurisdiction in Chancery. Thus viewed in reference to the principles

which caused them, the progressive alterations of the law become subjects of entertaining contemplation: from the dry detail of legal rules and maxims, their exceptions and modifications; from that multifarious mass, which would seem only calculated to distract attention, and overburden memory, may be elicited an interest to accompany and animate us in every path of laborious inquiry.

In this kind of investigation, the study of the English historians, and especially those who have treated the Constitutional history of that country, will prove an important assistance, as well as an agreeable relaxation. We would here briefly remark, that a professed and detailed history of the English constitution remained a desideratum, until the recent work of Mr. Hallam. Much excellent matter may also be found in the pages of Turner's History of the Anglo Saxons; Dr. Lingard's History of England; Reeves' History of English Law; M. Guizot's *Histoire de la Revolution d'Angleterre, depuis l'Avenement de Charles I. jusqu'à la Chûte de Jacques II.*; Mr. Brodie's History of the British Empire from the accession of Charles I. to the Restoration; and a recent anonymous work, entitled Conversations on the English Constitution; some notice of all of which will be found in their proper place in the ensuing Course. In the Appendixes of Hume, also, are some of the most valuable, and, to our apprehension, after all the cavils and controversies of party, some of the most just and impartial disquisitions, on the rise and progress of the English constitution and liberties, and of the revolutions of opinion conducing thereto; which, as we have noticed before, have ex-

erted also, in many important particulars, a material influence on the law. Indeed, the whole of that elegant and philosophical production deserves to be the manual of every scientific student of English jurisprudence. Still, we should not repose on Hume, or on any other historian. They are all without exception, in some degree prejudiced, and are occasionally superficial. An accurate knowledge of the spirit of any age can be gained from no one author.

But with all the aids which the student may derive from his adherence to method, he will nevertheless sometimes encounter a principle, a rule, a distinction, a form, or a term, which his previous reading may not have enabled him to understand, and which no legal friend is at hand to explain. In this case, whatever a Law Dictionary is insufficient to elucidate, should be carefully and orderly noted down in the manner hereafter explained.* The student who abandons a subject without understanding it, is like a commander who leaves an enemy in his rear: he advances without the cheering certainty of being fully master of the road over which he has travelled, and most generally finds the difficulty which he has left without overcoming, start up in the course of his progress in a hundred different shapes and a hundred different subjects, to harass and perplex him. But as he cannot always remove every obstacle in his course, he may at least know his weak points, and a faithful chronicle of them will prove useful perhaps for years after he has completed his prescribed studies. Lord Coke has encouraged his reader by saying, 'That although

* Vide Observations on Note Books, at the end of the work.

he may not at any one time reach the meaning of his author; yet at some other time, and in some other place, his doubts will be cleared;’ a remark which most of his students have found not a little consolatory, and which they are often happy to take for granted. But however it may be true, that most of the student’s doubts and perplexities vanish on a further acquaintance with his subject, it is not improbable that some of them may remain; in which case it would be well, had he some regular memorial or record of them, by referring to which he might either be assured of his advancement, or reminded of his deficiencies. Another method which we have found of service both for the distinct understanding, and faithful retention of any long and various work, (as for example, Rutherford’s Institutes, or Blackstone’s Commentaries,) is for the student to make a written analysis of it, or a careful index; the advantage of which is, not merely the readiness with which any topic may be referred to, or the general idea it affords of the scope and arrangement of the work, but the call which it makes on the analytical and synthetical powers, and the vivid impressions left on the mind from this joint operation of reason and memory. Bacon, in his terse manner, observes that
 2 ‘reading maketh a full man; conference a ready man; and *writing an exact man*; and, therefore, if a man write little, he had need have a great memory.’* There can be no doubt that many have written able and learned essays, and even books, not because they were previously able and learned on the topics which

* Essays, 157. ‘On Studies.’

they treated, but because they became so by writing. How much the full comprehension of an intricate subject, and the faculty of retaining it in all of its aspects, is assisted by composition, can be known to those only who have been in the habit of examining topics through this medium. It is said of M. Pothier that 'his method of investigating a subject was to write a dissertation upon it, as he was persuaded that this was the best, if not the only, method of completely mastering intricate questions.'* We therefore strongly recommend the student occasionally to write legal essays, on such moot questions, as he is desirous thoroughly to investigate.

Such as are destined for any of the liberal professions, and particularly for the law, should previously treasure up the elements of general and diversified knowledge; thus acquiring information on subjects which the study of their profession will seldom permit to be extensively and minutely inquired into, and at the same time framing their minds to habits of research and diligence. This is not, however, designed to exclude altogether the study of other sciences, or of polite literature, contemporaneously with that of law. The most indefatigable student has, either from external circumstances, or from mental exhaustion, many intervals of time in which he revolts from his immediate pursuit, though he would gladly fill them with less laborious avocations. The mind is unwilling to be for ever contending with difficulty, or exerted to the

* Vide Mr. Cushing's Biographical Sketch of M. Pothier, appended to his valuable Translation of Pothier's *Traité des Contrats de Louage Maritimes*.

full measure of its strength: the most diligent require some relaxation of employment, some change to diversify the rugged track of investigation. The author of the *Spirit of Laws* was accustomed to unbend his mind, in the moments stolen from the composition of that work, by the perusal of the *Arabian Tales*. The student who desires to economize time, should therefore indulge these variations of the intellectual appetite; and tempt this mental satiety with every modification with which genius has adorned literature, or disguised the harshness of science.

The title *Political Economy*, and the several *Auxiliary Subjects*, in the following Course, as they do not require to be taken up with a very strict adherence to the arrangement we have given, may sometimes be studied at the same time with those of a more abstruse and difficult character. Too great a variety would withdraw the attention from its grand and legitimate object, but a moderate diversity of the student's pursuits will relieve monotony, and enliven that languor which is the inevitable consequence of a single study.

At the same time, there is nothing which we more earnestly inculcate on every tyro in law, than to observe scrupulously the hours which he has allotted to the study of his profession. Whatever may be the temptations of other and more pleasing literary pursuits, or whatever the allurements of idleness or pleasure, this should be a permanent object from which his attention should never be long diverted. In all studious enterprises, (if we may be allowed the phrase,) he will be found to proceed on a very erroneous plan, who thinks to make the extraordinary efforts of to-morrow supply

the deficiencies of to-day. The mind which contemplates with pleasure a short exertion of its powers, which, though it must be regularly made, will, it knows, be regularly relieved by the period for relaxation or for rest, is apt to shrink from the long and uninterrupted exertion which the student often imposes on himself, by way of compensation for past indolence. It will, therefore, diminish his toil, as much as it will advance his progress, to allot to every day its just labour, and to perform this with all the scrupulosity which circumstances will permit. If, however, accident has deranged his plan, or idleness and dissipation have made inroads into the seasons set apart for study, we would warn him against the common mistake of neglecting to employ the fragments of time thus produced, in the expectation and design of more methodical exertion for the future. How much might be gained by the studious occupation of the moments thus idly and unprofitably thrown away, is incredible to those who have never calculated the days, the weeks, and months, to which they rapidly amount. He that would not experience the vain regret of misemployed days, 'must learn, therefore, to know the present value of single minutes, and endeavour to let no particle of time fall useless to the ground.'* Whoever pursues a contrary plan, will forever find something to break that continuity of exertion, in looking forward to which he solaces himself for his present supineness; and at the expiration of the period allotted for the completion of his legal apprenticeship, will generally find a mighty

* Rambler.

waste of time to have proceeded from the trivial value he attached to its fragments.

The sedentary and the studious have, indeed to contend with obstacles peculiar to themselves. Secluded of necessity, for the larger portion of their time, from the business and bustle of men, their ideas insensibly assume a monotonous character, and, receiving little ventilation from the constant current of novelties which refresh those who are engaged in active and crowded scenes, are apt to stagnate into languor and melancholy. It is little wonderful that intellectual exertion should become irksome, when thus accompanied by despondency; and that the student should find the lapse to indolence and relaxation so easy, and the return to his solitary avocations so painful; a painfulness most generally augmented by consciousness of the neglect of duty, which he is happy to drown in the pleasures or bustle of society, rather than brood over in the stillness of his study. Instead of attempting to remedy this tendency by total seclusion, it is better to indulge it with moderation; and to mingle business and pleasure in those proper proportions, which will equally prevent the fatigue of too much exertion, and the satiety of too much enjoyment. Hermits, whether in religion or in literature, have generally found their scheme of exclusive and solitary devotion to a single pursuit, to issue in lassitude and in indolence. But with this occasional relaxation from society; with the exact and uniform attention, and the strict economy in the occupation of time, which we have recommended; together with the facilities which we hope will be afforded by the methodical arrangement attempted in the Course,

now submitted to the student, and the interest which we have endeavoured to shew, may be extracted in no inconsiderable degree, even from the singularities and perplexities of law; the study of this important and highly useful profession, instead of a revolting task will be found an interesting employment, with which, to fill up those portions of life, which he, who knows his own happiness, will be sedulous to devote to business, in order to the more exquisite enjoyment of the remainder.

The mental, and even the physical exhaustion to which laborious students are frequently subjected, may be greatly relieved by very simple means, the more simple, indeed, the better. In such cases we advise bathing, and, more frequently, partial ablutions, especially of the forehead, hands, and wrists; frequent brushing of the hair; gentle walking in the streets; musings on the most trivial subjects,—and like the Jewish Socrates, Mendelshon, even to seek amusement in counting the tiles or bricks of neighbouring houses; or with Bayle, to luxuriate in these walks on the music of the pedestrian organists, and ballad singers,—and, boy-like, even to follow the idle crowd in their wanderings after mountebanks, or other like wonders,—to muse over the gaily decorated windows of the shops, and with lord Orford, or Mr. Pennant, to find recreation in the streets from sources, which, in hours of renewed strength and literary leisure, he may ripen into materials of some utility. He may, for example, speculate on the probable etymology of the curious names so often presented on signs; ponder over the historical or other associations connected with the

names of streets; the wonderful mutations they undergo in orthography and pronunciation, and the causes of the same; or, with a rapid glance at the beauties and defects of the various structures around him, he may contrast the architecture before him, with that of the Vitruviuses and the Palladios of former times; so that finally, he may, for a short time, give himself up to a total abstraction from his legal studies, and all of their associations. How much refreshment may be brought to the wearied mind by thus breaking in upon its chain of thought, and for a moment dissolving its links, can be fully understood only by those who have often experienced it. It is an art, however, which is susceptible of much cultivation, possessed, naturally, by few, but attainable by all. Rapid descents from Olympus to the level earth, are more frequently our duty than our pleasure; and, indeed, require that feature of strong common sense, which distinguishes its possessor from those of more ethereal mould.

The art of study is, no doubt, a nice one; and is capable, perhaps, of being reduced to something like system. Mr. Gibbon remarks, that 'Salmatius had read as much as Grotius, perhaps more. But their different modes of reading made the one, an enlightened philosopher; and the other, a pedant, puffed up with useless erudition.*' He attributes the ignorance, sometimes found even in great readers, to their neglect of method, and to their not having proposed to themselves an end to which all of their studies may point. The habit of skipping irregularly from

* Gibbon's *Miscellaneous Works*.

one subject to another, in his opinion, renders them incapable of combining their ideas, weakens the energies of their mind, generates a dislike to application, and even robs them of the advantages of natural good sense. If this be the unhappy result of not possessing the art of study, the evil must be still greater, when the student has no acquaintance with the sources of knowledge; their various connections and dependencies; and the best authors who have treated the numerous departments which compose his science. To relieve the student from these difficulties, as also to inform him in the art of study, is the object of this volume.

We doubt not but this work is susceptible of much improvement, though it has certainly received no inconsiderable portion of our attention: but as the subject is, we may say, entirely new, we cannot presume that this attempt, at a regular and methodical treatise can be free from errors, either of insertion or omission. The few productions which have appeared, under a somewhat similar title, have, in fact, been essentially of a different character; in most instances, mentioning but a few books, and those almost universally known, and, uniformly read: and many of the subjects discussed in them, sometimes with an able pen, being too general in their nature to be of particular utility to those to whom they are addressed, and not unfrequently so much so as to be of equal benefit to the students of any profession.

Our object in the following Course, is to produce a learned and accomplished lawyer; and, perhaps, we may say, to aid the researches of the Counsellor, the

Judge, and the Statesman. We have selected, with our best judgment, from an infinitude of works, in every branch of the science, and have, in no instance, recommended a single work, or even chapter, or page, which could, with propriety, have been omitted. The Course, we acknowledge, is extensive, but can be thoroughly accomplished, we compute, in six or seven years, making due allowance for other necessary reading. This may appear to some a very long period, and, indeed, is nearly double that which is usually allotted. But the student should bear in mind the extent, difficulty, and importance of the science, and how necessary it is to treasure up an ample fund of knowledge before he becomes fully engaged in practice, after which he will scarce be able to pursue any study with much perseverance or method.* We find in the third Henry's reign, that nine years were considered as the period of the legal novitiate, since which time, although the science has been much simplified, it has also been much enlarged. And we are informed that, although Sir Edward Coke's university education was very thorough, and he had been a most assiduous student of law of the Inner-Temple for six years, yet

* The student is referred to our Advertisement to this edition, for some observations on the mode of pursuing his studies after he comes to the bar; as also, for some remarks on the mode of using this Course, and of extracting from its pages a plan of study suited to his special views. He is also now informed, that on this point, we have been extremely particular to furnish him, (in the course of the volume,) with the means of shortening his scheme of study, according to his own wants, leaving the residue to be taken up by him, if need be, at such times as his future professional labours will admit.

his admission to the bar was regarded as a special mark of approbation. It was not until his twenty-eighth year that he argued his first cause in bank, that of lord Cromwell, a case of slander:—so also we may advert to the *viginti annorum lucubrationes*, mentioned by Fortescue; all of which show that the *three or four* years usually allotted, at the present day, to the study of a science, the boundaries of which have been greatly extended since the days of the Edwards and the Henrys, must result in very superficial acquirements, unless this short period be most assiduously and methodically occupied; and, at the same time, with the strictest regard to the most select sources of legal knowledge.

We are aware that there are circumstances, such as too advanced age, pecuniary necessity, &c. which may render the prosecution of our entire Course impracticable, at least as preliminary to practice; and there are, no doubt, some young men, who, though they may be affected by neither of these circumstances, have not sufficient industry or zeal to undertake so extensive a course. In order, therefore, to avoid all objection or cavil on this point, and to render our endeavours as generally useful and acceptable as possible, *we have designated by the letter E such books, &c. as may be ejected from the Course, by such as may not have it in their power to embrace the whole*: the remainder, according to our best calculation on such a subject, will require about *four* years; a period surely not too long to give just grounds for confidence in the young practitioner.

But, that the different views of students on this subject, may be still further gratified, we have designated a *three years' course*, to be ascertained by ejecting, in each title, the works, &c. to which are prefixed the letters E, e. Such being omitted, there will remain for this class of students a course, that may occupy the period last mentioned. And finally, a fourth course will be found, adapted to the wants of those who study with a fixed view of practising their profession in the interior; that is, out of our commercial and maritime cities. As to them, it is manifest that, beyond certain elementary attainments, there is no need to embrace several departments of the science; and also, that, as to some other departments, a much less extensive course will be required, than is essential for those who are destined to be practitioners in courts which ordinarily deal with the various branches of the *Lex Mercatoria*; of the Admiralty and Maritime Law; of the laws of Nature and Nations; and of the Constitution and Laws of the United States.

In respect to the second and third classes of students, and the courses prescribed for them, let it not be supposed that what we have thus designated, by either of the letters, is to be at a future period disregarded: we deemed the whole so highly valuable that the selection became difficult: we therefore urge all, who have it in their power, to study the entire Course, under the full persuasion that, if they have read with attention and understanding, they may engage in their professional career with confidence of uninterrupted success; and on those who, from necessity, adopt either of the shorter courses, we enjoin, as far as may be practicable,

a continuance of their studies after they have engaged in practice; as the first year or two thereafter are generally but little occupied by business.

This plan is advisable, as studious habits, if once from any cause abandoned, are not easily regained; but, on the other hand, it requires, at this time, much caution, lest a zeal for study should occasion them to neglect the interests of the few clients they may have.

STUDENT'S PRAYER.

PRAYER

BEFORE THE STUDY OF LAW,

BY DR. SAMUEL JOHNSON.

SEPTEMBER 26, 1765.

ALMIGHTY GOD, THE GIVER OF WISDOM,
WITHOUT WHOSE HELP RESOLUTIONS ARE VAIN,
WITHOUT WHOSE BLESSING STUDY IS INEFFECTUAL,
ENABLE, ME, IF IT BE THY WILL, TO ATTAIN
SUCH KNOWLEDGE AS MAY QUALIFY ME TO
DIRECT THE DOUBTFUL, AND INSTRUCT THE
IGNORANT, TO *PREVENT* WRONGS, AND *TERMINATE*
CONTENTIONS; AND GRANT THAT I MAY USE THAT
KNOWLEDGE WHICH I SHALL ATTAIN, TO THY
GLORY, AND MY OWN SALVATION; FOR JESUS
CHRIST'S SAKE. AMEN.

A

STUDENT'S RESOLUTIONS.

I AM RESOLVED [Deo Juvante,]

1. To have a scheme of life.
2. To have a scheme of study.
3. To live temperately.
4. To rise early.
5. To apply myself to study.
6. To oppose indolence, and never to postpone to the morrow the duty of to-day.
7. To take exercise.
8. To adhere to my hours for sleep.
9. To be moderate in my amusements.
10. To note my daily deficiencies, and endeavour to correct them.
11. To avoid, rigidly, all STUDIES on the Sabbath.
12. To preserve my health of body and mind, by a careful observance of all physical necessities and comforts.
13. To be moderate, but never mean, in my expenses.
14. To guard my mind from idle thoughts, and sensual images.
15. To reflect carefully, on the first of January in every year, on my past neglects, and to form all necessary resolutions.
16. To give due attention to my religious studies.
17. To give due attention to my classical studies.
18. To pay special attention to such necessary studies as I find myself particularly averse to.

19. To avoid useless knowledge; at the same time to be very sure that it is useless.
20. To avoid, at least during my novitiate, political disputations; religious polemics; all ephemeral causes of excitement; and all merely fashionable and light reading.
21. To dress fairly in the fashion, but never beyond my means, and studiously to shun foppery.
22. To avoid intimate association with *young men of doubtful principles.
23. To pay cash for every thing, and rather to deny myself a present gratification than to be a debtor.
24. To regard as absurd and dangerous the opinion of some, that men of distinguished talents are never capable of much application.
25. To avoid all eccentricity; and to root out every idiosyncrasy.
26. To cultivate practical knowledge, and a business tact; but to be sure that I am well grounded in the theory.
27. To subdue my imagination, if too wild; to strengthen my judgment, if apt to be false, and to improve my memory, if naturally dull.
28. To rely mainly on my industry, however great may be my talents.
29. To take care of the unavoidable fragments of time, and to see that they are as few as possible.
30. To keep constantly in view the essential distinction between *reading* and *studying*; two things often confounded; and, that as to elementary books, especially, the safest rule is 'multum legendum, non multa.'

FOUR DISTINCT COURSES.

NOTE.

§ The Student will perceive that the present volume contains four distinct courses; to either of which he may resort—viz.

- 1st. All the works, &c. mentioned in the thirteen Titles or 'Particular Syllabuses,' and in the nine Divisions of 'Auxiliary Subjects.' These would probably occupy him six or seven years; and are addressed to the notice of lawyers, as well as of students. Such students as complete this course may be denominated **PROLYTÆ**.
- 2d. A shorter course which embraces the foregoing works, with the exception of those designated by the letter E. This will probably occupy the student about four years; and those who have finished this course may be called **LYTÆ**.
- 3d. A still more limited course, which comprehends those works, &c. which remain after omitting all that are designated by the letters E. and e. This residue may probably occupy the student three years. Those who accomplish this course may be denominated **PAPINIANISTÆ**.†
- 4th. The last course embraces either of the three preceding, with the exception of such *Titles* as well as works, as are also designated by *. This course will probably require the same time as the preceding, and is intended for those who are to pursue their profession in the interior or out of the maritime cities. It omits some *Titles*, and also numerous works in some of the others.

† Should there be any (which we trust will never be the case) who will be content to glean a few works from the first and second Titles only of this volume, they may assume the name of **DUPONDII**, or students of small consideration, from the most common coin known in the Roman Empire, of the value of a penny sterling. Such *Elementary* attainments may sometimes pass them to the Bar; but as they have scarce attained '*ad limina legitimæ scientiæ*,' they will never reap the honours of those '*qui juris nodos, legumque ænigmata solvunt*.'

The extensive learning of Admiralty and Maritime Law, of the *Lex Mercatoria*, the Roman or Civil Law, &c. need not be studied by them, much beyond the elements embraced by the first and second Titles of the course. But as their peculiar studies are somewhat enlarged, or should be, on the remaining topics, and as they are equally destined to the high honours of the other classes, they may be entitled to the names of *Prolytæ*, *Lytæ*, or *Papinianistæ*, according to the course they have pursued. And, in order to exclude all mistake or difficulty in making the selection for either of the four courses, we have presented towards the close of the volume, summaries of all the courses; cautioning the student, however, to study our volume in the mode prescribed, and not to resort hastily to those summaries, but only after having faithfully adhered to the advice, not only in our introductory remarks, but in the course of the volume.

☞ The 'Advertisement,' and 'Proem,' to which we particularly refer the student, will more fully explain our views on these several courses.

Students in consulting the following course of study, should, bear in mind, that in all of the Syllabuses and Divisions, the Notes therein alluded to, and which are designated by numbers, will be found by corresponding numbers under their proper heads; there being, throughout the volume, a series of notes on all works and topics, enumerated under each Title and Division. The table of contents, and the indexes, will enable them to find with ease, any subject embraced in the volume.

A COURSE
OF
LEGAL STUDY.

Qui studet optatam cursû contingere metam,
Multa tulit, fecitque puer, sudavit et alsit.—*Hor. Epis. Ad. Pison.*

Method is the light and life of study: without it the simplest subject is dark, and with it the most abstruse is often easy, and even pleasing.

LAW, in its most comprehensive signification, is that system of rules to which the intellectual and physical worlds are subjected; either by *God* their creator or by *man*; by which the existence, rest, motion, and conduct of all created and uncreated entities are regulated, and on the due observance of which their being or happiness depends.

Law, as applied to *human* conduct generally, signifies that body of rules established for the regulation of human economy, whether *national* or *individual*; dictated to us by the light of nature, or by revelation; or prescribed by human superiors for individual observance; or ordained by the consent, express or implied, of sovereign states, for the guidance of international conduct; and to which those respectively, to whom the rules are directed, are obliged to make their actions conformable.

Law, or 'The Law,' is an abstract term, and as a *genus* means nothing more than the totality of individual laws contemplated as *one body*, without reference either to their origin or application. In this point of view, it is a mere fictitious entity.

Law, in the *concrete*, signifies a rule of action, and, according to the subject of its application, admits of numerous divisions.

Law in the concrete, as it prescribes rules of human conduct, may be advantageously studied under the following titles or divisions, which we presume will be found to embrace as much of this widely extended science as an individual should aspire to attain; and in its prosecution we would advise the student to take up the subjects in the order in which we have arranged them, both in the general and particular syllabus, subject, however, to the qualifications contained in our Introduction.

GENERAL SYLLABUS.

Titles.

- I. MORAL AND POLITICAL PHILOSOPHY.
- II. THE ELEMENTARY AND CONSTITUTIONAL PRINCIPLES OF THE MUNICIPAL LAW OF ENGLAND; OF THE UNITED STATES, AND OF THE ROMAN OR CIVIL LAW: AND HEREIN,
 - 1ST. OF THE FEUDAL LAW.
 - 2D. OF THE ORIGIN AND PROGRESS OF THE COMMON LAW.
 - 3D. OF THE INSTITUTES OF THE MUNICIPAL LAW OF ENGLAND.

4TH. OF THE INSTITUTES OF THE AMERICAN LAW.

5TH. OF THE INSTITUTES OF THE ROMAN, OR CIVIL LAW.

- § III. THE LAW OF REAL RIGHTS AND REAL REMEDIES.
- § IV. THE LAW OF PERSONAL RIGHTS AND PERSONAL REMEDIES.
- § V. THE LAW OF EQUITY.
- § VI. THE LEX MERCATORIA.
- § VII. THE LAW OF CRIMES AND PUNISHMENTS.
- ✓ VIII. THE LAW OF NATIONS.
- § IX. THE MARITIME AND ADMIRALTY LAW.
- ✓ X. THE CIVIL OR ROMAN LAW.
- XI. THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA.
- ✓ XII. THE CONSTITUTION AND LAWS OF THE SEVERAL STATES OF THE UNION.
- XIII. POLITICAL ECONOMY.

AUXILIARY SUBJECTS.

Divisions.

- 1ST. THE GEOGRAPHY, AND CIVIL, STATISTICAL, AND POLITICAL HISTORY OF THE UNITED STATES.
- 2D. FORENSIC ELOQUENCE AND ORATORY.
- 3D. LEGAL BIOGRAPHY AND BIBLIOGRAPHY.
- 4TH. LEGAL REVIEWS, ESSAYS, JOURNALS, MAGAZINES, &c.—BRITISH, FRENCH, GERMAN, AND AMERICAN.

5TH. CODIFICATION, AND PROPOSED AMENDMENTS
OF THE LAW.

6TH. MEDICAL JURISPRUDENCE.

7TH. MILITARY AND NAVAL LAW.

8TH. LOGIC.

9TH. PROFESSIONAL DEPARTMENT.

APPENDIX.

1ST. OF NOTE BOOKS.

2D. OF DEBATING SOCIETIES, AND OF MOOT COURTS.

NOTE.

The Syllabuses into which our work is divided, are made the foundation of a series of notes. In the former the student will find the works which constitute his regular course of studies; and in the latter are enumerated many productions of various degrees of merit, proper to be known by students, as well as lawyers, and some of which will, of course, be carefully read in after life. In each Syllabus, we have been careful to designate those leading works most likely to be accessible to students;—and in the notes many volumes of distinguished excellence, but which are little known to the profession generally, are now brought to their notice: so that the whole, if collected, would form a tolerably extensive library of the most select and approved works known to the law, in all its branches. The numerous other works found in still more extensive law libraries, may be gradually added through the entire period of the lawyer's professional life.

In the Arts, *he* is most likely to be thoroughly skilled in every nice and curious manipulation, who possesses the greatest variety of fit and perfect instruments; so in the law, or other sciences, those who have collected around them the largest library of well selected books, are likely, *cæteris paribus*, to be the most learned,—as every want may be immediately gratified, and as these are sure to beget others more refined and curious. As the lawyer's home should be his study (and the remark applies to every profession) let it be graced, not only with every convenience, but as far as practicable with every work, of any merit, known to his science. Not that the most elevated attainments *have* not, and *may* not be acquired with much less means,—but that their possession (with even a tolerably well regulated mind) is the surest stimulant to industrious and persevering enterprises into the depths of the science to which he is dedicated.

PARTICULAR SYLLABUS.

TITLE I.

Natura enim juris explicanda est nobis, eaque ab hominis repetenda natura.

Cic. De Leg. lib. i. c. v.

MORAL AND POLITICAL PHILOSOPHY.

- ✓ 1st. The Bible. (*Note 1.*)
- ✓ 2d. Cicero's Offices. (*Note 2.*)
- ✓ e. 3d. Seneca's Morals. (*Note 3.*)
- ✓ E. 4th. Aristotle's Ethics, *Gillies' translation.*
(*Note 4.*)
- ✓ e. 5th. Xenophon's Memorabilia Socratis.
(*Note 5.*)
- ✓ 6th. Beattie's Elements of Moral Science,
[*the following titles only:*]
 - 1st. 'Psychology.'
 - 2d. 'Natural Theology.'
 - 3d. 'Moral Philosophy.'} (*Note 6.*)
- 7th. Paley's Moral and Political Philosophy,
[*the first five Books only.*] (*Note 7.*)
- e. 8th. Locke's Essay concerning Human Understanding;

[*Especial attention to be paid to the following chapters:*]

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| 'Of Identity and Diversity.' | } BOOK II. Vol 2 ^d
ch. 28, 29. |
| 'Of Moral Relations.' | |
| 'Of Words.' <i>Book iii. Vol 2^d</i> | |
| 'Of Maxims.' <i>chap. 7th.</i> | } SMITH'S Vol 3 |
| 'Of Probability.' <i>chap. 15th.</i> | |
| 'Of the Degrees of Assent.' | |
| <i>chap. 16th.</i> | |
| 'Of Reason.' <i>chap. 17th.</i> | |
| 'Of Error.' <i>chap. 20th.</i> | |

E. 9th. Cogan's Ethical Questions. (*Note 8.*)

E. 10th. Smith's Theory of Moral Sentiments;

[*Particular attention to be paid to part iv.*

'Of the systems of Moral Philosophy.']

(*Note 9.*)

11th. Reid's Essays on the Powers of the Human Mind;

[*Particular attention to be paid to the following Essays:*]

Essay i. 'Preliminary.' *Vol. 1st.*

Essay vi. 'Of Judgment.' *Vol. 2d.*

Essay vii. 'Of Reasoning.' *Vol. 2d.*

Essay iii. 'Of the Rational Principles of Action.' *Vol. 3d. Part 3d.*

Essay iv. 'Of the Liberty of Moral Agents.' *Vol. 3.*

Essay v. 'Of Morals.' *Vol. 3. Part 3d.*

(*Note 10.*)

- E. 12th.** Hedge's Abridgment of Brown's Philosophy. (*Note 11.*)
- 13th. Paley's Philosophy, (*the sixth Book.*)*
- 14th. Beattie's Elements of Moral Science, 'Of Politics.'†
- e. 15th. Burlamaqui's Institutes of Natural and Political Law. (*Note 12.*)
- 16th. Rutherford's Institutes. (*Note 13.*)
- E. 17th** Bentham's Introduction to the Principles of Morals and Legislation; [*the first eleven chapters.*]‡
- ✓ e. 18th. Aristotle's Politics.‡ Gillies' translation. (*Note 14.*)
- e. 19th. Montesquieu's Spirit of Laws; (*Note 15.*) [*Particular attention to be paid to the 28th, 30th, and 31st books, for the reasons assigned in Note 5, to Title I. of this work.*]
- E. 20th.** Cataneo's Source, Strength, and True Spirit of Laws, in which the errors and defects of M. de Montesquieu, are pointed out and considered. (*Note 16.*)
- e. 21st. Grotius, on the Rights of War and Peace; (*Note 17.*) [*The following select chapters only:*]
- 1st. 'The Preliminary Discourse.'
- 2d 'Of the Original Acquisition of a right over Persons.'

* Vide Note 7th of this Title.

† Vide Note 6th of this Title.

‡ Vide Note 2, to Title vii.

§ Vide Note 4, to this Title.

‘Of the right of Parents.’
 ‘Of Marriage.’ ‘Of Societies.’
 ‘Of the right over subjects.’
 ‘Of Slaves.’

[*The 5th chapter of the 2d book.*]

3d. ‘Of Acquisitions by virtue of
 some Law.’ ‘Of succession
 to the Estate and Effects of an
 Intestate.’

[*The 7th chapter of the 2d book.*]

4th. ‘When Jurisdiction and Property
 cease.’ [*The 9th chap.*]

5th. ‘Of Promises.’ [*The 11th chap.*]

6th. ‘Of Contracts.’ [*The 12th chap.*]

7th. ‘Of Interpretation.’ [*The 16th chap.*]

E. 22d. Puffendorf, on the Law of Nature and
 Nations. (*Note 17.*)

[*The following select chapters only:*]

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|---|---|----------|
| 1st. ‘Of the Certainty of
Moral Science.’ ch. vii. | } | BOOK I. |
| 2d. ‘Of Law in general.’
ch. vi. | | |
| 3d. ‘Of the Qualities of
Actions.’ ch. vii. | | |
| 4th. ‘Of the Law of Na-
ture in general.’ ch. iii. | } | BOOK II. |
| ‘Of Self-Defence.’ ch. v. | | |

- 5th. 'Of an Oath.*' ch. ii.] BOOK IV.
- 6th. 'Of Price.' ch. i. }
- 7th. 'Of Bartering, Buying,
and selling.' ch. v. } BOOK V.
- 8th. 'Of Renting and Hir-
ing,' ch. vi. }
- 9th. 'Of Partnership.' ch. viii. }
- 10th. 'Of the Master's Au-
thority,' &c. ch. iii. } BOOK VI.
- 11th. 'Of the Parts of Sove-
reignty,' &c. ch. iv. }
- 12th. 'Of the Forms of Com-
monwealths,' &c. ch. v. } BOOK VII.
- 13th. 'Of the Power to direct
the Actions of the sub-
ject.' ch. i. }
- 14th. 'How Subjection ceases.'
ch. ix. } BOOK VIII.
- 23d. Hoffman's Legal Outlines. Vol. 1.
[The 10th Lecture to be omitted at this time.]

* It will not be premature for the student at this time to read the celebrated case of *Omicund v. Barker*. 1 Atkyn's Reports, p. 21.

NOTES ON THE FIRST TITLE.

(*Note 1.*) **THE BIBLE.**—The Bible forms a very natural introduction to this Course, as recording a form of government and law originating in the great Legislator of the universe; whose pleasure it was to enjoin, by a direct communication of his will, those duties, and declare those obligations which, when by reasoning on the nature and relations of man, we have concluded to be such, we consider as the dictates of nature. Those ordinances also, which were not designed to be of universal authority, but only to regulate the polity of the particular people to whom they were delivered, should however be minutely known; as they are, in many instances, the foundation of the law, and the clue to the controversies of the Canonists.

The Bible is valuable also in two other points of light: it affords the only authentic history of the origin and multiplication of mankind; and by exhibiting the actual manner in which society was generated, and communities were formed, offers the best theory of the social compact; a point on which there has been no small misconception. Its historical parts will tend to shew with great probability, that those general principles of morals prevalent among the rudest and most unlettered nations, and which have perhaps been too hastily attributed to the efforts of natural reason, are more rationally to be ascribed to direct revelation, and will appear, with all the errors and impurities which time, situation, and the proclivity

to corruption may have produced, to have been the broken glimpses of a fuller and clearer light, originally radiated directly from heaven. These remarks apply of course chiefly to those portions of the Bible connected with the origin and polity of the Jews.

The purity and sublimity of the morals of the Bible have at no time been questioned; it is the foundation of the common law of every christian nation. The christian religion is a part of the law of the land, and, as such, should certainly receive no inconsiderable portion of the lawyer's attention. In vain do we look among the writings of the ancient philosophers for a system of moral law comparable with that of the Old and New Testament. How meagre and lifeless are even the 'Ethics' of Aristotle, the 'Morals' of Seneca, the 'Memorabilia' of Xenophon, or the 'Offices' of Cicero, compared with it. 'From the Bible,' says Soame Jenyns, 'may be collected a system of Ethics, in which every moral precept founded on reason, is carried to a higher degree of purity and perfection than in any other of the wisest philosophers of preceding ages. Every moral precept founded on false principles, is totally omitted, and many new precepts added, particularly corresponding with the new object of this religion.'

So also, Mr. Locke remarks, that in morality there have been books enough written, both by ancient and modern philosophers, but that the morality of the Gospel so exceeds them all, that to give a man a complete knowledge of genuine morals, he would send him no other book but the Testament. These opinions are zealously corroborated by Sir William Jones, who thus expresses himself. 'I have carefully and regularly perused these Holy Scriptures, and am of opinion that the volume, independently of its divine origin, contains more *sublimity*, purer *morality*, more important *history*, and finer

strains of *eloquence*, than can be collected from *any other book, in whatever language it may have been written.*' On another occasion he repeats, but with a slight variation, the same opinion. 'I cannot refrain from adding,' says he, 'that the collection of tracts, which we call from their excellence the Scriptures, contain, independently of a divine origin, more true sublimity, more exquisite beauty, purer morality, more important history, and finer strains both of poetry and eloquence, than could be collected within the same compass, from all the other books that were ever composed in any age or in any idiom.' 'The two parts of which the Scriptures consists,' continues this distinguished writer, 'are connected by a chain of compositions, which bear no resemblance in form or style to any that can be produced from the stores of Grecian, Indian, Persian, or even Arabian learning. The antiquity of those compositions no man doubts, and the unrestrained application of them to events long subsequent to their publication, is a solid ground of belief that they are genuine compositions, and consequently inspired.'

If treatises on morals should be the first which are placed in the hands of the student, and the structure of his legal education should be raised on the broad and solid foundation of ethics, what book so proper to be thoroughly studied with this view, if no other, as the Bible?

But the religion and morals of the Scriptures by no means constitute the only claim which this inestimable volume possesses on the earnest attention of the legal student. There is much *law* in it, and a great deal which sheds more than a glimmering light on a variety of legal topics. Political science is certainly indebted to it for an accurate account of the origin of *society, government, and property*. The subjects of *marriage, the alienation of property inter vivos, its acquisi-*

tion by *inheritance* and *bequest*, the obligation of an *oath*, the relations of *governor* and *governed*, of *master* and *servant*, *husband* and *wife*, the nature and punishment of a variety of crimes and offences, as *murder*, *theft*, *adultery*, *incest*, *polygamy*, &c. the grounds of *divorce*, &c. &c. still receive illustration from this copious source; and this high authority is often appealed to by legal writers, either as decisive or argumentative of their doctrines. This view of the Scriptures is strongly entertained by the late Dr. Campbell, who in his lectures on ecclesiastical history, remarks that, 'When we consider attentively the institutions of Moses, we perceive that they comprehend every thing necessary for forming a civil establishment; not only precepts regarding the morals of the people, and the public and private offices of religion, but also laws of jurisprudence; such as regulate the formalities of private contracts, inheritance, succession and purchases; such as fix the limits of jurisdiction, and subordination of judicatories, appoint the method of procedure in trials, both civil and criminal, and punishments to be awarded by the judges to the several crimes. I may add, they comprehend, also a sort of law of nations, for the use of that people, in adjusting the terms of their intercourse with other states and kingdoms, prescribing rules for the making and conducting of war and peace, entering into public treaties, and the like.'

The eloquence and sublimity of the volume under consideration entitle it, as we conceive, to the particular attention of all who are designed for public speaking; for under the head of Eloquence, as well as that of Morals, in this Course, surely no book has so fair a claim to insertion. The infinite variety of topics, as history, biography, law, politics, ethics, poetry, &c. necessarily produce a great diversity of style. Does any history narrate events so grand and interesting, and conse-

quently so well suited for sublimity of expression and manner, as the book of *Genesis*? In the book of *Exodus* we have, in appropriate language, detailed to us the astonishing wonders effected by the Almighty for the rescue of the Israelites from the severity of Egyptian bondage. In *Leviticus*, *Numbers* and *Deuteronomy*, we have the ritual, moral, and civil law of the Jews. The book of *Joshua* unfolds the progress of the Israelites till their establishment in the land of promise; the books of *Judges*, *Samuel*, *Kings*, *Chronicles*, *Ezra*, *Nehemiah*, are chiefly historical. Where, among uninspired authors, do we find a work so replete with the most affecting and interesting tales, narrated in a style of singular perspicuity, and often of wonderful eloquence? the stories of Abraham's intended sacrifice of his son; of Joseph and his brethren; of Sampson and the Philistines; of Jephtha and his daughter, and of Esther, are of unrivalled excellence; and the biographies of Job and of David are no less interesting than sublime and instructive. In the poetry of the Bible, there is a great variety: *didactic*, *lyric*, *elegiac* and *pastoral*: as an instance of the first we have the book of Proverbs. The book of Psalms affords us an example of the second, of elegiac poetry there are many specimens, as David's lamentations over Jonathan, and the lamentations of Jeremiah, which have been considered, by many, as the most perfect model of this species of composition in the whole world; and as an instance of pastoral poetry, we have the song of Solomon.

In sublimity the Scriptures infinitely surpass every other composition. Dr. Blair says, that Isaiah is 'without exception, the most sublime of all poets; and the book of Job is not only equal to any other of the sacred writings, but is superior to them, Isaiah alone excepted.'

Burgh, in his 'Dignity of Human Nature,' deduces an argument for the divinity of the Scriptures from their sublimity.

This sensible writer remarks, that 'the loftiest passage in the most sublime of all *human* productions, is the beginning of the eighth book of Homer's Iliad. There the greatest of all human imaginations labours to describe, not a hero, but a God; not an inferior, but the supreme God; not to shew his superiority to mortals, but to the heavenly powers; and not to one, but to them all united.' We now submit to the student a *verbal* translation of the passage alluded to, as given by Burgh, and subsequently contrasted by him with one taken from the Bible. 'The saffron coloured morning was spread over the whole earth; and Jupiter, rejoicing in his thunder, held an assembly of the Gods upon the highest top of the many-headed Olympus. He himself spoke to them, and all the Gods together listened.

'Hear me, all ye Gods, and all ye Goddesses, that I may say what my soul within my breast commands. Let not, therefore, any female deity, or any male, endeavour to break through my word; but all consent together, that I may quickly perform these works.

'Whomsoever, therefore, of the Gods I shall understand to have gone by himself, and of his own accord, to give assistance to the Trojans, or to the Greeks, shall return to Olympus shamefully wounded; or I will throw him, seized by me, into dark hell, far off, whither the most deep abyss is under the earth, whither there are iron gates, and a brazen threshold, as far within hell, as heaven is distant from the earth. He will then know, by how much I am the most powerful of all the Gods. But come, try, O ye Gods, that ye may all see. Hang down the golden chain from heaven; hang it all ye Gods, and all ye Goddesses; but ye shall not be able to draw from heaven to the earth JUPITER, the great counsellor, though ye strive ever so much. But when I afterwards shall be willing to

draw, I shall lift both the earth and the sea. Then I shall bind the chain round the top of Olympus, and they shall all hang aloft. For as much am I above Gods, and above men.'

'With this most masterly passage,' continues Burgh, 'of the greatest master of the sublime of all antiquity; the writer who probably had the greatest natural and acquired advantages of any mortal for perfecting a genius; let the following *verbal* translation of a passage from writings penned by one brought up a shepherd, and in a country where learning was not thought of, be compared, that the difference may appear. In this comparison, I know of no unfair advantage given the inspired writer: for both fragments are literally translated; and if the critics are right, the Hebrew original is verse, as well as the Greek.'

'O Lord, my God, thou art very great! Thou art clothed with honour and majesty! Who coverest thyself with light as with a garment: who stretchest out the heavens like a canopy. Who layest the beams of his chambers in the waters: who makest the clouds his chariots: who walkest upon the wings of the wind. Who makest his angels spirits; his ministers a flame of fire. Who laid the foundation of the earth, that it should not be moved for ever. Thou coverest it with the deep, as with a garment: the waters stood above the mountains. At thy rebuke they fled; at the voice of thy thunder they hasted away. They go up by the mountains; they go down by the valleys unto the place thou hast founded for them. Thou hast set a bound, that they may not pass over; that they turn not again to cover the earth.

'O Lord, how manifold are thy works! In wisdom hast thou made them all. The earth is full of thy riches. So is the great and wide sea, wherein are creatures innumerable, both small and great. There go the ships. There is that

Leviathan, which thou hast made to play therein. These all wait upon thee, that thou mayest give them their food in due season. That thou givest them, they gather. Thou openest thy hand, they are filled with good: thou hidest thy face, they are troubled: they die, and return to their dust. Thou sendest forth thy spirit, they are created; and thou renewest the face of the earth. The glory of the Lord shall endure for ever. The Lord shall rejoice in his works. He looketh on the earth, and it trembleth. He toucheth the hills, and they smoke. I will sing unto the Lord as long as I live. I will sing praises unto my God, while I have my being.'

All comment on the comparative merit of these passages would be superfluous.

In the morals of the New Testament we have the fullness of light, the radiance of divine truth. The history of Christ and his apostles is in the highest degree interesting, and the style exceedingly fine. The ease, simplicity and aptness of the parables of our divine master, have never been equalled; finally, this, in common with the Old Testament, contains more of the *utile et dulce* than any other composition.

We have been thus particular on the subject of the utility of the Bible to the *lawyer*, from a deep conviction that its ethics, history, and law cannot fail of being eminently serviceable to him; from our observation that young lawyers frequently read any other book but this; and lastly, from the fact, that nearly all the distinguished lawyers with whom we have been personally, or through the medium of books, or otherwise acquainted, have not only professed a high veneration for biblical learning, but were themselves considerably versed in it. Lord Coke had, no doubt, made the Scriptures his study, long before Archbishop Whitgift sent him a copy of the New Testament, with a request, that he, who had so

thoroughly mastered the common law, should study the law of God: be this as it may, his writings abound with arguments and illustrations taken from that source. The names, also, of Bacon, Hale, Holt, Jones, Erskine, Yates, Grotius, D'Agnesseau, and very many others, who have testified their respect for this knowledge, by frequent reference to the sacred volume; added to the like tribute, so often paid to it by poets and orators, were a sufficient warrant, if one were needed, for the urgent manner in which I press this subject on the student's attention. And though it is very far from my design, to recommend law students to the same careful examination of these ancient and admirable writings, as is demanded of theological students; yet, as I am satisfied that the too common reluctance, manifested by them, to regard this volume as coming within the limits of a course of legal study, proceeds, in a great degree, from ignorance as to the proper mode of studying the Bible, and especially as to the sources of elementary and illustrative knowledge on this subject, with which our libraries abound; I shall not hesitate to make a few remarks on these topics; though to some, they may appear a little foreign to the purpose we have in hand.

As the Bible records, in some degree, the history, geography, manners, customs, laws, philosophy, and literature, of a very remote antiquity, and of nations long since passed away, and which have left scarce a trace of their existence, it is reasonable to suppose that it, beyond all other productions, would require, (for its just comprehension,) a knowledge of these various subjects, as it may be derived from numerous other sources; and indeed, in no small degree, from works composed chiefly from the scriptures themselves, by a careful and methodical arrangement of its particulars. The Bible, consequently, ought not to be studied alone, but due attention should be paid to the auxiliaries to which we have alluded.

Aware of the difficulties encountered by all who read the sacred volume, devoid of this elementary knowledge, or of an acquaintance with its sources; we shall briefly state what we conceive these impediments to be; and how they may be the most effectually removed. They may be classed, perhaps, as follows.

FIRST.—The historical portions of the Bible are little else than inartificially connected chronicles, presenting no very clear or continuous view of the events recorded; and a still more meagre history of the nations to which they relate. The difficulty arising from this circumstance, has been completely removed by a great number of works in all languages, which have either arranged all the materials furnished by the Scriptures, so as to form an orderly narrative; or, have added to these, much illustrative matter from foreign sources, ancient and modern; forming a connected, lively, and interesting detail.

Under this head we refer the student to the following, as the most approved works; *either of which* will, perhaps, be sufficient for his purpose. '*Howel's History of the Bible.*' '*Brown's History of the Bible.*' '*Gleig's History of the Bible,*' 1831. '*Jahn's History of the Hebrew Commonwealth.*' Andover, 1828. '*Milman's History of the Jews, from the earliest period to the present time.*' New York, 1831.

SECONDLY.—Students are less apt to be familiar with the Geography (historical and physical) of the Bible, than any other; not only because it is the most ancient, but because it is less connected with his classical and other studies, than the Geography of most other nations. We refer him to '*Mayo's Ancient Geography.*' Vol. 1. *Second Series*—page 97 to 197. Philadelphia, 1813. '*Smiley's Scripture Geography; or a Companion to the Bible.*' Philadelphia, 1831. '*Horne's Intro-*

duction to the Study of the Bible.' Part iii. Book i. page 222 to 258, of the *Abridgment of that work.*—London, 1827.

THIRDLY.—Another difficulty (and a very great one) which embarrasses the student in his early examination of the Bible, arises from his little acquaintance with the manners, customs, institutions, laws, &c. of the nations (especially the Jews) mentioned in the sacred volume. To relieve him from this, I know of no work comparable to '*Jenning's Jewish Antiquities*;' 2 vols. 8vo. London, 1823—of which there is a recent American edition in one volume. He may also read *Horne's Introduction to the Study of the Bible*, page 259 to 374, with the certainty of finding much that will enlighten his path, and make many things simple, which before were wholly incomprehensible. ¶ And we may here remark, once for all, that scarce a day elapses in which the philosophical researches of travellers into the existing habits, laws, and institutions of the descendants of these nations, does not shed some new light illustrative of the meaning, or confirmatory of the truth of the Scriptures.

FOURTHLY.—The most serious impediment to the proper understanding of the sacred volume, arises from its figurative or symbolical language; by which is to be understood, not only that language of imagination or passion which, however beautiful, seems to mark the style of all unlettered nations; but also much that has a mere spiritual or mystical signification. The student, then, must never lose sight of the fact that a very large portion of the New, and of the Old Testament, is replete with figurative language of both kinds; and that without a knowledge of its true import, neither its eloquence and sublimity, as a human, nor its mystical sense, as a divine production, can be felt, or understood. The student must further bear in mind that the Scripture figures have been classed into five kinds; and if (after comprehending

them thoroughly,) he makes it a practice to observe the figure, and to refer it to its proper head, a beautiful and wonderful system will arise to his view, which remains wholly invisible to those who read the Scriptures without these aids, and in the manner in which other works are usually read. The division of Scripture figures to which we allude, is as follows:

1. Those taken from the *physical* creation; these are also called similitudes; and, if a discourse is composed of them, it is then called a parable. By this means, things visible are made the representatives of things invisible; and when their true import reaches the mind, it is always with a pleasing effect, and a lasting impression.

2. Other figures are taken from the various institutions of the Mosaic law, that being figurative of things which were to come to pass. These are called *artificial* figures, as the first (being taken from the natural world) are denominated *natural* figures. The Mosaic institutions, thus considered, give rise to much figurative language, which is called the *shadow*, *copy*, or *type*, in contradiction to the things signified, which are called the *substance* or *archetype*. In the New Testament, also, many figures are borrowed from the institutions recorded in the Old; in which cases they are but repetitions of the figures, by appropriating the type, or matter prophesied, to the matter fulfilled.

3. Many, called *personal* figures, are derived from the persons of the prophets, to prefigure that great prophet (Christ) who was expected to come.

4. There is a considerable class of figures taken from the history of the Church under the old dispensation, to prefigure the model of that looked for under the Messiah.

5. And lastly. The miracles and other actions of inspired men, particularly those of Moses, and of Christ, are also

regarded as being often figurative of something beyond their mere obvious import. The foregoing classes of figures constitute the symbolical and mystical language of the Bible; and must never be lost sight of by those who would enjoy its sublimity, or profit by its truths.

Under this head we refer the student to '*Jones' Lectures on the Figurative Language of the Scriptures.*' London, 1788; republished, Philadelphia, 1818. '*Horne's Introduction to the Study of the Bible,*' page 180 to 198 of the *Abridgment of that work.* '*Keith's Evidencé of Prophecy,*' New York, 1832, from the sixth Edinburgh edition; and to '*Keith's Signs of the Times,*' Edinburgh, 1832.

FIFTHLY.—Another cause of difficulty, in the early study of the Bible, arises from the anomalous character of the composition of certain portions of it, which have long maintained a kind of traditional claim to be regarded as strictly poetical, not only as to elevation of thoughts, splendour of imagery, and the other essentials of poetry, but even as to the characteristics of rhyme and classical metre. Although the theory of Hebrew versification has undoubtedly been carried to a very fanciful extent, as has been, of late sufficiently demonstrated, it is equally clear that there is in these compositions a something which widely distinguishes them from mere prose; and the difficulty has been to ascertain its precise nature, and to give it an appropriate name. In the translations, no less than in the original, all have perceived a variety of cadences, an oratorical rhythm, a species of metre, and a curious repetition of the sounds, but more frequently of the sense, which seem to separate these compositions from all others. The student, we presume, will never have either the time or the curiosity to consult the numerous systems and opinions, ancient and modern, on the subject of Hebrew versification;

as all these doctrines, of Philo Judæus, of Origen, Eusebius, &c. among the ancients, and those of Masius, Fabricius, Gomar, Buxtorf, Meibomius, Vander Hardt, Le Clerc, Bishop Hare, Dr. Edwards, Grieve, Bellermann, and a hundred others, among the moderns, have been compelled to yield to the ingenious system of Bishop Lowth who, (like Champollion, of our own day, on an equally curious, and it must be admitted, a no less important subject,) has given to the world the solution of a question, which appeared to have been entirely lost in the lapse of ages, amidst the decline of Hebrew philology and literature. It would be well for the student to be at least apprised of the theory to which we allude, a crude outline of which is all that we can attempt, but which will be sufficient to enable him to read the poetical parts with a new key, that cannot fail to remove the impressions, often entertained, that they are occasionally redundant in unmeaning repetitions, and clothed in a style which renders their meaning doubtful, or unknown. Bishop Lowth, when in search of the long sought for pervading characteristic of that artificial conformation of sentences, visible in certain portions of the Bible, carefully and learnedly examined all former theories on the subject; and had no hesitation in rejecting them all. Not content, however, with prostrating the systems of others, showing thereby what the features of Hebrew poetry *are not*; he has established, to the satisfaction of nearly all, what *they are*; all of which he resolves into what is called the system of PARALLELISM. This characteristic he regards as universal, and equally applicable to several portions of the New Testament, since it is wholly independent of the Hebrew language, and arises entirely from the collocation of the words and sentences. Parallelism, then, consists in such an equality, resemblance and relationship between the members of sentences, and

between one sentence and another, as affects the thoughts and words; so that, by their direct, alternate, or other repetitions, not only a rhythmical effect is produced, but great dignity, force and sweetness are imparted. By this means things are made to correspond to things, and words to words. Since the time of Bishop Lowth, his theory has been thoroughly analyzed, commented on, and illustrated by numerous examples; and though it has been presented in a more elementary, and perhaps, scientific form by others, its learned author completed the theory, and left to them no other office. 'When a proposition is delivered,' says a late writer, 'and a second is placed under it, equivalent to, or contrasted with it in sense, or similar to it in the form of grammatical construction, these are called *parallel lines*; and the words or phrases answering one to another in the corresponding lines, *parallel terms*.*' The student will have but an imperfect idea of the nature of these parallels, unless we give him a few examples, out of the vast number stated by Lowth, Jebb, Gerard, Horne, and others, who have written on this subject. In these we shall be very brief, as the length of our Note begins to admonish us that it is time to come to a close.

The poetical parallels may be divided into three great classes; but there are many subordinate subdivisions, so that there is in truth, great variety in them. In some of them, however, the parallelism becomes extremely faint. The three great divisions are Synonymous Parallels, Antithetic Parallels, and Synthetic Parallels.

*Vide Jebb's Sacred Literature, 23. In this able, and very learned work, the theory of poetical parallelism is fully explained, and illustrated by numerous striking examples.

1: EXAMPLE OF THE SYNONYMOUS PARALLEL.

'O Jehovah, in thy strength the king shall rejoice;
 And in thy salvation, how greatly shall he exult!
 The desire of his heart thou hast granted him;
 And the request of his lips thou hast not denied.'

Psalms 21. 1, 2.

Here it will be perceived the lines correspond one to another; the same sense being expressed in *equivalent* terms. In this example nearly every word and thought is beautifully repeated, with a pleasing variation in the language, and a slight addition to the thought.

2: EXAMPLES OF THE ANTITHETIC PARALLEL.

'These in chariots, and those in horses;
 But we in the name of Jehovah our God, will be strong:
 They are bowed down and fallen;
 But we are risen, and maintain ourselves firm.'

Psalms 20. 7, 8.

'Faithful are the wounds of a friend;
 But deceitful are the kisses of an enemy.'

Proverbs, 27. 6.

In these examples the correspondence in the lines is by way of *opposition* of the words and thoughts. In this class the antithesis is sometimes in the terms only, and again in the sentiments only; and lastly, it pervades the entire verse, so as to contrast word with word, singulars with singulars, and plurals with plurals.

3: EXAMPLES OF SYNTHETIC PARALLELS.

'The law of Jehovah is perfect, converting the soul;
 The testimony of Jehovah is sure, making wise the simple;
 The precepts of Jehovah are right, rejoicing the heart;
 The commandment of Jehovah is clear, enlightening the eyes;

The fear of Jehovah is pure, enduring forever;
 The judgments of Jehovah are truth, they are altogether righteous;
 More desirable than gold, and than much fine gold,
 Sweeter than honey, and the droppings of honey-combs.²

Psalm, 19. 7, 10.

Here the words are neither equivalent, nor opposite, but the whole sentence is so constituted that the parts of speech answer to each other, and the form of construction is equal and similar.

The subordinate divisions of the three classes need not be particularly exemplified. They are very various, the chief of which are denominated *bi-membrals*, *triplets*, *quatrains*, and *alternate quatrains*, of the last of which only we now give an example.

EXAMPLE OF THE ALTERNATE QUATRAIN PARALLEL.

*'I will make mine arrows drunk with blood;
 And my sword shall devour flesh:
 With the blood of the slain and the captive;
 From the hairy head of the enemy.'*

Deut. 32. 42.

In all such cases the correspondence between the first and third, and the second and fourth lines must be observed.

The foregoing remarks on Hebrew composition, and on Bishop Lowth's system of parallelism, with the examples we have given, are sufficient, perhaps, to apprise the student of the nature and extent of the difficulty we have been considering. If students are careful to remove the five impediments, we have thus briefly endeavoured to explain, we entertain no doubt that the Bible will be resorted to by them 'as a matchless temple, where they will delight to be, to contemplate the

beauty, the symmetry, and the magnificence of the structure, and to increase their awe, and excite their devotion to the Deity there adored.*

Under this head we refer the student to *Louth's Prælection*, in vol. 2, page 34, of *Gregory's translation*. *Gerard's Institutes of Biblical Criticism*. Part i. chap. v. *Horne's Introduction to the study of the Bible*, vol. 1, 318—or chap. ix. of *the Abridgment*, page 143; and lastly, *the very able Treatise by Jebb, on Sacred Literature*.

We have not yet brought to the student's attention the PROVERBS: these we recommend to be treasured up with care, as they are full of practical wisdom. A learned writer, (Holden,) speaking of the book of Proverbs, remarks, that 'in judicious brevity, in elegant conciseness, in nice adjustment of expressions, and in that terseness of diction which gives weight to precept, and poignancy to aphoristic truth, it stands pre-eminent, and remains an illustrious monument to the glory of its author.†

We make no apology for the length of this Note, nor for any matter in it which may be conceived, by some, not strictly within the design of this volume. We think differently; at all events, the Bible may be allowed to form an exception; for upon no occasion, where it is recommended, can any matter be irrelevant which in any degree unfolds its excellencies, or facilitates its study.

(Note 2.) CICERO'S OFFICES.—This work justly holds an elevated rank among the ethical writings of heathen philosophers; and as a summary of practical morals, may be perused

* Boyle.

† Vide Auxiliary Subjects, Div. ix. Note (1.) Note (5.) for further remarks on the 'Proverbs,' &c.

with great advantage. The moral system of Cicero is somewhat founded on the doctrines of the Stoics, to the rigours of which, however, he was by no means friendly; nor did he countenance the doubts and uncertainties of the sceptics. In opposition to the Epicurean philosophy, he asserted the existence of a Supreme Being, and of a superintending providence. He maintained the immortality of the soul, and the essential and immutable difference between virtue and vice.

In recommending this, and similar works, we assume it as undeniable that pure Ethics and Natural Law lie at the very foundation of all laws. The original principles of law, as a science, are to be found in the moral nature of man; and these, when ascertained, are applied to regulate the conduct of individuals and of nations. Sir James Mackintosh, has beautifully remarked, that 'between the most abstract and elementary maxims of moral philosophy, and the most complicated controversies of civil or public law, there subsists a certain connection. The duties of men, of subjects, of princes, of lawgivers, of magistrates, and of states, are all parts of one consistent system of universal morality.*' So thought Cicero, and Quintilian, and Seneca, and Plato; and so think all well read lawyers and orators of our own day. We shall not argue this point, nor rely on the great weight of authority that might easily be adduced; but refer the student to the first volume of the author's Legal Outlines, where his views on this subject are abundantly stated.

The moral writings of Cicero are all valuable, but none is so important to the law student as the 'Offices,' a work so highly esteemed that, it is said to have been the second, if not the first, book ever printed. An eminent writer says that, next to the Bible, it is the best book in the world; and although

* Mackintosh's Intro. Lec.

a like encomium has been passed, by another author, on the *Morals* of Seneca, it is an evidence of its great excellence. It was addressed by its illustrious author to his son when a student at Athens, under Cratippus, a philosopher of eminence, and of whom Cicero entertained the highest opinion. The troubles at Rome, consequent upon the defeat of Pompey, the murder of Cæsar, and the dangerous power of Anthony and his associates, urged Cicero into the retirement of his villas, where he dedicated his time to the noblest of purposes, the instruction of his son in the duties which appertain to nearly every relation of life; and which he hoped to see him practice, when the dark clouds, which then hung over Rome, should pass away. It is reasonable to suppose that a work composed under such circumstances would have commanded all the resources, and the best feelings of that great man. It is, indeed, all that could have been anticipated, 'the noblest present ever made by a parent to a child.' We find in it little, if any thing, that can be called false morality. There is an earnestness, truly charming, in his inculcation of the virtues, and especially of his favourite maxim, that nothing should be accounted *useful*, but what is *honest*; a doctrine which puts to the blush the boasted theory of some of the modern christian utilitarians; and which is sustained by Cicero, not only with zeal, but with great force of argument. A great many useful, curious, and interesting questions in casuistry are proposed and solved by him. He holds, for example, that the distinction taken by some, (in order to justify the Alexandrian merchant,) viz: that *not to tell* may be honest, when to *conceal* is dishonest, is without foundation in pure morals. The case put is where the merchant of that city had shipped to Rhodes a quantity of grain, when that article was extremely scarce and dear at that place, but great quantities had been shipped

for Alexandria to Rhodes, and were then on the way; which fact, known to him alone, he *did not conceal*, but merely *did not disclose*. The justification he says is a distinction without a difference, and to be resorted to only by 'your shifting, sly, cunning, deceitful, roguish, crafty, foxish, juggling kind of fellows.' He holds also, that an orator may *defend* the guilty, provided his case be not wholly villanous and abominable, that much being allowed by the nature of his vocation; but that his duty will never permit him to *accuse* the innocent. That oaths made to lawful enemies are binding; not so of those made to pirates; hence the oath made by Regulus to the Carthagenians was obligatory, though its performance would certainly end in death: this point he maintains, in opposition to all the arguments of various philosophers. That a vicious and unjust action is equally wicked, and to be avoided, though done so in secret as never to be known,—and that this would be the case, were it possible to conceal it even from the Gods—a most sublime and useful morality. That it was not sinning against virtue for Pythias to pledge his life for his friend Damon. That when an action is certainly dishonest, it is impious even to deliberate whether it shall be done or not. That the conduct of Scævola, in paying for an estate more than the owner estimated it at, because Scævola knew it to be worth more, was honest and profitable;—and that the distinction, taken by some, between prudence and honesty, has no foundation in pure ethics. That the seller is in all cases bound to disclose to the full extent of his knowledge all defects, whether patent or latent, of his commodity; and that all commendation, in neglect of this duty, is additionally dishonest. That a person who has ignorantly received bad money for his goods, cannot honestly pass it off to another. That if an ignorant man offers to sell gold, believing it to be

copper, honesty enjoins us to inform him of his mistake. That if when at sea a plank can save but one person, he who knows his own life to be of less value than that of the other, would not be justified in snatching from him the *tabulam in naufragio*. That the opinion of some philosophers is wicked, which justifies the saving at sea a valuable horse in preference to a worthless slave. That a son who knows that his father designs to betray, in any way, his country, cannot honestly be silent; but is bound to disclose the fact, though the father perish thereby: but that in case of ordinary crimes committed by a parent, the son should rather defend than accuse the father, since it is much more to the general interest of a country that its citizens should reverence their parents, even to this extent, than that the sacred relation between child and parent should be weakened by an obligation to disclose them.

The foregoing are a few of the numerous points discussed in the volume under consideration. The book is replete with sentiments of the most elevated morality: and though it may be familiar to many classical scholars, as it is generally a part of the course of academic instruction, we have preferred to speak of this, as we shall generally of the works recommended in this Course of Study, in such a manner as may invite the student's attention, which we believe cannot be so well done as by giving a concise statement of their prominent contents, and such other interesting matters appertaining to them, as properly come within the scope of bibliography.

Of this work there are two English translations; one by L'Estrange, and the other by Cockman, accompanied with a variety of valuable notes.

The student will perceive that we have recommended the translation of this work. On the subject of *translations*, we shall perhaps find it not easy to make ourselves understood.

Whilst we would anxiously caution the student against the habit of generally reading translations, we would guard him against that false and injurious contempt of them, inspired by an idle emulation of classical learning; which often deters him from a perusal of any other than their originals. Few young men read the dead languages with that facility, without which a perusal of the Latin and Greek authors in the original is an idle waste of time; and admitting them to read the languages with ease, to feel the beauties, and enter into the spirit of what Quintilian denominates the simple style, it is but reasonable to suppose that those who have devoted years to the critical investigation of a particular author, have attained a more accurate knowledge of his meaning, than could be acquired by even the most attentive consideration of minds engaged in a variety of other pursuits. These translations, besides, are usually illustrated by numerous annotations; and we see no reason why the student should insist on being his own pioneer, when he has the choice of broad and secure avenues. Is it not irrational, because you have a torch, to refuse the light of the sun? These observations apply chiefly to a certain description of writers,—historical, didactic, and philosophical; but an occasional reference even to these in the original is strongly recommended. Homer, Virgil, Horace, Juvenal, Martial, &c.—the orations of Demosthenes, Cicero, Isæus, Lysias, Isocrates, &c. should be read chiefly in the original; but still who hesitates to read with pleasure Pope's translation of the *Iliad* and *Odyssey*? Or who would conceive his time misspent in occasionally perusing the translations of any of the above authors? Such works as the excellent translations of Aristotle's *Ethics* and *Politics*, by Gillies; of Tacitus, by Murphy; of Polybius, by Hampton; Plato, by Taylor; Herodotus, by Beloe; Plutarch, by Langhorne; Thucydides,

by Smith; Livy, by Baker; should be read by legal students chiefly in their translations, by all means occasionally perusing the original, in order to catch the peculiar beauties of the style. Such time as the student or lawyer can afford to this species of reading, should certainly be given to the perusal of the classics in the original, as they will not only extend his knowledge, but verse him in the elegancies of their respective tongues. But the student, even if he be an excellent classical scholar, should hold good translations in high respect: and while some of these he may be permitted to disregard, in compliance with his classical taste, or more often his classical pride, others are in every respect, as valuable to him as their originals, or are at least auxiliary to their complete understanding.

In regard to works on the *Roman Civil Law*, while we would recommend translations, as well for the facilities they afford to the student, as for the sake of the illustrations by which they are accompanied, we would at the same time, in most cases, advise an attentive perusal of the originals, as their language is often peculiarly expressive, and their maxims, rules, and definitions are full, comprehensive, and sententious, scarcely admitting of adequate translation. This observation applies with peculiar force to the Institutes, Digests, and Code of Justinian; and, indeed, to most of the Roman legal writers. But Bynkershoek, Hugo, Warnkœing, and the numerous modern authors on Roman law, and the jurisprudence of the continent, (as far as they have been translated,) will be read to advantage in their new garb. We have anticipated these observations on the Roman law, (which the student will take up near the close of his studies,) because they now fall in with our views on the subject of translations generally, and could not well have been separated. The object of these

remarks is to direct our student into every path in which solid learning is to be most easily acquired: and if actuated by that desire, he will neither wholly neglect, nor entirely rely on translations.

(*Note 3.*) **SENECA'S MORALS.**—Though the principles of moral philosophy may be found more plainly demonstrated, and more orderly arranged in many modern treatises than in Seneca, it will still be very profitable to the student to see in what light these matters, as a system, were contemplated by ancient moralists. He will find the sentiments of all ages on moral conduct to be nearly the same, however the theories of philosophy may have varied; and in the author under consideration, if he discovers great imperfection as to systematical arrangement, he will meet many of those terse and condensed maxims of life and morals, which most forcibly convey truth, and most readily impress themselves on the recollection; and which are of excellent service to him, who in the practice of his profession, is oftener under the necessity of enforcing truth, than of demonstrating it.

The work entitled, '*Seneca's Morals by way of abstract,*' by Sir Roger L'Estrange, and Lodge's translation of the works of Seneca, London, 1632, folio, are better known in this country, we presume, than the original. Sir Roger is strong in his commendation of Seneca. He says, 'next to the Gospel itself, I do look upon it as the most sovereign remedy against the miseries of human nature; and I have ever found it so, in all the miseries and distresses of an unfortunate life.' So Lactantius holds, 'That he who would know all things, let him read Seneca; the most lively describer of public vices and manners, and the smartest reprehender of them.' By others he has been denominated the prince of erudition, and a man

of excellent wit and learning. His style however, has been very generally censured: Caligula, if he be authority for any thing, compares it to sand without lime; and Quintilian says that it is *corrupt throughout*. No doubt the classical scholar will not often consult the pages of Seneca for elegant and pure latinity, nor for very rare and well arranged moral wisdom; but he may with confidence and pleasure resort to him for sound ethics, conveyed in a very sententious and pithy manner, and, as was the custom of Bolingbroke, he may frequently quote him, '*rather for the smartness of expression, than the weight or newness of matter.*'*

Seneca's *Morals* were translated in 1745, by Bennet; and L'Estrange's translation has gone through upwards of one hundred editions since 1678.

(Note 4.) ARISTOTLE'S ETHICS.—The writings of Aristotle, whom Suidas denominates the '*Secretary of Nature,*' and whom another philosopher styles '*Princeps Politicorum,*' maintained, during many centuries, an authority accorded to those of no other man.

But whilst his admirers have been extravagant in their eulogy, his opponents have been no less so in their censures. While on the one hand we are informed that he was ordained a special messenger to prepare the way for divine revelation; that the mysteries of religion have been solved by his philosophy; that his moral wisdom was from Solomon, and himself of the tribe of Benjamin; that he was, (according to Plato,) the philosopher of truth, and styled by Cicero a man of eloquence, unbounded learning, fertility and acuteness of invention, and fulness of thought; we are, on the other hand, instructed that his writings display a vain and verbose pretence of learning;

* Boling. Works, vol. iv. 165.

that they are too acromatic, and contain little else than a wordy and unintelligible shew of occult learning; perplexing the intellect with metaphysical and sublimated notions; leaving on the mind no definite impressions, and finally, that until the mental vassalage to Aristotelian philosophy was dissolved, intellect was at a stand, and useful science at least stationary, if not retrograde. The fact is that the truth, as is often the case, lies in the middle of these extremes; and as we have elsewhere stated, it is not for us to be enlisted on either side of these scientific and literary contests and prejudices; our duty is to select from the writings of all that which is really meritorious, and stamped with the seal of good sense and sound philosophy. We would recommend or pass by, without reference to the fashion or idol of the day, and take for our motto, *Amicus Plato, Amicus Socrates, sed magis amica veritas.*

The writings of this extraordinary man unquestionably shew him to have been possessed of singular intellectual vigour, happily and richly improved by the learning of his age; and notwithstanding much may be said against some of his writings, it would still not be easy to say too much in praise of them generally. As to the merit of the work here recommended, there is at present no diversity of opinion; in the books on *Ethics* and *Politics* we find him luminous, satisfactory and learned. To the exertions of Dr. Gillies are we indebted for the revival of this valuable treatise. Twice, in common with his other works, has it been consigned to oblivion, and twice revived from its undeserved obscurity. 'The extraordinary and unmerited fate,' says Dr. Gillies, 'of these writings, while it excites the curiosity, must provoke the indignation of every friend to science. Few of them were published in his life time; the greater part nearly perished through neglect; and the remainder have been so grossly misapplied, that

doubts have arisen whether their preservation ought to be regarded as a benefit. Aristotle's manuscripts and library were bequeathed to Theophrastus, the most illustrious of his pupils. Theophrastus again bequeathed them to his own scholar Neleus, who carrying them to Scepsis, a city of the ancient Troas, left them to his heir in the undistinguished mass of his property. The heirs of Neleus, men ignorant of literature, and careless of books, totally neglected the intellectual treasure, that had most unworthily devolved to them, until they heard that the king of Pergamus, under whose dominion they lived, was employing much attention and much research in collecting a large library. With the caution incident to the subjects of a despot, who often have recourse to concealment in order to avoid robbery, they hid their books under ground; and the writings of Aristotle, as well as the vast collection of materials from which they had been composed, thus remained in a subterranean mansion for many generations, a prey to dampness and to worms. At length they were released from their prison, or rather raised from their graves, and sold for a large sum to Apellicon of Athens, a lover of books, rather than a scholar; through whose labour and expense the work of restoring Aristotle's manuscripts, though performed in the same city in which they had been originally written, was very imperfectly executed. What became of the original manuscript, we are not informed; but the copy made for Apellicon was, together with his whole library, seized by Sylla, the Roman conqueror of Athens, and by him transmitted to Rome. Tyrannion, a native of Amysus in Pontus, procured the manuscript by paying court to Sylla's librarian, and communicated the use of it to Andronicus of Rhodes, who flourished as a philosopher at Rome, in the time of Cicero and Pompey; and who, having undertaken the task of arranging and cor-

recting those long injured writings, finally performed the duty of a skilful editor.*

The work under consideration, with its sequel, the treatise of *Politics*, is unquestionably the most valuable among his productions which have reached us. 'The Nicomachean Ethics,' says Rennell, 'afford not only the most perfect specimen of scientific morality, but exhibit also the powers of the most compact and best constructed system, which the human intellect ever produced upon any subject; enlivening occasionally great severity of method, and strict precision of terms, by the sublimest splendour of diction. If moral philosophy, I mean specifically and properly so called, is to be studied as a science, in such sources is it to be sought. Thence will be formed a manly intellectual vigour, an ingenuous modesty and dignity of habit, an energy of thought and diction, and a reach of comprehensive knowledge which distinguish the true English scholar. On the contrary, it is to be feared that the feeble speculation which almost all modern systems of morality encourage, and the superficial information they afford, superseding the necessity of all active and real employment of the faculties, have operated more fatally upon the mental habits of the rising generation, than total ignorance could possibly have done.†

Dr. Gillies observes in the preface to his translation of the *Ethics*, that 'this and the treatise on *Politics* should never have been disjoined, since they are considered by Aristotle himself as forming essential parts of one and the same work; which, as it was the last and principal object of his studies, is of all his performances the longest, the best connected, and comparatively the most interesting. The two treatises combined constitute what he calls his '*Practical Philosophy*,'

* Vide Gill. Aris. 1 vol. 54.

† Vide Gill. Aris. 409, Note S.

'*His Philosophy concerning Human affairs;*' an epithet to which, in comparison with other works of the same kind, they will be found peculiarly entitled. 'In the Ethics,' continues this able translator, 'the reader will see a full and satisfactory delineation of the moral nature of man, and of the discipline and exercise best adapted to its improvement. The philosopher speaks with commanding authority to the heart and affections, through the irresistible conviction of the understanding. His morality is neither on the one hand too indulgent, nor on the other impracticable. His lessons are not cramped by the narrow, nor perverted by the wild spirit of system; they are clear inductions, flowing naturally and spontaneously from a copious and pure source of well-digested experience.'

So strongly do we desire to recommend this work to the studious perusal of our young inquirers after knowledge, that they must pardon a further extract from the judicious observations of the learned translator, as it affords additional testimony of the merit of this production.

'The most profound, as well as the most elegant of all modern writers on the subject of political ethics, the immortal Grotius, in his treatise on the laws of war and peace, observes, that Aristotle holds the first rank among philosophers, whether we estimate him by the perspicuity of his method, the acuteness of his distinctions, or the weight and solidity of his arguments. This criticism is fully justified,' continues the doctor,* 'by the book before us, in which our author treats of the nature of moral virtue; shews by what means it is acquired; proves by an accurate induction that it consists in the habit of mediocrity, and lays down three practical rules for its attainment. This part of his work will bear that trial which

* Gillies' introduction to 2d book of Aristotle's Ethics.

he regards as the test of excellence; *it requires not any addition, and it will not admit of retrenchment.* The objections made to it, as falling short of the purity and sublimity of christian morality, will equally apply to all the discoveries of human reason, when compared with *'that divine light which coming into the world, gives or offers light to every man in it.'* But the critics who make objections to Aristotle, would urge them with less confidence, if they attended to two remarks, on which our author often insists; first, that practical matters admit not of scientific or logical accuracy; secondly, that the virtues of which he is in quest, are all of them merely relative to the condition and exigencies of man in political society; being those habits acquired by our own exertion, in which, when confirmed, we shall uniformly act our parts on the theatre of the world, usefully, agreeably, and gracefully. In Aristotle's philosophy man is the judge of man; in christianity, the judge of man is God. Philosophy confines itself to the perishing interests of the present world: christianity, looking beyond those interests, takes a loftier aim, inspires the mind with nobler motives, and promises to adorn it with perfections worthy of its inestimably valuable rewards. Yet to the man of piety, it may be matter of edification, to compare the virtue of philosophical firmness with the grace of christian patience; and to observe how nearly the rules discovered by reason and experience, as most conducive to the happiness of our present state, coincide with those precepts which are given in the Gospel, in order to fit us for a better.'

We have no doubt that a history of *Aristotleism*, as it influenced the morals, physics, and metaphysics, theology, jurisprudence, and even critical taste, of all countries, and of all ages, for nearly two thousand years, would be, not only highly curious and interesting, but would present the

most remarkable instance ever known, or that can ever arise, of the mutations in human opinion, the whimses of the learned, and the vanity of all earthly fame. Greeks and Romans, Arabians and Moslems, Syrians and Persians, and Tartars; people of all faiths; the learned of all schools; the politicians of all governments, have sought for wisdom in his pages, and united to offer the most grateful incense at his shrine; whilst, at times, no name has been more bitterly censured, none more acrimoniously ridiculed. His writings, like those of the Bible, have been perverted to all possible purposes; made the text of various, and even contradictory opinions; became the theme of catholic praise, and of protestant abuse: and finally, were lauded as the oracles of a divinity, or condemned as the wicked crudities of a fiend! As at one time it was the fashion to impute to the Stagyrte all that was wise, and learned, and good, and to see in his works much more than was ever 'dreamt of in his philosophy;' so, in turn, he has been robbed of some of his greatest merits; and new discoveries were seen and ascribed to others, which, without doubt, are to be found in his writings; but owing to the character of the times, they were not availed of. Instances might easily be cited, but none is more striking than the system of induction, so uniformly imputed alone to lord Bacon, but which stands out in as full relief in the pages of Aristotle, as in those of the *Novum Organum*, or the treatise *De Augustis Scientiarum*.

We have mentioned how extensively the works of the Greek philosopher were cultivated by the oriental nations, and among the rest by the Arabians, by whose commentators it was their remarkable lot to have been equally misunderstood and perverted. Sismondi remarks, that 'Aristotle was worshipped by them as a sort of divinity. In their opinion,

all philosophy was to be found in his writings, and they explained every question according to the scholastic rules. An accurate translation and a subtle commentary on the work of the Stagyrte, appeared to them the highest pitch to which the genius of a philosopher could attain. With this object they read, they explained, and they compared all the commentaries of the first disciples of Aristotle. They were all of them, however, in error, and sometimes grossly so. The mania of discovering mysteries in the most simple things, and hidden meanings in the clearest phrases, would have rendered the school of Aristotle, among the Arabians, (could he have appeared once more upon earth,) quite unintelligible even to the philosopher himself.* To the same effect are the following remarks of a late writer. 'It has been singularly the fate of the Greek philosopher, to be at one time superstitiously venerated, and at another contemptuously ridiculed; without sufficient pains taken, either by his adversaries or his admirers, to understand his meaning. It has been too frequently his misfortune to be judged from the opinions of his followers, rather than from his own. Even the celebrated Locke is not to be acquitted of this unfair treatment of his illustrious predecessor, in the paths of metaphysics; although, perhaps, it is not too much to say of his well-known Essay, that there is scarcely to be found in it one valuable and important truth concerning the operations of the understanding, which may not be traced in Aristotle's writings; whilst, at the same time, they exhibit many results of deep thinking, which have entirely escaped Locke's perspicacity. Indeed it may be generally pronounced of those who have, within the two last centuries been occupied in the investigation of the intellectual powers of man, that had they studied Aristotle more, and

* Roscoe's *Sismondi*, vol. i. p. 40.

reviled him less, they would have been more successful in their endeavours to extend the sphere of human knowledge.*

We do not design, and indeed it would be here somewhat out of place, to examine into causes which led to the overwhelming influence accorded at one time to the writings of Aristotle, and its consequent evils; nor into those which occasioned its decline, and the unmerited and almost total neglect of them which followed. We are pleased to find, however, that the present age seems more disposed than any other, to entertain rational views on the subject, and to do them ample justice. His writings have been republished of late, in various countries; and are now read with pleasure and advantage, without the least danger of our relapsing into the error of wild admiration, or of fanatic or ignorant neglect. No one has contributed more to this effect than Dr. Gillies, the able translator of, and annotator on several of his works. We are pleased, also, to find that in France and England, highly improved editions of his works and translations have been published; and that this great philosopher's fame, is now likely to be placed on that true and lasting foundation, from which it had been removed only by a singular combination of circumstances. We may, in conclusion, remark, that the law student, in the course of his investigations, will have frequent occasion to observe, and to be amused with, the strange operation of the Aristotelian influence, (to which we have so often adverted,) on the minds of many of the most able of the early English lawyers; many portions of their works, and even the course of judicial reasoning, being tinctured with this philosophy. It is proper that these biases, and all that may have influenced judicial decisions, or the legal opinions of writers, should be known to the lawyer; since it sometimes

* Magee on Atonement, et vide Gillies' Aristotle's Rhetoric, 25.

occurs that the weight of authority is so nearly balanced, that the scale may, perhaps, be turned, by adverting to the fact of the particular foreign influence that may have produced the decision. And although our student is, at this time, scarcely on the threshold of his studies, we shall advert to a few of these instances, under the expectation that, at a future period, he may have occasion to turn back to this concluding part of our note. In *Keighley's* case, reported in 10 Coke, page 139, the question was whether he, under his contract, or the commissioners of sewers, were obliged to repair a wall, cast down by a *sudden* and *unusual* irruption of the sea, he having kept it in good repair till then, under the contract to repair *contra fluxum maris*. In arguing for the responsibility of the commissioners, under the statute 22 Henry 8, as also under their commission and oath, it was gravely urged, that 'every statute, ordinance and provision, made by force of the commission of sewers, ought to consist upon four causes. 1. *The material cause*, and that is the substance. 2. *The formal cause*, and that is the manner, with convenient circumstances. 3. *The efficient cause*, and that is their authority according to their commission. 4. *The final cause*, and that is pro bono publico, et nunquam pro privato!' We have no doubt but that this fourfold division of the schoolmen, after Aristotle, and the charm which attended it, had quite as much weight in enforcing the argument, as the simple reasoning derived from the very nature of the contract; the evident policy which casts the duty to repair on the public; and the known maxim, that *actus dei nemini facit injuriam*, could possibly have had. Again. In the case of *Reniger v. Fogassa*, in Plowden's Reports, 19, the doctrine was learnedly discussed that, where a man has broken the words of a law, by reason of some sudden emergency, which he could not foresee, the act ought not to

be imputed to him: and Aristotle is cited to maintain the distinction taken by him between acts done *ignoranter*, and those done *ex ignorantid*; for that the former are voluntary, the latter involuntary; as in the case where one intoxicated slays another, he merits double punishment, says the Greek philosopher, as he hath doubly offended, in being drunk to the evil example of others; and in committing the homicide; which, though done *ignoranter*, is yet voluntary and a crime; whereas, an act done *ex ignorantid*, to avoid a greater evil, or from compulsion, is no crime, as it is involuntary. In the cases of *Stradling v. Morgan*, 202, and *Eyston v. Studd*, 466, 467, of the same volume, Aristotle again figures as an authority to sustain the power of courts to apply '*Epichaia*,' or equity in mitigation of the severities of the law; and that this, though no part of the law, is a moral virtue to carry the real intention of the legislator into effect. So also in the controversies as to the legality of usury, Aristotle has been appealed to, who laid it down that all increase of money, by way of compensation for its use, is unjust, as money is '*naturally barren*,' and that to make it breed money is a perversion of its institution, which was to serve the purposes of a currency only! We need scarce inform the student, not only that this argument, as Justice Blackstone, in substance, remarks, proves too much, since houses, and twenty other things do not breed houses, &c. and yet may be let to hire; but it is also not true, that the office of money is restricted to the purposes of exchange. Another instance we may mention is, where lord Coke and others, in treating of the origin, personal identity, immortality, and invisibility of a *corporation*, appeal to Aristotle to justify their denominating it a mere *ens rationis*, having no predecessor or successor, as all the individuals who have been, or shall be members, are but one person in law; and as to identity, it

may be compared to a river which remains still the same river, though the waters have been perpetually flowing in and off. 'Manet idem fluminis nomen, aqua transmissa est. Sicut Aristoteles, flumen populo comparens dixit, flumina eadem vocari quanquam alia subeat semper aqua, alia decedat.'

In adverting to these few cases, out of many that might be cited, to show the overweening influence of Aristotileism, even in our science, we do not mean to impress the student with the idea that the jurisprudence of the country ever received from it any very deep, and beneficial, or injurious impressions: all that we desire to apprise him of is, that the fashionable learning of the times may be frequently found so to tincture the judicial mind as to manifest itself in the administration of justice, little to the credit of good taste, sound philosophy, and just discrimination; and that we think this is visible in most cases where judges and lawyers, in those times, resorted to the pages of Aristotle. We say this without the least apprehension that the fact can, in any way, disparage the philosopher, some of whose works we now so strongly recommend.

(*Note 5.*) XENOPHON'S MEMORABILIA.—This work was translated into English by W. Bysshe, in 1712. There is likewise a work entitled, 'The Life of Socrates, collected from the Memorabilia,' by J. Cooper, London, 1771: and another, 'The Socratic System of Morals, as delivered in the Memorabilia,' by Edward Edwards, 1773. Mrs. Fielding's translation (of which there are three editions, in 1762, 1767 and 1788,) is the most highly and justly esteemed. 'The Memorabilia,' together with that beautiful moral romance, entitled, 'Cyræpædia,' (which has been translated by Maurice Ashley Cooper, in 1778, reprinted in 1803, and again in Philadelphia

in 1810) are replete with the sublimest morals of the Socratic school; and written, as the classical scholar will remember, with the most artless and persuasive eloquence.

(*Note 6.*) BEATTIE'S ELEMENTS.—We seldom see so much useful knowledge in so small a compass. The subjects treated are numerous, and of the first importance, and all in an elementary and uncommonly perspicuous manner. A second perusal of this little work need scarce be recommended, as we believe few of its readers will be content with one reading.

(*Note 7.*) PALEY'S MORAL PHILOSOPHY.—The theory of moral obligation is necessarily a preliminary study to that of municipal and international law. The student, should, therefore, well comprehend the principles on which the vast body of human institutions is built, the end at which they aim, and the nature of that necessity imposed upon us, of conforming to their injunctions.

The utility of moral philosophy, as a substantive branch of scientific study, has been questioned by some, under the objection that it has generated vain and subtle theories of moral obligation, and that natural reason, and moral sense are the surest and safest guides! But, do not all experience, and all history contradict this flattering opinion of man's nature? With all his boasted reason, and instinctive promptings to virtue, man stands in constant need of counsel; and, next to religion, nothing can be of more value than the science which teaches him to see clearly the principles of his morals, and to define them with as much certainty as belongs to mathematical or physical truths. The great object of moral philosophy is to demonstrate its truths, and by their systematic arrangement to present the whole as a connected scheme of moral

action, based on a careful scrutiny into our physical, intellectual, and moral nature. We find the following eloquent remarks on this subject, by the late Professor Frisbie, in an inaugural discourse delivered by him at Cambridge, so pertinent, and beautifully illustrative of our views, that we cannot deny our student the pleasure of reading them.

‘It is not to be denied,’ says our countryman, ‘that we have from nature a moral as well as an intellectual capacity; but the former, no less than the latter, is to be improved and enlarged by observation and thought. Many duties arise from relations, which are complicated and remote; these relations must be investigated and brought together, and general principles, which may be settled into rules, deduced from them. The necessity of this is sufficiently shown by the different and contradictory maxims of duty, that have prevailed in different ages and nations. Were, however, the original suggestions of uncultivated conscience far clearer and more decisive than experience will allow us to believe, still the necessity of philosophy would not be superseded. The unremitting labours of the moralist would notwithstanding be required, to relieve the sentiments of mankind, from those associations of prejudice, of fashion, and of false opinion, which have so constant an influence in perverting the judgment and corrupting the heart, and to bring them back to the unbiassed dictates of nature and common sense. Besides, the moral constitution of man, his relations and duties, are subjects too interesting, and too fruitful of remark, to be neglected in the speculations of the ingenious and inquiring. Erroneous theories will be formed, nay they will be presented to mankind as the rule of life, and even history and fiction be made vehicles of principles, dangerous alike to virtue and to peace. While, indeed, these speculations of false philosophy are wrapped in metaphysical

subtleties, they may excite little alarm, and serve rather to amuse the learned; they are those eccentric lightnings, that play harmlessly in the evening cloud; but when they are made the maxims of common life, or, embodied in popular fiction, finding their way into the hearts of men, they are these same lightnings concentrated and brought down to earth, blasting and consuming. The safety of society then requires that such systems be subjected to the jealous scrutiny of a sound philosophy, and that there be men, whose habits and studies will lead them to a rigid superintendence of whatever is proposed;—to give authority to truth, and to detect and expose what is only specious and insinuating. If our mortal being could be left, as it came from the hands of its Creator, to the simple and wholesome viands of nature, if it breathed only the pure atmosphere of truth, it might perhaps preserve the soundness of health, and the ingenuous suffusions of virtue; but pampered, as it is, with false philosophy, and fictitious sentiment, the antidote should go with the poison. There will always be a Hobbes, a Rousseau, or a Godwin; let us then also have our Cudworths, our Butlers, and our Stewarts.'

In the foregoing views of the learned Professor we entirely concur, and would only add, that law as a moral science is without doubt based not only on the soundest systems of moral philosophy, and of metaphysics, but derives much of its utility, certainty, and practicableness from viewing it in connection with the physical sciences. It would, perhaps, not be saying too much, that Bayle's scepticism, and his errors in moral reasoning were owing in a large degree to his want of acquaintance with the physical sciences, his ignorance and even contempt of mathematics, and his want of clear perceptions on the influences of the physical constitution of man on his moral actions and character. With all of his great and

varied learning, Bayle never became acquainted with even the first proposition of Euclid,—and hence his ridicule of mathematical evidence, and his obtuseness on the subject of moral truths. His *Critical Dictionary*, truly a wonderful production, would perhaps have been nearly perfect, had his capacity for moral reasoning been strengthened by an enlarged knowledge of the physical sciences. How intimately are all the sciences connected, and how much mistaken is the idea entertained by many in this country, that the lawyer (whose province is reasoning,) can attain to eminence, though he restricts his inquiries within the visible boundaries of his peculiar science, chiefly as it is found in the treatises of municipal law. This narrow view we hoped in a degree to have corrected by the course we pursued in the first volume of *Legal Outlines*, a work however, which has been found fault with by American critics, chiefly on this very ground, viz: that we have thus intimately connected law, not only with ethics and the physical sciences, but with the higher branches of metaphysics, and the esoteric philosophy of politics, and of legislation. We have since seen no cause to change our opinion, and still contend that if a lawyer has the ambition to aim at the most elevated rank in his profession, he must carry his researches much beyond the vulgar limits of municipal law.

In obedience to these considerations, is it that we desire strongly to recommend the selection we have made under this title of our Course; as these topics are set forth and illustrated in these works with more ability and learning than in any with which we are acquainted. This elementary work of Dr. Paley is deservedly very popular. His arrangement is very methodical and lucid, and his conclusions, which are generally correct, are deduced from the great cardinal principles of morals, and are conveyed in a style at once clear and logical. His moral

system is that of *utility*, which has been espoused by a great variety of authors; but, as Mr. Gillies justly observes, 'it is the foundation of works of the most opposite tendency,—of Paley's Moral Philosophy, and of Godwin's Political Justice.*' On the subject of the utilitarian theory of moral philosophy, much may be, and has been, said on both sides; it is rather feebly supported by Paley; and somewhat quixotically advocated by Bentham and his disciples. The student will judge for himself on this point; we have some faith in it, but think it has not been clearly and dispassionately set forth.

(Note 8.) COGAN'S ETHICAL QUESTIONS.—This is a small volume, published in 1817, in which the learned author examines with great zeal, but with fairness and talent, most of the principal subjects in controversy in moral philosophy. His works, entitled, 'A Philosophical Treatise on the Passions,' and 'An Ethical Treatise on the Passions,' had gained him great reputation as a moralist; and the work now recommended cannot have failed to add to his fame. The leading questions discussed by him relate to the sources of rational conviction; to the nature of benevolence, and the selfish principle; the existence of a moral sense; the doctrine of volition; the theory of common sense as a criterion of truth; the sceptical opinions of Mr. Hume; and finally, whence arise our ideas of moral obligation; and what are the cause and nature of obligation. All of these topics, which cover a large surface, are treated by him with great ingenuity and clearness of thought.

(Note 9.) SMITH'S THEORY OF MORAL SENTIMENTS.—The enlightened author of the 'Wealth of Nations,' has proved

* Vide Gillies' Aristotle's Rhetoric, 120. Note (91.)

himself, in the work now recommended, as eminently qualified to maintain with ingenuity, a great theory in morals and metaphysics, as in the subject of political economy. No one can read the works we have just mentioned, without the profoundest respect for the genius and learning of their author: but we conceive it still probable, that the ultimate fate of both the theories may be very similar; and that the science of morals will be found to have gained directly, no more from the one, than that of political economy from the other. In the perusal of the work under consideration, it is quite necessary, as we humbly conceive, to distinguish between the theory set forth, and the great body of learning and ingenious argument with which this extremely interesting work is adorned: and it is mainly, on account of the latter, that we now bring it to the student's notice. Dr. Smith was a metaphysician and moral philosopher, deeply versed in the writings of the Greek, French, and British schools; and eminently qualified to review all preceding theories of morals; to illustrate and decorate them with all the riches of a highly embellished mind; and, consequently, to fortify his own theory with all that is specious and captivating.

There are few questions which have been more agitated than that which respects the true source of moral obligation. Why a free agent is morally bound to approve one class of actions and disapprove another; what is the sure criterion that distinguishes right from wrong; what is virtue; what is vice; and why we are bound to follow the one, and eschew the other; are all essentially one and the same question. The theories on this subject have been very numerous, and the champions who have contended in the field of this controversy, embrace nearly all who have written on mental philosophy. Some of these theories differ from each other rather in

phraseology, than in fundamental principles; and they are all distinctly known by certain short or pithy names, which enable the metaphysician, or moralist, at once, to refer them to their respective authors. Thus we speak of the theory of '*Moral Sense*,' and refer it to Dr. Francis Hutcheson; of '*Moral Charm*,' and refer it to lord Shaftesbury; of '*Sense of Deity*,' to lord Kames; of '*Common Sense*,' to lord Herbert, Dr. Reid, or Dr. Beattie; of '*Sentiment*,' to Ellis; of '*Reason*,' to Dr. Samuel Clarke; of '*Cause and Effect*,' to Aristotle; of '*Understanding*,' to Cudworth, Price, Butler; of '*Utility*,' to Paley, Hume, Bentham; (and if we go far enough back, then) to Plato,—and so on through as many, and more, until we come to the theory of '*Sympathy*,' which belongs to Dr. Adam Smith; or, as Dr. Gillies contends, (if we look among the ancients,) to Polybius.* All of these theories the student will not fail to be familiar with, long before he has finished the works we have recommended under this title of our Course.

We presume that most students, before they commence a work, would prefer to have some idea of its general contents, especially when it advances a new theory. Such previous insight not only awakens curiosity, but affords a facility, particularly to young minds, in comprehending the work. Our object being to invite, and, if possible, to seduce the student into paths of learning which his timidity, little acquaintance with the art of reading, or other causes, might occasion him to neglect; we shall not regard the additional labour it may cost us,—nor the enlargement of our volume, but shall present such views of many of the works recommended, as we hope and believe will prove, in any way, useful.

* Aris. Rhet. Gillies, 120.

Dr. Smith's theory, in a few words, is this:—he conceives that the actions of those around us are the *primary* objects of our moral perceptions; and that with respect to our own conduct, our moral judgments are only applications to ourselves of the decisions already passed on the conduct of our neighbours. His first inquiry is, as to the manner in which we learn to judge of the actions of others; and in the second place, he points out in what manner, by applying these decisions to ourselves, we acquire a sense of duty, or moral obligation. He contends that our own experience alone enables us to form an idea of what another experiences under a given state of things. In all such cases we are prone to consider ourselves as in his situation, and to experience, in our own minds, what we conceive would be our feelings, were we really in his condition. We feel, in a degree, the pleasure or pain which we suppose he must feel, or rather what we believe we should experience, were we under the like circumstances. He conceives that the *spectator* strives to *raise* his emotions to a level with those of the object contemplated; whilst, on the other hand, nature teaches that person to *depress* his feelings, as much as possible, to the level with those of the spectator. Upon these reciprocal efforts, the learned author bases the origin of two classes of virtues, viz: the gentle virtues, such as condescension, humanity, &c. which he refers to the sympathy of the spectator; and the sterner, and more respectable virtues, such as self-denial, self-government, &c. which he refers to the reciprocal exertions of the object sympathized with. He regards moral approbation as a *feeling*, but not of that specific nature, and not founded on that substantive faculty, which we find in Dr. Hutchinson's theory of moral sense. Our ideas of merit and demerit, of approbation and disapprobation, of virtues and their antagonist vices, are, in

all cases, referred in the theory of Dr. Smith to sympathy, or that process by which the contemplator of an action places himself in the stead of the actor, and, in a degree, feels and judges as if he were the agent; and hence one who had never associated with his fellow beings could form no idea of virtue, or vice, as he never felt the emotion of sympathy.

The foregoing theory, we think, is obnoxious to many powerful objections; but whilst it by no means falls within the scope of our work, critically to analyze the doctrines maintained in the volumes to which we have referred our student; we are still willing to apprise him of what we take to be cardinal objections; as these may be sufficient to guard him against those serious errors into which the vivacity of an author, and the numerous beautiful and apparently apt illustrations, with which he supports his theory, may easily betray, even wiser heads.

1. It would seem to us (and we desire to express it with great deference,) that the learned author in his theory of sympathy, has taken up the *rationale* of moral obligation at the *second* step; and has wholly failed in tracing up the cause to its ultimate fountain. Sympathy surely is not moral approbation, or disapprobation; nor is it the *cause* of the one, or the other; but is rather the *effect* of a cause, the nature and origin of which should have been the sole object of this, in common with every other theory of morals.

2. Metaphysicians of the highest standing have justly disputed the great fact on which the entire theory of sympathy is based, viz: the indissoluble connection between sympathy and moral approbation and disapprobation. 'It is a plain matter of fact,' says Dr. Gillies, 'that there may be sympathy without moral approbation, and the greatest approbation, nay

admiration itself, without the slightest sympathy."³* If this be the case in a single instance, and many might be stated, the theory necessarily falls to the ground.

3. This theory is not only liable to the objections just stated, viz: that it really does not account for the very matter it designed to unfold; and also that, if it did trace the cause to its source, the *fact* on which the system is raised, does not exist,—but it is further liable to the imputation of making virtue and vice, moral approbation, and disapprobation, too artificial, and dependent upon the individual feelings and judgments of men, which vary according to the physical, and intellectual constitution of individuals. The inquiry in such cases is not what an individual thinks, but what, *cæteris paribus*, is the general understanding: are not virtue and vice entities independent of all approbation and disapprobation, as well as of all sympathy?

4. Sympathy, *per se*, cannot approve, or disapprove. There must be a judgment (or something equivalent thereto,) previous to all sympathy; and that judgment is the very matter to be sought after; it is that which has been referred to reason, moral sense, common sense, &c. but which cannot, in like manner, be referred to sympathy alone, as sympathy cannot, as moral sense and common sense may, be independent of all reason. If sympathy, indeed, means nothing more than an instantaneous, and necessary perception of right and wrong, it becomes a mere name, differing in no material respect from those which designate various other theories. But that this is not the idea of Dr. Smith, is manifest from his account of sympathy, and from all his illustrations.

These general views as to the defects of this theory (whether they be sound or not,) may serve to stimulate our student to

* Aristotle's Rhetoric, by Dr. Gillies, 121.

read the work with greater caution, and to derive from it more knowledge than he might otherwise have gained.

(*Note 10.*) **REID'S ESSAYS.**—The philosophy of the mind is so intimately connected with the philosophy of the rules by which that mind is under a moral sanction to be regulated, that the psychological authors recommended will not appear out of place, for this reason, and others previously stated. The chapters, moreover, selected in this work, as worthy of particular attention, are, for the most part, on topics which are the proper concern of every lawyer. The essays of Reid, Locke, and Stewart, are inestimable to the student, who to familiarity with the science in the erection of which they have all been master workmen, is ambitious to add the talents of profound and severe investigation, of just reasoning, and happy illustration. Of all writers, ancient and modern, none has been so rational on the subject of metaphysics as Dr. Reid; and there is more substance and good sense in the few volumes published by him and his disciple Stewart, than is to be found any where else, in perhaps ten times the compass. We therefore urgently recommend every tyro in law to acquaint himself intimately with the metaphysical works of Locke, Reid, and Stewart, as they can scarcely fail to fashion his mind to patient inquiry, and to furnish it with principles of universal application in the science of law.

(*Note 11.*) **HEDGE'S ABRIDGMENT OF BROWN'S PHILOSOPHY.**—Professor Hedge's work, published in 1827, is a faithful abridgment in two volumes, of Dr. Brown's lectures on the Philosophy of the Human Mind, in four volumes, given to the public in 1820, a short time after his death. A little before this, Dr. Brown had published a small volume, entitled

‘Sketch of a System of Philosophy on the Human Mind.’ But as this work embraces only a portion of the entire scheme of lectures delivered by him, the abridgment of the posthumous work, so ably done by Mr. Hedge, will supersede the ‘Sketch,’ and will be found abundantly sufficient for the student’s purpose; and perhaps, for that of the more advanced scholar in the law. Dr. Brown was certainly a very original thinker on most of the topics of mental philosophy, ethics, politics, and natural theology. Those who have ample time to cultivate these delightful, and useful subjects, may resort to the original; but we think it probable, that lawyers will find Mr. Hedge’s abridgment fully to answer their purpose.

(*Note 12.*) BURLAMAQUI’S INSTITUTES.—This has at all times been a very admired and popular work, not indeed as a very original production, but as an excellent commentary on the works of those great masters of natural and political law, Grotius, Puffendorf, Barbeyrac, &c. The great merit of this production consists in its uniformly ascending to the original principles of the science of morals and politics, and gradually unfolding the subject in a forcible, clear, and methodical manner. The style is sententious, and the definitions perspicuous and satisfactory. The connection between morals and jurisprudence is often dwelt on in a pleasing and useful manner. This little production is very generally placed in the hands of the student; we advise that it should be attentively read, but never be considered as a substitute for that inestimable work on the natural law, by Mr. Rutherford, which we think decidedly preferable to any other production on that topic, with which we are acquainted. There is an English translation of Burlamaqui by Thomas Nugent, in 1748. Burlamaqui was born at Geneva, in 1694; was appointed professor of law in 1720,

and subsequently counsellor of state; and died in 1750. In 1820, M. Dupin gave a new edition, in 5 vols. 8vo.—‘*revue, corrigée et augmentée d’une préface et d’une table analytique et raisonnée,*’—and in 1821, another edition, in 2 vols. appeared, with notes, by M. Cotille.

(*Note 13.*) RUTHERFORTH’S INSTITUTES.—This book has an undoubted claim to be considered much more than its very able author has modestly termed it,—a commentary on the work of Grotius. The reader will find every important question and topic discussed in the great treatise of that author, compressed into the lectures of his elegant commentator, without the formality of a regular comment, his decisions compared with those of other casuists, and his occasional errors detected and corrected, in a style and method not so concise as to be obscure, nor so diffuse as to fatigue the attention of the reader. Indeed, we conceive the logical clearness with which this very sensible work is written, to impart to it an interest unusual in treatises of its abstract nature; and to give it on the whole a decided preference to any other work on that subject, with which we are acquainted. Heineccius, Hutchinson, Cumberland, Wolf, Vattel, Burlamaqui, &c. until very lately, were more usually placed in students’ hands, and were better known, only because they considerably preceded Rutherford, they being the sources to which the senior lawyers of the present time were accustomed to resort. They are each possessed of great merit; but none so free from error and objection as the Institutes of Dr. Rutherford. The two last we do not hesitate to give a place in our Course, and the others may be occasionally looked into with advantage, particularly Heineccius. We would take occasion here to remark, that Burlamaqui’s conclusions are not always correct, and he is somewhat

tainted with the errors of the Gallic school. Vattel, also, is rather too wordy, promising, and 'all things to all men.' Rutherford is occasionally too argumentative on simple points; and even on difficult points is sometimes reluctant to leave his subject, after he has fully satisfied his reader. His chapters on 'Marriage' and 'Slavery,' contain much that is sophistical. The *entire work* should be carefully studied,—but we select the following chapters as particularly valuable, and meriting more than one perusal.

1st. Vol.	{	Chapter xii.	'Of Promises.'
		Chapter xiii.	'Of Contracts.'
		Chapter xvi.	'Of the Right of Defence.'
		Chapter xvii.	'Of Reparation for Damages.'
		Chapter xviii.	'Of Punishment.'
2d. Vol.	{	Chapter v.	'Of the changes produced in the rights of individuals by Civil Union.'
		Chapter vi.	'Of Civil Laws.'
		Chapter vii.	'Of Interpretation.'
		Chapter ix.	'Of the Law of Nations.'

Archdeacon Rutherford was not only an eminent divine, but an ingenious and learned philosopher. His moral and theological works are remarkable for great clearness, and logical argument,—the principal of which are 'Essays on Virtue,' 'A Discourse on Miracles,' 'Examination of Dr. Kennicott's Defence of the Samaritan Pentateuch, &c.' 'Defence of Bishop Sherlock, on Prophecy.' His claims as a philosopher rest on his 'Ordo Institutionum Physicarum,' 'A system of Natural Philosophy—or Lectures on Mechanics, Optics, Astronomy,' &c. and his communication in the Philo. Trans.

The Institutes of Natural Law were published in 1754, 1756, in 2 vols. 8vo. The second American edition, by

W. & J. Neal, Baltimore, 1832, is in 1 vol. 8vo. Dr. Rutherford was born in 1712, and died 1771.

(Note 14.) ARISTOTLE'S POLITICS.—When remarking, in our Note 4, on the works of this great philosopher, we observed, that the 'Ethics' and 'Politics' are not to be disjoined. What has been there advanced in praise of the excellence and value of the treatise of Morals, may with perhaps additional propriety be extended to the work on 'Politics,' as it is a production which most persons will unite with Dr. Taylor in pronouncing '*One of the most sterling among the works of antiquity, and a most inexhaustible treasure to the statesman, the lawyer, and the philosopher.*'* Mr. Locke, in a letter to Mr. King, who had requested his opinion as to a plan of reading on morality and politics, remarks, that 'to proceed orderly in this, the foundation should be laid in inquiring into the ground and nature of civil society, and how it is formed into different models of government, and what are the several species of it.' In this science, Aristotle is allowed to be a master; and few enter into the consideration of government without reading his 'Politics.'

In order to give the student a previous idea of the valuable contents of this work, we shall, in as brief a manner as possible, exhibit a summary of it, differently and more extensively stated by Dr. Gillies in his Introductions. The truly zealous and inquiring student would not desire such previous tastes, in order to stimulate or provoke his appetite to a more ample repast: but as every one is not possessed with an ardent thirst after knowledge, provocatives are often necessary. Under the influence of this sentiment is it that we extend this note, and shall in many instances dwell on the nature,

* Vide Taylor's Civil Law, 342.

contents, and merits of works, longer than may appear requisite.

In the first book of the 'Politics,' the student will meet with a succinct and rational account of the origin of society and government, and of the distinction of ranks; and an inquiry into the most approved systems of political economy. As to the first, the author considers society 'a sort of community or copartnership, instituted for the benefit of the partners. Utility is the end and aim of every such institution; and the greatest and most extensive utility is the aim of that great association comprehending all the rest, and known by the name of the '*Commonwealth.*'

In investigating the origin of society and government, he unfolds the elements of which they are composed, and shews conclusively, that both are as natural and essential to man, as it is for plants to radicate themselves in the earth, and draw their nourishment from the encompassing soil and air: he therefore considers society and government, and men and society, as coeval. He is of opinion that monarchy was the first form of civil government, and that it originated from paternal influence and authority. The nature of domestic economy; the origin of servitude or slavery, its extent and several kinds; the origin and accumulation of property; the various kinds of commerce; the use and real value of money; the illegality of usury; the utility of agriculture, &c. are displayed in a concise, but masterly manner. He points out the analogy between the authority exercised in the three domestic or economical relations of master and servant, parent and child, and husband and wife, and that which is used in the three forms of government. A *master*, he says, commands like an *absolute monarch*; a *father* rules like a *king*; and a *husband* governs like a *republican magistrate*: he concludes the book

by pointing out the connection between domestic and political economy; for as husband and wife, parent and child, master and servant, are the elements of *families*, so families are the elements of *states*.

In the second book, are described the most celebrated systems or forms of government, which have actually existed; and likewise those ideal or imaginary schemes of polity or government, devised and matured by the fancy and philosophy of celebrated men. In this book are examined the governments of Sparta, Crete, Carthage, and Athens; the systems of Zaleucus, Charondas, Philolaus, Diocles, Phaleas, Pittacus and Androgamus; and a minute inquiry is made into Plato's Republic. The commonwealth of Carthage, and the institutions of Crete and Sparta (the wisest of any which have been reduced to practice,) are amply described.

The introduction to this book by the learned translator, is excellent, and no doubt will receive more than one perusal. The student will find in it a masterly refutation of the opinion advanced by some, that the ancients knew but little, if any thing, of *representative* government. To this second book, Dr. Gillies has appended an ample and highly interesting account of the little republic of St. Marino.

In the third book, the various forms of government which had existed, and the principles and characteristics of each are ably investigated, the author bestowing, as Dr. Gillies observes, 'just and liberal praise, where praise seemed to be due; but declaring himself not completely satisfied with any thing that philosophers had devised, legislators prescribed, or time and chance had produced.'

In this book, Aristotle first defines a state or commonwealth, of which the component elements are those called *citizens*. He then proceeds to the inquiry as to what constitutes a citizen,

and the *identity* of a commonwealth. He holds man to be naturally a gregarious and political animal, and that all just and legitimate governments must have the good of the governed for their object. He considers the just and pure governments to be *monarchy*, *aristocracy*, and a *republic*: the corruptions of these are *tyranny*, *oligarchy*, and *democracy*.

The great and delicate question as to the portion of the state in which sovereignty ought to reside, is discussed and solved: the principle of distributive justice in the apportionment of political honours and emoluments, and the principle and necessity of ostracism, are investigated; and lastly, monarchy and its five kinds, its advantages, defects and corruptions, are satisfactorily displayed.

In the fourth book, Aristotle inquires into the genuine sources of individual and national happiness, and exposes the various errors which have been adopted on this subject. He institutes many important and interesting inquiries as to the salutary limits to population; the extent and nature of the territory; the situation of the capital, as to remoteness from, or proximity to the sea; the cultivation of commerce; the influence of climate on government and men; the things essential to the subsistence of a state, which according to him, are six: *food*, *arts*, *arms*, *money*, *religious establishments*, and *deliberative councils*, and *courts of justice*. In every commonwealth, therefore, there must be *husbandmen*, *artisans*, *soldiers*, *merchants*, *priests*, and *judges*. The proper employments of citizens, according to the different periods of life; the distinctions of rank; the organization of the capital; the different kinds and aim of education; the proper age and season of the year for marriage in either sex; exposure of children, their nourishment and exercises, their moral and physical education, are interesting topics, successively and ably treated.

In the fifth book, the subject of the education best suited to the maintenance of the wisest system of government, is considered somewhat in detail; and the necessity of this education being relative to the nature of the government, is advocated and illustrated.

In the sixth book, Aristotle has fully developed the astonishing powers of his mind. This production alone would entitle him to the reputation of the profoundest philosophical statesman. He has never been equalled, and probably never will be surpassed. On the subject treated it is certainly a *chef d'œuvre*, and to it was Montesquieu, (in politics the modern Aristotle,) so largely indebted. 'In this book,' says his translator, 'Aristotle approves himself a master in politics, surpassing, as even Locke acknowledges, in perspicuity and precision every writer ancient and modern, in explaining how civil society is formed into different models of government, and the several species of it.' In this book all the different species of pure and corrupt governments are fully treated of, and the relation between laws and governments satisfactorily displayed.

The seventh book, is a production of unrivalled excellence on the subject of political revolutions. The introduction by Dr. Gillies is exceedingly sensible and valuable, as it applies with much force the doctrines of this book to the wild and revolutionary spirit which has been so long prevalent in Europe and elsewhere.

The eighth and last book, contains much excellent matter on the subject of governments, the same in name, but essentially different in their nature. In some respects this is a summary of some of the preceding books, and in many instances supplies their defects. The different kinds of democracies and oligarchies, with the means of improving and

perpetuating them; the adaptation of the military and naval force to the various forms of polity; and the subject of the nature and extent of the executive authority of a state, are all very interestingly and learnedly discussed.

The above brief analysis of this admirable work cannot fail in producing its intended effect, of impelling the student to accord to this translation and the excellent introductory observations of Dr. Gillies, a considerable portion of his time and attention.

(*Note 15.*) MONTESQUIEU'S SPIRIT OF LAWS.*—Few works in any age or nation have contributed more to the fame of their authors, than this very philosophical and masterly production of the baron de Montesquieu. With the exception of Aristotle, no writer ancient or modern has entered so deeply into the spirit and genius of government and law; or so well entitled himself to the distinguished appellation of the '*legislator of the human race, and prince of philosophical politicians.*'

This very singular work, full of thought, learning, and genius, is the offspring of no less than *twenty years'* reflection and diligent elaboration; and, as its illustrious author says, should not be judged of by a *few hours'* reading.

But Montesquieu, like his great predecessor, Aristotle, has had enemies to his fame, no less distinguished for their zeal than were his friends. He has been much praised and not a little censured. That there are errors and faults in that work cannot be denied; for what human production is exempt from them? But as long as genius has power, as long as learning and philosophy have influence, so long must the '*Spirit of Laws*' be esteemed among the most valuable of

* Vide note 5, on the Second Title of this Course.

intellectual productions. The commentators on and censurers of this work, have in many instances evidenced a disingenuous and fault-finding spirit, inconsistent with the genius of liberal and useful criticism, and manifestly dictated by a desire of acquiring fame from an ephemeral opposition to the opinions of so great a master. The merits and faults, however, of this work are now well known, and generally allowed; and it may with confidence be asserted, that the statesman, the general politician, the lawyer, and philosopher, will often seek instruction and delight in the pages of Montesquieu, when the ablest productions on similar topics, of ancient and modern times, will be but occasionally resorted to. His errors, real and asserted, have been so much commented on, that the student can be in no danger of imbibing them from the weight of authority, or the absence of different information. While the 'Spirit of Laws,' therefore is read, let not the student close his eyes to its errors, or neglect the perusal of some even of its warmest opponents; this is the most effectual way of fully understanding an author. A few extracts from the opinions of some authors as to the merit of this writer, may serve to place him in a proper point of view. 'Montesquieu,' says Dr. Priestly, 'is one of the most excellent of all political writers; but his lively manner of expression is apt to lead his readers into mistakes, if they do not make use of some parts of his works to explain others. Thus it is too peremptory to say, as he does, that the blood of Lucretia put an end to kingly power at Rome; that the debtor appearing covered with wounds, made a change in the form of the republic; that the sight of Virginia put an end to the power of the decemvirs; and that the sight of the robe and body of Cæsar enslaved Rome. This is certainly ascribing too much to *spectacles*, without telling what was the reason why such spectacles, in

those particular circumstances, had so much influence: for, as he himself excellently observes, if a particular event, as the loss of a battle, be the ruin of a state, there must have been a more general reason why the loss of a battle would ruin it.*

Sir James Mackintosh, in noticing this work, has with his usual felicity of expression, passed on it a high eulogium, accompanied, however, with perhaps a little more concession to the baron's censurers than ought easily to be allowed. 'Montesquieu,' says sir James, 'has been, perhaps justly, charged with abusing his advantages, by the undistinguishing adoption of the narratives of travellers of every different degree of accuracy and veracity. But if we reluctantly confess the justness of this objection; if we are compelled to own that he exaggerates the influence of climate, that he ascribes too much to the foresight and forming skill of legislators, and far too little to time and circumstance, in the growth of political constitutions; that the substantial character, and essential differences of governments, are often lost and confounded in his technical language and arrangement; that he often bends the free and irregular outline of nature to the imposing but fallacious geometrical regularity of system; that he has chosen a style of affected abruptness, sententiousness, and vivacity, ill suited to the gravity of his subject; after all these concessions, (for his fame is large enough to spare many concessions,) the 'Spirit of Laws' will still remain not only one of the most solid and durable monuments of the powers of the human mind, but a striking evidence of the inestimable advantages which political philosophy may receive from a wide survey of all the various conditions of human society.'†

* Priest. Lect. on Hist. 248.

† Mac. Intro: Disco. 28.

(*Note 16.*) **COUNT DE CATANEO.**—It is not an ungenerous enthusiasm which sometimes prompts the student to an undue admiration, and incautious reception of the positions of a favourite author. This partiality is most sensible, when these positions are connected into system; and strike us at once by their novelty, and their agreement with an ingenious and plausible theory. There are few to whom this partiality is more pardonable than towards the author of the ‘*Spirit of Laws.*’ It were wonderful, however, if in the range of so many and so various subjects, so happy and profound reflections, he were not sometimes misled by the spirit of systematizing, or seduced by the desire of the specious and the brilliant. Among the many critics of Montesquieu, few are more celebrated than the Count de Cataneo. He has started some objections to the theories of that author, which the student will find well deserving of his investigation; though, to our view, the style, manner, and arguments of this writer are not the most clear and forcible: there is some difficulty in arriving at his meaning in many particular positions, and yet more, perhaps, in comprehending the scope of his work. The volume is a small quarto, very rare in this country. Many of our public libraries, however, possess it.

(*Note 17.*) **GROTIUS DE JURE BELLI AC PACIS.**—**PUFFENDORF DE JURE GENTIUM ET NATURÆ.**—The names of Grotius and Puffendorf of themselves carry with them an air of authority. Subsequent writers and commentators have, however, embodied in their works most of what is important in these authors, and by discarding the pedantic and, in such treatises, sometimes unnecessary learning with which they have encumbered their pages, but which was less their fault than that of the times, and by methodizing, abridging, and

sometimes correcting, have better adapted their treatises to the taste of a modern reader. To these works therefore, with the exception of the selected chapters, which may serve to give the student some acquaintance with these *venerable* writers on national law, we prefer to recommend his attention; *strenuously insisting, however, that these chapters be attentively studied.* What legal student, ambitious of deep and solid learning, would be willing to acknowledge an unacquaintance with the treatises, 'De Jure Belli ac Pacis,' and 'De Jure Gentium et Naturæ?' The chapters recommended are the most valuable in each, and contain but a small portion of the entire works, yet amply sufficient for the intended purpose; and for their learning alone, independent of all extraneous motives, well merit the student's attention. Of the two, Grotius is decidedly the more learned, especially in the doctrines of the imperial or civil code: his latinity also is purer than Puffendorf's. The work of Grotius was translated by William Evats, in folio, in the year 1682; again in 1715; and lastly in 1738, with the valuable notes of his learned annotator M. Barbeyrac. There have also been several octavo editions of this work. The latin editions of Grotius, of most note, are as follows. *De Jure Belli et Pacis, libri iii. cum Commentariis Vander Meulen et Gronovii notis*, 1696, 1700, and Amst. 1704, 3 volumes, folio. Also *De Jure Belli ac Pacis, cum Commentariis Coccei, libri. v.* 1751. Also *cum notis variorum.* Amst. Wetstein, 1712, 8vo. libri. ii.* It is also proper to apprize the student that there is a recent and admirable translation of Grotius, by the Rev. A. C. Campbell, with very able annotations. The whole has been newly arranged, and the mass of classical learning, and numerous quotations, which so strongly

* Vide also *Institutiones Juris Naturæ et Gentium ex Jus libris de Juri Belli ac Pacis Excerptæ* Camb. 1763, 8vo.

mark the original, are omitted,—but the notes, and other improvements, make great amends. Mr. Campbell's work is in three volumes octavo, and was printed at Pontefract, in 1814. The treatise 'De Jure Gentium et Naturæ' has been translated into several languages. Kennet's and Carew's are the principal English editions, the latter of which, published in 1749, with M. Barbeyrac's notes, is the most valuable.

The student will require no apology for the length of the following extract, as the name of Sir James Mackintosh is a surety for its worth, both of matter and manner.

'The reduction of the law of nations to a system was reserved for Grotius. It was by the advice of lord Bacon and Peiresc that he undertook this arduous task. He produced a work which we now indeed justly deem imperfect, but which is perhaps the most complete that the world has owed, at so early a stage in the progress of any science, to the genius and learning of one man. So great is the uncertainty of posthumous reputation, and so liable is the fame even of great men to be obscured by those new fashions of thinking and writing which succeed each other so rapidly among polished nations, that Grotius, who filled so large a space in the eye of his contemporaries, is now perhaps known to some of my readers only by name. Yet if we fairly estimate both his endowments and his virtues, we may justly consider him as one of the most memorable men who have done honour to modern times. He combined the discharge of the most important duties of active and public life, with the attainment of that exact and various learning which is generally the portion only of the recluse student. He was distinguished as an advocate and a magistrate, and he composed the most valuable works on the law of his own country; he was almost equally celebrated as an historian, a scholar, a poet, and a divine; a

disinterested statesman, a philosophical lawyer, a patriot who united moderation with firmness, and a theologian who was taught candour by his learning.

‘Unmerited exile did not damp his patriotism; the bitterness of controversy did not extinguish his charity. The sagacity of his numerous and fierce adversaries could not discover a blot on his character; and in the midst of all the hard trials and galling provocations of a turbulent political life, he never once deserted his friends when they were unfortunate, nor insulted his enemies when they were weak. In times of the most furious, civil and religious faction, he preserved his name unspotted; and he knew how to reconcile fidelity to his own party, with moderation towards his opponents. Such was the man who was destined to give a new form to the law of nations, or rather to create a science, of which only rude sketches and indigested materials were scattered over the writings of those who had gone before him. By tracing the laws of his country to their principles, he was led to the contemplation of the law of nature, which he justly considered as the parent of all municipal law. Few works were more celebrated than that of Grotius in his own days, and in the age which succeeded. It has, however, been the fashion of the last half century to depreciate his work as a shapeless compilation, in which reason lies buried under a mass of authorities and quotations. This fashion originated among French wits and declaimers, and it has been, I know not for what reason, adopted, though with far greater moderation and decency, by some respectable writers among ourselves. As to those who first used this language, the most candid supposition that we can make with respect to them is, that they never read the work; for if they had not been deterred from the perusal of it by such a formidable display of Greek charac-

ters, they must soon have discovered that Grotius never quotes on any subject till he has first appealed to some principles; and often, in my humble opinion, though not always, to the soundest and most rational principles.

‘But another sort of answer is due to some of those* who have criticised Grotius, and that answer might be given in the words of Grotius himself.† He was not of such a stupid and servile cast of mind, as to quote the opinions of poets or orators, of historians and philosophers, as those of judges from whose decision there was no appeal. He quotes them, as he tells us himself, as witnesses, whose conspiring testimony, mightily strengthened and confirmed by their discordance on almost every other subject, is a conclusive proof of the unanimity of the whole human race on the great rules of duty, and the fundamental principles of morals. On such matters, poets and orators are the most unexceptionable of all witnesses; for they address themselves to the general feelings and sympathies of mankind; they are neither warped by system, nor perverted by sophistry; they can attain none of their objects, they can neither please nor persuade, if they dwell on moral subjects not in unison with those of their readers. No system of moral philosophy can surely disregard the general feelings of human nature, and the according judgment of all ages and nations. But where are these feelings and that judgment recorded? In those very writings which Grotius is gravely blamed for having quoted. The usages and laws of nations, the events of history, the opinions of philosophers, the sentiments of orators and poets, as well as the observations of common life, are, in truth, the materials out of which the science of morality is formed; and those who neglect them

* Paley's *Prin. of Mor. Philo.* pref. xiv.

† *Grot. Jur. Bel. et Pac. Proleg.* Sec. 40.

are justly chargeable with a vain attempt to philosophize without regard to fact and experience, the sole foundation of all true philosophy.

‘If this were merely an objection of taste, I should be willing to allow that Grotius has indeed poured forth his learning with a profusion that sometimes rather encumbers than adorns his work, and which is not always necessary to the illustration of his subject. Yet, even in making that concession, I should rather yield to the taste of others than speak from my own feelings. I own that such richness and splendour of literature have a powerful charm for me. They fill my mind with an endless variety of delightful recollections and associations. They relieve the understanding in its progress through a vast science, by calling up the memory of great men, and of interesting events. By this means we see the truths of morality clothed with all the eloquence (not that could be produced by the powers of one man, but) that could be bestowed on them by the collective genius of the world. Even virtue and wisdom themselves acquire new majesty in my eyes, when I thus see all the great masters of thinking and writing called together, as it were, from all times and countries, to do them homage, and to appear in their train. But this is no place for discussions of taste, and I am very ready to own that mine may be corrupted.

‘The work of Grotius is liable to a more serious objection, though I do not recollect that it has ever been made. His method is inconvenient and unscientific. He has inverted the natural order. That natural order undoubtedly dictates, that we should first search for the original principles of the science in human nature; then apply them to the regulation of the conduct of individuals; and lastly, employ them for the decision of those difficult and complicated questions that arise

with respect to the intercourse of nations. But Grotius has chosen the reverse of this method. He begins with the consideration of the states of peace and war, and he examines original principles only occasionally and incidentally, as they grow out of the questions which he is called upon to decide. It is a necessary consequence of this disorderly method, which exhibits the elements of the science in the form of scattered digressions, that he seldom employs sufficient discussion on these fundamental truths, and never in the place where such a discussion would be most instructive to the reader.

‘This defect in the plan of Grotius was perceived and supplied by Puffendorf, who restored natural law to that superiority which belonged to it, and with great propriety treated the law of nations as only one main branch of the parent stock. Without the genius of his master, and with very inferior learning, he has yet treated this subject with sound sense, with clear method, with extensive and accurate knowledge, and with a copiousness of detail, sometimes, indeed, tedious, but always instructive and satisfactory. His work will be always studied by those who spare no labour to acquire a deep knowledge of the subject, but will in our times, I fear, be oftener found on the shelf than on the desk of the general student.

‘In the time of Mr. Locke it was considered as the manual of those who were intended for active life; but in the present age, I believe, it will be found that men of business are too much occupied, men of letters are too fastidious, and men of the world too indolent, for the study or even the perusal of such works. Far be it from me to derogate from the real and great merit of so useful a writer as Puffendorf. His treatise is a mine in which all his successors must dig. I only presume

to suggest, that a book so prolix, and so utterly void of all the attractions of composition, is likely to repel many readers who are interested, and who might perhaps be disposed to acquire some knowledge of the principles of public law.*

In a subsequent part of this volume, we shall state our views as to the utility of legal biography, and furnish the student with ample means of cultivating this hitherto neglected branch of legal education. The interest we feel in the lives of those who have been distinguished for wisdom and learning is natural and useful,—but additionally so in respect to those who have been luminaries in our peculiar science. We shall conclude this notice of Grotius and his works, with an extract from a sketch of his life by an author, whose name we have not been able to ascertain.

‘Hugo Grotius, or de Groot, was born at Delft, April, 1583. He was a person of uncommon genius, and without controversy one of the greatest men of his age. When but eight years old, he made Latin verses which would have been no discredit to the mature age of an accredited poet. When but fifteen years old, he had acquired a very critical knowledge of philosophy, mathematics, and jurisprudence. At twenty-four years of age, he was made advocate general. In 1613, he settled at Rotterdam, and became syndic of that city. At this time Holland was greatly agitated with the (religious) disputes of the *Remonstrants* and *Contra-remonstrants*. Barneveldt, the intimate friend and patron of Grotius, declared in favour of the former, and Grotius by his writings and influence supported the party of his benefactor. This business ended in the ruin of Barneveldt, who lost his head; and Grotius, involved in his ruin, was condemned to perpetual imprison-

* Vide Mackintosh's Intro. Disco. p. 15. London, 1799.

ment, and shut up in the castle of Louvestein. His wife observing that the chest in which his linen, &c. passed and repassed from the prison, had ceased to be inspected by the guards, advised him to shut himself up in it, and endeavour to make his escape. Holes were bored in the chest to admit the air, and Grotius locked up in it, was carried out unobserved, his wife remaining in his stead. He was carried in safety to a friend's house at Gorcum, where dressing himself like a mason, and taking a rule and trowel in his hand, he passed unnoticed through the market-place, took boat, and arriving in safety in Velvet, in Brabant, he took carriage and got thence to Antwerp. Some of the judges were of opinion that Grotius' wife should be kept in prison in his stead; but she was liberated by a majority of voices, and her conduct universally applauded. Grotius then retired to France, where Louis XIII. gave him a pension of 1,000 crowns per annum; but of this he was deprived by the influence of cardinal de Richelieu, in 1631. In 1634, he became counsellor to *Christina*, queen of Sweden, who sent him ambassador to France. In this station he remained for eleven years: and when he returned to Sweden to give an account of his mission, he asked, and with great difficulty obtained, his dismissal. On his return to his own country, whither he had been warmly invited, (his enemies being almost all dead,) he was taken ill on the way, and died at Rostock, August 28, 1645, in the sixty-second year of his age. Grotius was a great lawyer, a great critic, a great divine, and a good man. His numerous writings have immortalized him, especially his treatise on War and Peace, and his Truth of the Christian Religion.'

PARTICULAR SYLLABUS.

TITLE II.

'Principles, causes, and elements being unknown, the science whereof they are, is altogether unknown.'—*Fortes. ch. viii.*

THE ELEMENTARY AND CONSTITUTIONAL PRINCIPLES OF THE MUNICIPAL LAW OF ENGLAND; OF THE UNITED STATES OF AMERICA, AND OF THE ROMAN CIVIL LAW: AND HEREIN,

I. OF THE FEUDAL LAW. (*Note 1.*)

1st. Robertson's 'State of Europe,' being the Introduction to his History of Charles V.

2d. Lecture X. of vol. 1, of Hoffman's Legal Outlines, 'Of the Feudal Law.'

3d. Wright's Tenures. (*Note 2.*)

4th. Sullivan's Lectures. (*Note 3.*)

e. 5th. Dalrymple on Feudal Property. (*Note 4.*)

E. 6th. Gilbert Stuart's View of Civil Society. (*Note 5.*)

7th. Lord chief baron Gilbert's Treatise of Tenures. [*Part 1st. 'Of the Origin, Nature, Use, and Effects of Feudal or Common Law Tenures.'*] (*Note 6.*)

E. e. 8th. Millar on Ranks. (*Note 7.*)

II. OF THE ORIGIN AND PROGRESS OF THE COMMON LAW.

E. e. 1st. Gilbert Stuart's Historical Dissertation concerning the Antiquity of the English Constitution.*

E. e. 2d. Turner's History of the Anglo-Saxons. (*Note 8.*)

E. e. 3d. Millar's Historical View of the English Constitution.

E. e. 4th. Hallam's Constitutional History of England. (*Note 9.*)

5th. Conversations on the English Constitution. [*Anonymous, London, 1828.*] (*Note 10.*)

6th. De Lolme on the Constitution of England. (*Note 11.*)

E. e. 7th. Plowden's Treatise on the Constitution of the United Kingdom of Great Britain and Ireland. (*Note 12.*)

E. e. 8th. Eunomus, or Dialogues on the Law and Constitution of England. (*Note 13.*)

e. 9th. Hale's History of the Common Law. (*Note 14.*)

III. THE INSTITUTES OF THE MUNICIPAL LAW OF ENGLAND.

1st. Blackstone's Commentaries on the Laws of England. (*Note 15.*)

e. 2d. Wooddeson's Systematical View of the Laws of England. (*Note 16.*)

* Vide Note 5, on this Second Title.

E. e. 3d. Reeves' History of the English Law, from the time of the Saxons, to the end of the reign of Elizabeth.

(Note 17.)

IV. THE INSTITUTES OF AMERICAN LAW.

1st. Kent's Commentaries. (Note 19.)

2d. Rawle on the Constitution of the United States. (Note 19.)

V. THE INSTITUTES OF THE ROMAN OR CIVIL LAW.

(Note 20.)

1st. Schomberg's Elements of the Roman Law. (Note 21.)

e. 2d. Justinian's Institutes. [*Dr. Cooper's edition, with Notes, Philadelphia, 1812.*] (Note 22.)

[☞ Here terminate the student's regular Elementary studies.]*

(☞ *Works of occasional reference, which will greatly assist the Student in his Elementary studies under this Second Title.*

1. Jacob's Law Dictionary, *Tomlin's edition, 1797, or Byrnes and Riley's, Philadelphia, 1811.*
2. T aylor's Law Glossary of the Latin, Greek, Norman, French, and other languages, interspersed in various Law Treatises. *London, 1823.*
3. Branche's Principia Legis et Equitatis. *London, 1822.* [*Mr. Preston says that this work contains more law, and more useful matter, than any one book of the same size, which can be put into the hands of the student.*]

* Vide Note 1, on the Third Title.

4. Jacob's Law Grammar, 1817.
5. Burns' Law Dictionary, 1792.
6. Kelham's Norman Dictionary, 1779.
7. Wingate's Maxims, or Reasons of the Common Law, 1658.
8. Noy's Maxims, *Barton's edition*, 1794.
9. Potts' Compendious Law Dictionary, 1813.
10. Francis' Maxims of Equity, *Hening's edition*, *Richmond*, 1823.
11. Grounds and Rudiments of Law and Equity, alphabetically digested, 1751.
12. Howard's Analytical, historical, etymological, critical, and explanatory Dictionary of the Customs of Normandy, 1780.
13. Spelman's Glossary, 1664.
14. Repertorium Juridicum, 1787. [*Repertoriums are dictionaries of all the reported cases, and by whom reported.*]
15. Cunningham's Dictionary, 1764.
16. Maxwell's Pocket Dictionary of the Law of Bills of Exchange and Promissory Notes, 1802.
17. Winshaw's New Law Dictionary of mere Terms of Art, and of Obsolete Words. *London*, 1830.
18. Barton's Practical Points, or Maxims in Conveyancing, selected from the manuscripts of Butler, Preston, Bradley, Barton, sen. Downing, and others; alphabetically arranged for Students. *London*, 1830.

19. Readings on the Statutes alphabetically digested, illustrating the difficult points, 5 vols. octavo, 1725.
20. Reeves' Chart of Penal Law, 1779. [*This is a large sheet exhibiting by means of lines, and various colours, and appropriate notes, a historical view of the penal laws of England.*]
21. Legal Recreations; or Popular Amusements in the Laws of England.
22. Bacon's Elements of the Common Law, included in his volume of Law Tracts.
23. Barrington's Observations on the more ancient Statutes.
24. Encyclopædia Americana. [*Most of the articles on legal subjects are concise, elementary and learned.*]

[§] The student will have frequent occasion to resort to some of the foregoing works, for the solution of doubts and difficulties, as they arise in the prosecution of his regular studies. His researches may now and then lead him to consult, with equal advantage, others not enumerated; and all of them are to be regarded, merely as sources of occasional reference. Such auxiliaries should be familiar to the student; and if the library to which he has immediate access, should not contain them all, it is probable to possess those, at least, to which he would have occasion most frequently to refer. The student will also bear in mind that several of the Analyses, Abridgments, &c. of Blackstone's Commentaries, enumerated in a subsequent page of this Title, are to be regarded chiefly as books of occasional reference, though some of them ought to be read through, with attention, especially Field's, or Anthon's Analysis. The student is advised (after he has studied a chapter in the original work,) to read the corresponding chapter in the Analysis.]

NOTES ON THE SECOND TITLE.

ELEMENTARY LAW.

(Note 1.) FEUDAL LAW, WHY THE STUDY OF IT SHOULD PRECEDE THAT OF THE COMMON LAW.—The laws like the language of England, are of a very miscellaneous character: nearly every part of this vast system of jurisprudence is somewhat tinctured with feudalism; but the law affecting *real* property has its foundation deeply laid in the rules and principles of that extraordinary code. To acquire a comprehensive and philosophical view of the laws of England, it is very essential to examine the early history of that country and of Europe generally, and to explore the very sources and springs whence these laws originated; for *ignoratis causis rerum, ut res ipsas ignoretis necesse est*; and these are principally to be found in the repositories of the laws and customs of the dark and feudal ages.

If, therefore, the student aspire to a knowledge of something more than mere 'expository jurisprudence,' which terminates in ascertaining the *ita lex scripta est*; if he desire to contemplate law 'censorially,' and thereby investigate its spirit and philosophy, in order to determine its justness or what it ought to be; if his object be to impress on his mind the infinite variety of rules and principles, and to apply them with facility and judgment, as the ever varying circumstances and facts may require; it can only be effected by a familiarity with the feudal institutions, which, though in numerous instances no longer the law of the land, are however the parent of much

that is, and still retain so manifest an influence as to render our law extremely obscure, arbitrary, and unphilosophical, to all who have disregarded its feudal relations and dependencies.

It is but reasonable to suppose, that a system of law in active and efficient operation for the space of at least six centuries, would be so radically incorporated in the general law of the land, and would have occasioned such an infinite variety of customs, laws, and institutions, and such numerous modifications and alterations in the original code, as for ever to retain an almost immutable influence. For though the statute 12 Charles II. removed the oppressive and military part of this system; and though the refinements, as well as the necessities of mankind, had introduced, long before, important alterations in the forms of procedures, and the general spirit both of legislation and interpretation, much still remains, and a very considerable portion of the present law has its foundations resting immediately on feudal principles.

It would be no difficult undertaking to enumerate many hundred rules of law, as much in force at present as they ever were, which in the abstract appear unaccountable, if not absurd, until inquiry into their feudal origin dispels the difficulty, removes the aspersion, and imparts that life and dignity, which philosophy and science never fail to afford to subjects apparently the most abstruse and arbitrary. The student, for instance, is informed that a *freehold* cannot commence *in futuro*; that it cannot be put in *abeyance*, but that the inheritance may; that a *contingent* remainder of freehold cannot be limited on a particular estate for *years*; that a *particular estate* and *remainder* must have a contemporaneous inception; that an estate to A. for years, remainder to B. for life, remainder to the right heirs of C. is good; that an estate for *life* to the ancestor, and a limitation of the *inheritance* to his heirs, coalesce,

and constitute him tenant in fee; that title by *descent* is preferable to title by *purchase*; that a *condition* broken defeats the *entire* estate; that a right of entry for condition broken cannot be reserved to a stranger; that the entire estate in joint tenancy vests in the survivor; that the courts are disposed to presume against cross-remainders; that a remainder must vest in possession *eo instanti* the particular estate determines; that a rent, properly so called, cannot be reserved to a stranger; that in descent the *eldest* son shall *solely* inherit; that the male shall be preferred to the female; that females shall inherit in coparcenary; that by no species of conveyance shall a man be permitted to raise a fee-simple to his own right heirs as *purchasers*; that inheritances shall never lineally *ascend*, &c. &c. These rules, which are very numerous, can make but little useful impression, unless the principles in which they originated be well understood; and let not the student look for these principles *out* of the Liber Feudorum. There are, however, no truths so manifest as to be established without some opposition. This more frequently originates from prejudice, idleness, or a spirit of contention, than from ignorance. In lord Coke it was certainly prejudice. His little estimation for feudal learning was more the result of an overweening and tenacious opinion of the peculiar excellence and dignity of the laws of his country, than any absence of information as to their real origin. With lord Coke, the admission that English jurisprudence was largely indebted to the code of any other nation, was to detract from its dignity. Sir Henry Spelman remarks, 'I do marvel many times that my lord Coke, adorning our law with so many flowers of antiquity and foreign learning, hath not, as I suppose, turned aside into this field of *feudal* learning, from whence so many roots of our law have, of old, been taken and transplanted.' The fact,

however, is that this system is of Roman, Saxon, and feudal origin; and can be well understood only by reference to the principles and genius of those respective codes. As regards that portion of it which is feudal, we are happy to call in corroboration of the opinion advanced in this note, that of professor Sullivan, who insists on a broad foundation of feudal learning being laid, in order to erect a durable, solid, and splendid superstructure of English law. 'But, perhaps,' says the instructive writer, 'it may be thought sufficient to explain and deduce these rules from the feudal ones, as they occur occasionally in the books of the common law; which is the method that, in conformity with the rest of his plan the Oxford professor has adopted; and that the reading through a course of that law, even the shortest, will be attended with an unprofitable delay, and detain the students too long from their principal object. The answer to this objection is short, and if well founded, perfectly satisfactory. It is, that the real reason of proposing a system of the feudal law to be gone through was to *save time*. The method is so much better, and clearer, and, by necessary consequence, so much easier to be comprehended and retained, that the delay will be abundantly compensated, and one third at least of Littleton will be understood and known by the students, before they open his book. For the maxims of the common law, as they lie dispersed in our books, often without reasons, and often with false or frivolous ones, appear disjointed and unconnected, and as so many separate and independent axioms; and in this very many of them must appear unaccountable at least, if not absurd; whereas in truth, they are almost every one of them deducible by a train of necessary consequences, from a few plain and simple rules, that were absolutely necessary to the being and preservation of such kind of constitutions as the feudal king-

doms were. The knowledge of which few, timely obtained, will obviate the necessity of frequent and laboured illustrations, as often as these maxims occur in our law; will reconcile many seeming contradictions, and will shew that many distinctions, which at first view appear to be without a difference, are founded in just and evident reason: to say nothing of the improvement the mind will attain by exercise, in following such a train of deductions, and the great help to the memory, by acquiring a perfect knowledge of the true grounds of those various rules, and of their mutual connection and dependence on each other.*

(*Note 2.*) WRIGHT'S TENURES.—The introduction to the Law of Tenures, by sir Martin Wright, though a small volume, is one of immense, and of the most accurate research. It is a beautiful specimen of deep learning, united with a concise and elementary exposition of its subject. The utmost reliance may be placed on his citations, which are numerous; and those who may be in search of minute learning on the various topics of feudalism, may take his authorities as faithful guides. The first edition was printed in 1730; the fifth edition in 1792, is the one most commonly in use.

In 1825, James Ram, Esq. who is advantageously known to the profession by several works, published, 'An Outline of the Law of Tenure and Tenancy, containing the first principles of the law of real property.' There are in this work some novel and ingenious views on the doctrines of the realty. We also desire to bring to the reader's notice the late sir Robert Chambers' 'Treatise on Estates and Tenures,' published in 1824, by his relative sir H. C. Chambers, one of

* Vide Sullivan's Lectures, p. 15.

the judges of the S. C. of judicature, at Bombay. The learned author was the immediate successor of sir William Blackstone in the Vinerian professorship; and this small volume contains the substance of the lectures delivered by him during the short period in which he occupied the chair. Dr. Wooddeson has been uniformly spoken of as the second Vinerian professor. He commenced in Michaelmas Term, 1777; we presume the appointment of sir Robert Chambers took place several years earlier.

(Note 3.) SULLIVAN'S LECTURES ON FEUDAL LAW.—The lectures of Dr. Sullivan on the Feudal Law, and the Constitution and Laws of England, delivered in the university of Dublin, were first published in 1770. Another edition appeared in 1776, in quarto, with numerous authorities, to which is prefixed a Discourse on the Laws and Government of England, by *Gilbert Stuart*. We know of no work on feudal learning, and the first principles of the English Constitution, equal in merit and interest. Dr. Sullivan was an able lawyer, and a pleasing writer, whose premature death was much regretted, as his researches were prosecuted with uncommon zeal, and would certainly have been productive of no less utility than honour to the institution with which he was connected.

(Note 4.) DALRYMPLE ON FEUDAL PROPERTY.—We have had occasion to remark in the Introduction, on the necessity of an acquaintance with the *history* of the law, in order to comprehend the reason of its principles, and the origin of its forms. The work which we now recommend, published in 1757, and of which there have been many subsequent editions, is a brief and philosophical history of the revolutions of Eng-

lish tenures, and of the gradual alterations produced by the exigencies or convenience of successive ages, in the mode of holding and transferring property; of the conflicts between principles anciently recognized, and those which it was found convenient afterwards to adopt; and of the various devices and subtuges by which, often under a nominal adherence to ancient maxims, a new complexion was given to men's estates, and the modes of defeating, conveying, enlarging, or defending them. The slow melioration of the services and restraints of the old military feuds; the progress of voluntary and involuntary alienation; the history of entails, with their appurtenances, fine and recovery; the introduction and application of other conveyances, together with the original jurisdiction of the several English courts, and their subsequent mutual encroachments or limitations; may be here perspicuously traced by the student; who, unless he contemplates these changes in connection with the dates and causes of their origin, could conceive of them only as a mass of discordant principles, and frivolous forms. From this and other treatises of a similar nature, the student may discover, indeed, the deficiencies of English law, as an elegant and symmetrical system; but he will be no less profoundly impressed with the prudence and sagacity of those legislators and judges, who were content to sacrifice symmetry to strength; and discovered, perhaps, a more happy invention in thus introducing the innovations demanded by times and circumstances, under the shadow and sanction of an ancient and venerable system.

(*Note 5.*) GILBERT STUART'S VIEW OF CIVIL SOCIETY.—From the various treatises on feudal institutions and manners here recommended, the reader will discover that the question of the existence of feudalism in England anterior to the con-

quest, having been dragged into the dispute between the popular and court parties, has, together with some collateral points, been agitated between some of the most distinguished British lawyers and antiquarians, with no inconsiderable warmth.

The student's investigation of this point will issue, we imagine, in the opinion of those, who taking a middle course, have allowed among the Saxons some faint vestiges of the feudal law and manners. Among the boldest productions on the side of the popular party is Gilbert Stuart's 'View of the Progress of Society in Europe,' a work which, in support of the novel theory it sets forth of the origin of chivalry, contains many opinions which an acquaintance with the rise and progress of the British constitution forcibly contradicts, and much learning and research misapplied, or wilfully prostituted by party prejudice. The same remarks apply to his 'Dissertation on the Antiquity of the British Constitution.' To understand the work on the 'Progress of Society,' which is written to establish a peculiar theory, and, as mentioned, to strengthen some party notions; it is advisable for the student to read in Hume's History of England, the following: 1st vol. page 79, 216, 298, 397, 467, and the 1st Appendix to that volume, page 169 to 196; also 2d vol. page 1, 398; 3d vol. page 104.

In our notice of Montesquieu's 'Spirit of Laws,' we have required the student's particular attention to the 28th, 30th, and 31st books.* This very sensible writer, who in the first part of his work has so well extracted the spirit of laws in general, has shown in these three books, with what philosophical scrutiny he can investigate the institutions of a particular people. From the study of those books, in which he has evolved the principles and causes of the feudal system, and traced its changes in the French empire during the early

* Vide Note 15, on the First Title.

ages, with a singular skill and felicity, we remember to have derived a pleasure, but slightly diminished by the obscurity into which his sententious conciseness occasionally betrays him. But we conceive that this part of the work would be read with greater advantage after the works of Robertson, Hume, and Gilbert.

(*Note 6.*) GILBERT'S TREATISE OF TENURES.—The legal productions of sir Jeffrey Gilbert, lord chief baron of the Exchequer, are confessedly among the most valuable that we possess. None of his works reached the press until some time after his death, which took place in 1726. It is a singular excellence of these works, (most of which are to be found in what is called Bacon's Abridgment of the Law,) that they uniformly trace legal points to their first principles, especially those which are of feudal descent; for no where are the grounds and reasons of the English law more fully illustrated, or more ably pursued to their feudal or other origin, than in the writings of this learned judge.

His 'Treatise of Tenures,' is peculiarly entitled to the student's regard, as it is one of the most elementary, luminous and satisfactory essays we have on this abstruse learning; and in a short compass removes numerous difficulties, which, without the aid of this little work, nothing less than great assiduity, and ardour of research could subdue. In 1796, Charles Watkins, Esq. published the fourth edition of this work, with copious notes and illustrations; to which he affixed an Historical Introduction on the feudal system. It is scarce necessary to remark that the student need not read the second part of this work, which treats exclusively of the tenure of copyhold, as he cannot fail to know all that is necessary of that tenure, after he has read Blackstone's Commentaries.

(Note 7.) MILLAR ON RANKS.—The author of this work was professor of law in the University of Glasgow. His ‘Observations concerning the origin and distinction of ranks in Society; or, An Inquiry into the circumstances which give rise to influence and authority in the different members of Society,’ appeared in 1771; and the fourth edition much enlarged, and with the life of the author, in 1806. He is also the author of the valuable ‘Historical View of the English Government,’ in 4 vols. London, 1803. And of the ‘Elements of the Law relating to insurance,” 1 vol. 1787.

(Note 8.) TURNER’S HISTORY OF THE ANGLO-SAXONS.—The subject of this work is, comparatively, new. It is full of interest, by no means only to the historical antiquarian, but to the statesman and lawyer, as it sheds much light on the political structure of the English government, and on its laws respecting property. There is, perhaps, no system of jurisprudence so dependant on historical research, for its due comprehension, as that of England. It can scarce be said that its philosophy has ever been systematically investigated, certainly not *ex professo*. It is, therefore, to be sought only in its history; and we are happy to say that these researches (stimulated, we presume, by the example of German and French jurists,) have recently become in England more common.

(Note 9.) HALLAM’S CONSTITUTIONAL HISTORY.—The learned author, in his ‘View of the State of Europe during the Middle Ages,’ investigates, with great ability, the origin and progress of the English Constitution, commencing with the Anglo-Saxons, and carried down to the extinction of the house of Plantagenet. Vide vol. 3, chap. viii. His work

entitled, 'The Constitutional History of England from the accession of Henry VII. to the death of George II,' is the sequel of that history, through a much more important period; the whole of which forms a more thorough, learned, and impartial view of the subject than is elsewhere to be found. These two works ought to be in every lawyer's library and merit to be *studied*, not merely read.

(Note 10.) CONVERSATIONS ON THE ENGLISH CONSTITUTION.—These are spirited and highly instructive dialogues, in which the interlocutors are sir Ralph Elyot, and his two sons. Sir Ralph is a descendant of Reginald Elyot, a gentleman of note in the reign of the third Henry; and being naturally desirous that his sons should fill with distinction, the same honourable stations which their progenitor had graced, undertakes (in these Conversations) to instruct them in the constitutional history of their country. Actuated by these motives, he professes to inquire only after truth; and discarding theories, and every source of prejudice, he encourages his sons to maintain the dialogue with the same frank spirit; and to form for themselves, from their own examination, such opinions as their deliberate judgment, and strict impartiality, should alone dictate. The parent, with a highly embellished mind, and with that caution and dignity of manners, demanded by the occasion; and the sons, ardent in the pursuit of knowledge, give the reader assurance that their colloquies will abound in useful and interesting information on the many important topics on which they design to converse. In this little volume, therefore, the student is constantly instructed, in a very natural and agreeable manner, without any of the art or formality so often visible in didactic, and historical productions. It is extremely pleasing, moreover, to observe how perfectly the

personal identity of the several interlocutors, is maintained throughout the volume, each contributing exactly what might be expected from his gradually developed character; and all in the order, and with the ease and truth of actual discussion. How much this mode of imparting knowledge was practised in the works of the ancients, is known to the classical student: and, in elementary works, it has of late been much adopted, especially in England and France. Chemistry, natural philosophy, political economy, mythology, botany, mineralogy, history, and even algebra, &c. have been treated in this manner, and we think with good effect. Were productions on topics of a strictly legal character, sometimes to assume the form of easy and sprightly dialogue, we doubt not that even the most abstruse points, (the *nodi juris*) might find a more willing access to minds, than is often the case when differently taught. Be this as it may, we are satisfied that at least the fundamental principles, or the contour of any science, may be advantageously taught, by relinquishing, in a considerable degree, the formal, didactic, and staid manner of the regular treatise; and assuming one more colloquial, simple, and pleasing,—illustrating difficult things by familiar examples, and disrobing abstruse topics of their pedantry, and of those adscititious circumstances which the learned, through the lapse of ages, have thrown around them.

(*Note 11.*) DE LOLME ON THE ENGLISH CONSTITUTION.—This is deservedly a work of high estimation, and has been much commended, not only in England, but wherever it has been read. Junius recommends it as a deep, solid, and ingenious production; and lords Chatham and Camden have spoken of it in terms of great approbation. It is unquestionably a luminous, candid, concise, yet satisfactory

exposition of the British constitution, and is written in a pure and nervous style. John Lewis De Lolme was born in Geneva, where he was for some time a senator. He resided for several years in England, and wrote there on a variety of topics. He is the author of 'Parallel between the English constitution and the former government of Sweden,' published in 1772; 'Essay on the union of Scotland with England,' 1787; 'Flagellantes;' 'Memorials of human superstition;' 'Observations on the tax on windows,' 1778; (a pamphlet of much wit and good sense;) and 'Observations on the late national embarrassments,' 1789. He died in his native country, aged and poor, in March, 1807. He is said to have been a man of genius and learning, of sprightly and witty conversation, but rather eccentric.

By some he has been placed in the splendid catalogue of those to whom the celebrated letters of Junius have been ascribed.

The work on the English Constitution, was published in Holland, in the French language, when the author was not thirty years of age, and was translated in 1775. The versatility of his genius, and the variety of his acquirements are in nothing so strongly manifested as in his Essay on the learning of Executory Devises, published only a few years before his death. That a foreigner, and a Frenchman, should have felt sufficient interest to become an author, in one of the most abstruse branches of English jurisprudence, is not a little surprising; but that his production, (which, however is very brief,) should be highly respectable, is still more so.

(*Note 12.*) PLOWDEN'S TREATISE, &c.—This is a very interesting and clear, though concise history of the civil and ecclesiastical constitutions of Great Britain and Ireland. It

presents, in a bird's eye view, every important feature of that wonderful piece of state mechanism, and unfolds its progressive advancement from its first rude foundations, to its present regularity and excellence.

We presume that neither the writings of the constitution-
alists, nor those of the republicans or anarchists, will mislead the student to suppose with the one, that the British constitution is nearly free from defects, nor with the other, that it is vulnerable at all points, and replete with the seeds of its own certain destruction. The productions of each party should be read with the single view of extracting truth, and under the persuasion that entire verity and invariable candour are not to be found in the pages of either. This little volume of Mr. Plowden is written with a laudable and ingenuous spirit, and presents a very pleasing view of the fundamental principles of a government which every good and reflecting mind might reasonably wish to be perpetual.

(*Note 13.*) EUNOMUS.—As an institutionary treatise this work has much merit. Its main object is the removal of many vulgar prejudices relative to the science of law and its professors, by a liberal and minute inquiry into the origin and spirit of many of its principles. The aspersions usually cast on the constitution and laws of England, both as to principle and practice, are satisfactorily removed, and the excellence and dignity of both ably vindicated.

The difficulties usually encountered in matters of practice, and the numerous apparently unmeaning technicalities of English jurisprudence, are, together with the science generally, illustrated in an able and attractive manner. The intimate connection of law with history and general literature is displayed, and the student strongly urged to pursue a liberal

method of legal study. It is matter of regret that this work is, with us, so little known. The merited renown of its predecessor, the 'Commentaries,' has cast it into shade, from which we should esteem ourselves fortunate to rescue it. The best edition is by Edward Wynne, in 4 volumes, octavo, with learned notes.

(*Note 14.*) **HALE'S HISTORY OF THE COMMON LAW.**—The fourth edition of this work, in one volume, was published in 1779, by Charles Runnington, Esq. with many valuable notes and references, and a biographical sketch of its learned and estimable author. In 1794, a new edition of Runnington's Hale, appeared in two volumes. Sir Matthew Hale was born in November, 1609, and died in December, 1676. In 1651 he was created, by Cromwell, chief justice of the court of common pleas; which appointment he accepted with extreme reluctance,—and on the death of the usurper, he declined its continuance, when urged upon him by Richard Cromwell. In May, 1671, he was promoted by Charles II. to the office of chief justice of England; which he held only till February, 1675, when he resigned the commission, in consequence of the decayed state of his health. He was a lawyer of great eminence; and a judge of the most spotless purity. In constitutional and antiquarian learning, he had not his equal in England,—not even in Coke, or in Bacon. He was, therefore, eminently qualified for the task of deducing the history of the common law of England. It must be admitted, however, that parts of the work, at least, have fallen short of public expectation. But what scholar in the law would be willing to admit that he had never read lord Hale's *History of the Common Law*?

(*Note 15.*) **BLACKSTONE'S COMMENTARIES.***—While ample praise has been bestowed on the elegance, taste, and genius which distinguish this splendid production, there are some who have questioned its utility. It has been objected to the Commentaries, that they seduce the student from the more weighty and learned writers of the law; and it is doubted whether, under all the embarrassments of his progress, he did not derive a more substantial and durable benefit from his obscure and difficult masters, than from the labours of the more modern commentator; where the great principles of the law are so clearly delineated, and its elementary difficulties so happily solved to the student, as to render him, it is said, less patient and laborious in his future researches; while the subject is treated with an elegance of manner and language, with which the style of other legal writers must hold a very disadvantageous comparison.

While some, under the apprehension of these seductions, are content to follow the old avenues, and grapple with the giant difficulties of the law in the very entrance of the labyrinth, it is a more general error to neglect too much the ancient sources of learning, and to confine our attention too

* We are particularly sedulous to guard against the too common error of calling students to the Commentaries of sir William Blackstone, before they have laid a solid foundation in requisite preliminary studies. It is a serious mistake to suppose that, because that work is an elementary outline of English jurisprudence, it should be placed, at once, in their hands. We scarce ever saw a student well grounded in the 'Commentaries,' who had pursued this course; and we believe the mistake of which we now apprise them, has often either occasioned despondency, or induced students to rely on repeated readings, with the vain hope of mastering the difficulties. We feel assured, on the contrary, that if they carefully study what has been pointed out as preliminary; they will study this admirable work with understanding and alacrity, and eventually save time, as they will, after one perusal, scarce have occasion to regard the work in any other light than for occasional revision and reference.

exclusively to a work, whose object was to incite, to conduct, and extend them. This course will as certainly render us sciolous, as the proper use of these admirable and scientific institutes of the law of England will facilitate our introduction to more extensive and profound researches.

The general institutes of a science resemble a general map: they trace the grand outline; they possess us of the leading features; and assist our understanding of the parts, by presenting the arrangement and connection of the whole. The commentaries exhibit a general map of the English law; yet to hope from them particular and definite knowledge on any of its various doctrines, were a like folly with expecting an accurate draught of St. Peter's in a map of Italy.

It seems unjust to conclude that this elegant production is injurious, because the idle and superficial, collecting knowledge from it with facility, find no occasion for research and exertion; or to imagine it useless, because the laborious and the enterprising have made great, and sometimes more solid acquisitions, without it. In the first case it is probable, that the acquisitions not made by this means, had never been made at all; in the second, that the legal scholars who have been formed by this course, have been generated from the same cause which produced hardy citizens in some ancient commonwealths; where the severity of education and discipline permitted only a constitution of iron to escape. But between these extremes lies the most common and numerous class of students; who do well under a guide, what they never enterprise without one; who travel patiently over the mountain, though they would clamber no unnecessary precipices; and who are willing to dig in the mine, though they cannot fly with the wings of the eagle. To such it seems absurd to doubt the utility of a work which exhibits the general contour

of English jurisprudence, its causes, reasons, and rules; and diffuses the interest of science and symmetry on topics which, contemplated apart, often seem extremely arbitrary and confused. It seemed wise to the great digester of the Roman law, to arrange and abridge in the Institutes, for the service of the Roman student, the multifarious learning of the Code and Pandects.

That this work is to be regarded and admired merely as an outline of the various and intricate science of English jurisprudence, was the opinion of sir William Jones, who holds the commentaries to be the 'most correct and beautiful outline that ever was exhibited of any human science; but they alone,' says he, 'will no more form a *lawyer*, than a general map of the world, how accurately and elegantly soever it may be delineated, will make a *geographer*: if indeed all the titles, which he professed only to sketch in elementary discourses, were filled up with exactness and perspicuity, Englishmen might hope at length to possess a digest of their laws, which would leave but little room for controversy, except in cases depending on their particular circumstances; a work which every lover of humanity and peace must anxiously wish to see accomplished.*

Mr. Hargrave well expresses the opinion we have ever entertained on this subject; and it is much to be lamented that young men of fine talents, fascinated by the perspicuity of the arrangement, and the charms of the style, persist in reading little else than these commentaries, when their time should be devoted to Bacon, Cruise, Fearne, Chitty, Tidd, &c. 'Those who are sufficiently acquainted with my devoted respect for this late most eminent commentator on the laws of England,' says Mr. Hargrave, 'cannot reasonably suspect me

* Vide Jones on Bailment, p. 4.

of being easily betrayed into any measure tending to injure his fame. Often have I remonstrated to various persons, for whose opinions I have the highest respect, that, notwithstanding the wonderful merit of that great work, his commentaries, still they were only elements of our law, only written for students, not designed for profound experienced lawyers, such as are either the fixed ornaments of their country, on the elevated seats of justice, or move as shining, though secondary planets, in our juridical world. If the commentaries of Mr. Blackstone have attracted the attention of great judges and eminent counsel, before sufficiently enlightened; have been critically read, and ardently studied by persons of such description; it is the strongest possible proof of a commanding excellence; and though such persons should find blemishes in every page, it will be at once obviated, by reminding them of the nature of the work, and of their unremitting condescension in examining its contents. Such,' continues Mr. Hargrave, 'is the point of view, in which I have ever considered these famous commentaries of an almost second Hale.'*

Lord chancellor Redesdale also, in the case of *Shannon v. Shannon*, 1 Scho. and Lef. 327, in noticing a legal doctrine cited from the commentaries, says 'I am always sorry to hear Mr. Justice Blackstone's commentaries cited as an *authority*: he would have been sorry himself to hear the book so cited: he did not consider it such.' Judge Tucker, the American editor of the commentaries, thus expresses himself on the subject. 'On the appearance of the commentaries, the laws of England, from a rude chaos, instantly assumed the semblance of a regular system. The *viginti annorum lucubra-*

* Vide Hargrave's Law Tracts, p. 45.

tiones recommended by Fortescue, it was thought, might be dispensed with, and the student, who had read the commentaries three or four times over, was led to believe, that he was a thorough proficient in the law, without further labour or assistance. The crude and immethodical labours of sir Edward Coke were laid aside, and that rich mine of learning; his commentary upon Littleton, was thought to be no longer worthy of the labour requisite for extracting its precious ore. This sudden revolution in the course of study may be considered as having produced effects *almost as pernicious* as the want of a regular and systematic guide; since it cannot be doubted, that it has contributed to usher into the profession a great number, whose superficial knowledge of the law has been almost as soon forgotten as acquired.'

Judge Tucker has been found fault with for this opinion. It is manifest, however, that the judge meant not to censure the work, nor to diminish its merited fame; for he was himself greatly instrumental towards its circulation. He has, no doubt, with regret observed the evil we have been noticing, and warmly censures the folly of relying on the commentaries for solid learning: this is the '*pernicious effect*' which he deprecates, and which has no doubt occasioned the failure of many students of law.

Upon the whole, we strongly urge an earnest perusal of this admirable work, the student always bearing in mind, that its principal object is to present an orderly and systematic view of a science, the outlines of which are not to be found as briefly yet completely delineated, in any other work. Let him also regard it as a 'more beautiful specimen of elegant literature, than has in any other instance been applied to a professional subject, which has greatly facilitated the acquisition of juridical knowledge, while it has improved the judgment of mature

experience, and given a convincing proof to the cultivators of general literature, that if the science of English law has not been often presented in an elegant form, the defect has not been occasioned by the nature of the subject.' 1 Evans' Pothier. Intro. 75. Such unqualified, disingenuous, and ungrateful remarks as the following, can only be mentioned to be condemned. 'The commentaries of Blackstone have met with success, but have not deserved it. At a time when taste and literature are very much advanced in Great Britain, it was necessary its inhabitants should be presented with a *readable* system of law. This judge Blackstone did, and *no more*; we find in it no invention, no philosophy, no erudition; it may instruct a country gentleman, but lawyers receive no benefit from it. These commentaries do not go sufficiently into the history and antiquities of the law; *deep researches did not suit his capacity*; he should all along, where the subject permitted it, have appealed to the Saxon government and policy. More modern usages should have been illustrated by ancient customs, and every point of the constitution should have been traced to its source. He found it a much easier task to deduce his subject from the conquest, and to transcribe, with a few improvements of language, the matter which is heaped together in lord Coke, or in Maddox, than to walk in a path, where there was no such genius to direct him: a vast labyrinth presented itself to him; he was *conscious of his weakness, and recoiled*. A great many ingenious things have been written on the nature and plan of the feudal polity, by sir Martin Wright: these Dr. Blackstone found it easier to copy, than to communicate any ideas of his own on that very curious and intricate system. The crabbed, rugged, and unequal style of Bacon, Selden, and Spelman disgusts all readers of taste; and it is in these, and in authors that resemble them, that the

industrious student must dig for legal knowledge. It is much to be wished, that some lawyer, whose views are enlarged by science, and whose penetration is sharpened by practice, would apply himself to compose a work, on a plan more *original*, *liberal*, and *extensive* than the commentaries; which, whenever that is done, *will slide into insignificance and oblivion.*' When this *is* done, that consequence will certainly follow, most enlightened and liberal critic!

The editions, abridgments, analyses, and other forms, in which this work has appeared before the public, have almost equalled in number the years which have elapsed since its first publication, showing, very clearly, its deserved and growing estimation. The following list of the principal editions, abridgments, &c. will, no doubt, be acceptable to the student.

☞ OF THE PRINCIPAL EDITIONS OF BLACKSTONE'S COMMENTARIES, ITS ABRIDGMENTS, ANALYSES, AND OTHER FORMS IN WHICH THE WORK HAS APPEARED.*

1. In November, 1765, the author published the first volume of his 'Commentaries,' and in the course of the four succeeding years the other three volumes appeared.

2. The subsequent eight editions received some corrections from the author, the result of new statutes and judicial decisions; and also, in consequence of severe strictures on some political and ecclesiastical doctrines, made by various critics, among whom are the author of Junius; Dr. Priestley, Dr. Furneaux, Mr. Bentham and others, the author saw fit to modify, in a few instances, the objectionable passages of the text.

3. In 1782, DR. RICHARD BURN published the ninth edition, in four volumes octavo, from the author's manuscript, prepared

* Vide Note, ☞ ante page 136.

for the press a short time prior to his death. In this we find many valuable additions, and authorities, and some corrections of the text.

4. Since Dr. Blackstone's death the work has assumed a great variety of forms; in some of which the annotations are so crowded on one another as to destroy its elementary character, and render it scarcely *readable*. The tenth and eleventh editions published in 1787 and 1791, by John Williams, Esq. added but little to the work. He is nevertheless entitled to be considered the first editor of this great work. The twelfth edition, with portraits of the judges, appeared in 1793; and the thirteenth in 1800. To these editions no new matter was added.

5. In 1803, EDWARD CHRISTIAN, Esq. edited, with great ability, the fourteenth edition; and again in 1809, the fifteenth edition, with further new matter.

6. In 1811, JOHN FREDERICK ARCHBOLD, greatly improved the work. He retained the able notes of Professor Christian, and added much valuable matter of his own. He also gave analyses, and an epitome of the whole work, and greatly improved the index.

7. In 1826, an extremely valuable edition was published by JOSEPH CHITTY, Esq. with such notes as are adapted to 'render the Commentaries a work of *practical* utility and convenient reference to the profession, in their daily avocations.'

8. COLERIDGE and CHRISTIAN'S edition.

9. JONES' edition. 2 vols. New York, 1827.

10. PROFESSOR TUCKER'S edition, with notes and references to the Constitution and laws of the United States, and of the state of Virginia. Philadelphia, 1803, 5 vols.

11. REED'S Pennsylvania Blackstone, being a modification of the Commentaries of sir William Blackstone, with nume-

rous alterations and additions, illustrative of the laws of Pennsylvania, 3 vols. Carlisle, 1831.

12. In 1796 an Abridgment was made, with corrective and explanatory notes by WILLIAM CURRY, Esq. in one volume, octavo. And in 1809 a new and improved edition of this abridgment was also given by him.

13. Another Abridgment, in one volume, was published in 1819 by Mr. ADAMS. This, as well as Mr. Curry's abridgment, is ably executed, and will be found extremely useful for revision. The former, however, is something more than an abridgment, as it assumes, in many respects, the character of a distinct performance, accompanied by notes and numerous references.

14. FIELD'S ANALYSIS of the Commentaries, in a series of questions, to which the student is to frame his own answers. London, 1811, 1817, &c. The questions are judiciously propounded, and afford a useful test of the student's knowledge of Blackstone.

15. ANTHON'S ANALYTICAL ABRIDGMENT of the Commentaries, with a synopsis of each volume. New York, 1809. This little volume cannot fail to be a great favourite with elementary students.

16. JONES' TRANSLATION of all the Greek, Latin, Italian and French quotations which occur in Blackstone's Commentaries, and in the notes of the editions by Christian, Archbold, and Williams. London, 1823.

17. SEDGWICK'S Critical and Miscellaneous Remarks on Blackstone's Commentaries, 1 vol. 4to. London, 1800, 1808.

18. ROWE'S Vindication of the Commentaries of sir William Blackstone, against the strictures of Mr. Sedgwick, 1 vol. 8vo. 1806.

(Note 16.) WOODDESON'S LECTURES.—The transition from the Commentaries of Mr. Justice Blackstone, to the '*Systematical View of the Laws of England*,' by professor Wooddeson, will be found natural and very agreeable. Some of the topics scarcely mentioned, and others more fully treated of by Justice Blackstone, have in this work been considered somewhat in detail, so that the student, having attained in the former the elements, welcomes a more particular (though still elementary) view of the subjects in the latter. It has been frequently said, erroneously we suppose, that Dr. Wooddeson was the successor of sir William Blackstone, and the second Vinerian professor. We believe sir Robert Chambers was the immediate successor. In 1824, a small volume, containing the substance of his short course of lectures, was published by his relative, in the preface to which, sir Robert is stated to have been the second Vinerian professor. Dr. Wooddeson commenced his lectures in Michaelmas term, 1777, and they were published in the year 1792, in three octavo volumes. There have been several other editions, one of which is in four volumes. The last edition, with valuable notes, appeared in 1834 by R. W. Williams, in 3 vols. 8vo.

We notice as particularly excellent in these volumes, part 2d, division 1st, and part 3d, division 2d.

(Note 17.) REEVE'S HISTORY OF THE ENGLISH LAW.—On the first appearance of this great work, in 1784, it embraced the history of English law, from the time of the Saxons to the reign of Henry VII. in two volumes. In 1787 a new edition in four volumes was published, which brought the history down to the reign of Philip and Mary inclusive, and is the work to be found in most of our law libraries. In the year 1829, the profession were much gratified to find a fifth volume

published by this aged and truly estimable author. It embraces the reign of Elizabeth; and is executed with equal skill and learning with the previous volumes.

Until the appearance of this work, a general history of English jurisprudence was no where to be found, and was certainly a great *desideratum*. The connection between the law and the history of the times in which it originated, advanced, and matured, is very intimate; and, as has elsewhere been observed, must receive an attention commensurate with its great utility. But the history of the science of law itself, its origin, alterations, modifications and maturity, demands a closer inspection, and cannot fail to be regarded as a subject of singular interest to every legal inquirer. A lawyer surely will not content himself with a knowledge of the existing laws, without respect to their origin and primary spirit, but will acquaint himself with the reasons which occasioned their enactment, the causes of their various changes, and the circumstances which would justify their abolition. He should know what the law has been; why it no longer exists the same; and the cause of the alteration in any of its provisions; for the parts which have been pruned and cast off, still affect the nature and configuration of those which remain: in fine, the law more than any other science, should be known in all the various stages of its progression: its history discloses its philosophy, and as legal writers are too often content with declaring the mere operative law, a juridical history, gradually and chronologically developing the science from its infancy, through all its struggles to manly and vigorous maturity; designating with certainty and precision the various mutations it has undergone, and the causes which induced them; cannot but be a work of great interest and manifest utility. In this point of light we regard Mr. Reeve's history. The object

of this very laborious and judicious author, is the investigation of English jurisprudence, not English antiquities: with this view, every work of established authority of early times has been critically examined; and, as he himself informs us, the whole of Glanville, and the most valuable and interesting parts of Bracton, have been incorporated in this work. How much the history of English jurisprudence has been neglected, is manifest, not only from the circumstance that there are no general histories of the law, with the exception of the work under consideration, and that of Mr. Crabb, presently to be mentioned,—but the regular treatises on distinct portions of our science, very rarely enter into historical researches. How much the civilians, in this respect, have the advantage of us, will be remarked on hereafter.*

The style of this production is as easy, and the manner of treating the subject as interesting, as the topics would admit; but notwithstanding their interest and importance, it must be admitted to be a work which should be rather frequently than continuedly in the hands of the student. Like some other works of great value, it fatigues more from the multiplicity of its topics, than from the dullness either of its matter or manner. The most judicious method, therefore, of reading this work, is to take it up at intervals, and to impress faithfully on the mind the law as it existed at a particular period, before proceeding with it in all its variety of changes. A contrary procedure might engender confusion in a work embracing the revolutions and modifications of the law of England through many centuries. The advantage of this method of reading Mr. Reeves's history is strongly impressed on our mind, from a lively recollection of the pleasure and benefit we received from devoting to it an hour or two a day; from which we have

* Vide Note 7, on Title X.

always thought we gained more useful knowledge of English law than from any other work placed in our hands during our legal novitiate. The propriety of the place assigned it in this Course, viz: between the works of Blackstone, Wooddeson, &c. and the great Commentary upon Littleton, is strengthened by the views of its author. 'In pursuing the changes,' says Mr. Reeves, 'in our laws thus far, it is hoped that if nothing is added to the stock of professional information, something is done towards giving it such illustration and novelty, as may assist the early inquiries of the student. The investigation here made into the origin of English tenures, the law of real property, the nature of writs, and the ancient and more simple practice of real actions, may, perhaps, facilitate the student's passage from Blackstone's Commentaries to Coke upon Littleton; and better qualify him to consider the many points of ancient law which are discussed in that learned work.'

In the same year, 1829, that Mr. Reeves published his fifth volume, a new work, in one volume, appeared from the pen of George Crabb, Esq. entitled, '*A History of the English Law; or an attempt to trace the rise, progress, and successive changes of the Common Law, from the earliest period to the present time.*' And in 1831, an American edition of this work was published, to which have been added numerous definitions, translations of law terms and phrases, additional references, dates of successive changes, and a table of the abbreviations in general use, in references to English law books.

In looking carefully over this volume of five hundred and eighty-two pages, we much regretted that five hundred and ten of them are taken up in retracing the ground so ably occupied by Mr. Reeves; and that the remaining seventy-two pages have been allotted by Mr. Crabb to the history of English law, from the accession of the first Charles, to the end of the reign

of the fourth George! The author remarks in his preface that 'Mr. Reeves' History of the English Law came so near in design and title to this work, that, when the writer *first obtained a view of it, which was not until he made some advances in his own*, he conceived that nothing remained for him to do but to abridge that work, and carry it on to the present period.' He then proceeds to state that his idea of abridging Mr. Reeves' work was afterwards wholly abandoned, and that he has quoted that gentleman's work as he has other authors; and states, with some care, that his history is in many essential respects different, and contains many anecdotes and facts, illustrative of the history of English law, which are not to be found in the pages of Mr. Reeves.

It strikes us, however, as a somewhat unfortunate admission in a preface, and one which is not a little startling, that a historian of the English law should have made considerable progress in his work, in total ignorance of the only thorough, able, and voluminous work ever published on that subject: a work, too, which, for nearly half a century, might have been found in almost every library in the kingdom! Had the learned author been content to give a brief outline of the history of English jurisprudence, from the time of the Saxons to the end of the reign of Elizabeth, (where Mr. Reeves' work terminates,) and had then devoted himself to a thorough history of our law through its remaining, most interesting and important period, he would have rendered to the profession a very essential service. As it is, we are a little inclined to believe the work may prove rather prejudicial, than otherwise; as students are too often inclined to encourage the belief that a smaller work will answer every purpose; whereas, Mr. Reeves' history is a full, learned, and satisfactory detail; whilst that of Mr. Crabb is a meagre chronicle, in which few things

are fully explained, and nothing is so stated as to leave a very durable impression on the mind. The last seventy pages, however, should be carefully read.

(*Note 18.*) KENT'S COMMENTARIES ON AMERICAN LAW.*—The 'Commentaries on American Law,' in four volumes, by our distinguished countryman, James Kent, for many years chief justice of the supreme court of judicature, of New York, and subsequently chancellor of that state, have already gained the high reputation of a standard work, and justly rank next in value and estimation to those of the great commentator on the laws of England.

Much might be said of the deep research, the classical embellishments, the apt illustrations, and the clear and manly style, which characterize every portion of this able work; but this would be superfluous, as the well merited fame of this great American juriconsult, is too well known to need any remarks of this kind. Our duty to the student, in such a case, is rather to note defects, if there be any, than to collect beauties; the latter abound,—the former are to be sought after. In compliance with this view, we shall briefly notice such as have occurred to us.

1. The general arrangement, or method of the work, as we think, is not as correct as it might have been. With a few exceptions, the contents of the first volume would have been more suitably found in a fourth; and those of the fourth would have been better as the second volume; whilst most of the topics embraced by his second and third volumes should have found their appropriate places elsewhere.

2. The learning is sometimes too particular and minute, for an elementary work, as it occasionally loses sight of its insti-

* Vide also note 2, on Title IV.

tutionary character; and topics are, at times, too abruptly discussed, the student not having presented to him the requisite definitions, and elementary knowledge essential to the due comprehension of the argument.

3. The laws of the state of New York are rather too much dwelt on, for a treatise on American jurisprudence; and the references to legal doctrines, homogeneous throughout the union, are not always clear and satisfactory.

4. Many important titles of the law are wholly omitted; and but little is said of the extensive doctrine of equity, on which the learned commentator is so peculiarly qualified to treat. The philosophy and general principles of penal law, as they have been softened down by the pervading humanity of our legislation, might have been embraced in his scheme: and as a system of American law it is defective in some other material branches, which are peculiarly national; the practical proceedings of courts are, perhaps, justly omitted, but the outlines of pleading, evidence, actions, &c. we should have been much gratified to see explained by so able a pen.

5. In the fourth volume, on the doctrines of the realty, we have much to admire; but we perceive that the learned author's pen has been too frequently restrained by the consideration that very many of the common law principles of this abstruse branch of our jurisprudence, have been abolished in the state of New York, by the recent code of that state. This American students generally will have just cause to regret.

Such is our sincere admiration of the labours of this estimable and philosophical jurist, that it sometimes appeared to us rash and ungrateful to find the least fault, amidst so many excellencies. But as the foregoing, (if they be defects,) are trivial, and easily remedied; we doubt not they will be amply corrected in a new edition: and if not, they can never diminish

the class of his readers, and admirers. The feelings with which we express our opinions on all occasions, are those of gratitude to all who have enlarged the boundaries of our science, and contributed to its philosophical illustration; and none deserves the meed of high praise more justly than chancellor Kent, in this work, as also in his decisions, which must for ever remain a monument of judicial wisdom, learning, and eloquence, without superiour in those of any country, or any age; moreover, the maxim which has guided us in this volume is *Amicus Plato, Amicus Socrates, sed magis amica veritas.*

(*Note 19.*) **RAWLE ON THE CONSTITUTION OF THE UNITED STATES.**—An elementary acquaintance with the American Constitution cannot, with propriety, be postponed, until the student arrives at the studies designated under the Eleventh Title of this Course. We have, therefore, recommended this volume to be carefully read at this time; as it is quite sufficient to impart the required knowledge, and will also facilitate him in the various studies into which he is to enter, after completing the elementary course we have pointed out, under this and the preceding title.

This work first appeared in 1825, but has been recently considerably improved in a new edition, published in 1830.

(*Note 20.*) **ON THE INSTITUTES OF THE ROMAN OR CIVIL LAW.**—The student will find from the Tenth Title, and other parts of our course of study, that considerable attention to the Roman or Civil Law is strongly inculcated. We refer him to the Notes on that Title for our views, more at large, as to the imperative necessity of cultivating to some extent, an acquaintance with that vast collection of **WRITTEN REASON** which for so many centuries has influenced, in no small

degree, the political and private law of nearly all the European states; and which has infused into the municipal laws of England, and of our own country, a considerable portion of its spirit and its principles. How much our jurisprudence is indebted to that code, and how intimately it is connected with it, especially in some of its departments, cannot now be particularly dwelt on. To study, so much of the *elements* of that rich system of universal justice, as we at present recommend, *must* be proper; and we trust the student will repose with entire confidence, on this opinion, and study with care the two works now recommended. Should this be done we venture to predict that, long before he arrives at the period in which the more enlarged studies of the civil law are urged upon him, he will clearly perceive their great value, and be no way disposed to withdraw from them. All that we now, and even in the Syllabus of the tenth Title, have pointed out to him, amounts to little more than the outlines of the Justinian law. To those who are disposed to deeper researches, we have endeavoured to indicate, in the Notes, more copious sources; but the works contained in the Syllabus of that Title, are no more than what should be thoroughly studied by every lawyer who aims at distinction, and desires to keep pace with the present enlarged and growing views on the subject of legal science.

Dr. Hallifax, in his Analysis of the Civil Law, remarks, 'Nor have I the smallest scruple to assert, that the student who confines himself to the institutions of his own country, without joining to them any acquaintance with those of Imperial Rome, will never arrive at any considerable skill in the grounds and theory of his profession: though he may attain to a certain mechanical readiness in the forms and practical parts of the law, he will not be able to comprehend

that enlarged and general idea of it, by which it is connected with the great system of universal jurisprudence; by the knowledge of which alone he will be qualified to become a master in this art, and be capable of applying it as an honourable means of subsistence for himself, and of credit to his country.'

The student ought never to forget, that if he establishes during his novitiate, a broad and deep foundation, all his future studies when at the bar, will prove comparatively easy. He who would be a thorough lawyer, must be a thorough student, through life. And this need create no despondency, as it is a benignant law of our nature, that the appetite for knowledge, and the capacity to acquire it, increase with our years, if we are in the enjoyment of health, and have toiled, when young, in the acquisition of all requisite preliminary learning.

In regard to the Civil Law, and those analogous studies which come under the head of what has been aptly called, comparative and universal jurisprudence, we take occasion briefly to remark, how greatly it is to be regretted, that the legal literature of England has, at no period, and on no subject, (with a very few exceptions,) taken an extended range beyond the distinct limits of her own municipal jurisprudence. Nearly every topic in the wide dominion of knowledge, has been marked in that distinguished country, by more research into the laboured results of other nations, than the science of law. The sources of legal knowledge to which their ablest judges, with occasional exceptions, have been accustomed to resort, are almost wholly of English origin. The authorities relied on in her courts of justice; those to which her legal writers appeal; and those to which her statesmen and legislators repair, have for centuries past been altogether too domestic, considering that the early foundations of her

jurisprudence were, undeniably, laid on the basis of Roman, Saxon, Feudal, and other laws. It is true, indeed, that Bracton, Britton, Fleta, Cowell, and many of the early legal writers, perceiving this fact, have made copious drafts on the fountains of Roman law: and the judges also, have, from time to time, incorporated into the English law various principles of the Roman code. Still, during a long period, and until very recently, the striking characteristic has been rather that of hostility, than of enlightened partiality for philosophical researches into the legal science of other nations.

Lord Coke, indeed, on several occasions seems to make a merit of this fact. In speaking of the opinions of the judges, in Calvin's great case, he observes, 'Also in their arguments of this cause concerning an alien, they told no strange histories, cited no foreign laws, produced no alien precedents, and that for two causes: the one, for that the laws of England are so copious in this point, as, God willing, by the report of this case shall appear; the other, lest their arguments concerning an alien born should become foreign, strange, and an alien to the state of the question, which being *questio juris* concerning freehold and inheritance in England, is only to be decided by the laws of this realm.*' To the same effect is his doctrine in the Second Institute, page 68. This is surely a very narrow view of the subject, as, though such cases need not be absolutely '*decided*' by an appeal to foreign laws, they surely may be illustrated, *arguendo*, by them.

It is pleasing to observe, however, a manifest change, in this respect, gradually taking place in England; and more so, that no such hostile feeling has been ever visible in this country. Bright examples of deep research into the legal science of the eternal city, and the jurisprudence of all

* 7 Coke, page 7.

nations, might easily be stated; but the examples of Story, Kent, Livermore, Duponceau, and several others of our countrymen might be mentioned to students, as conclusively authoritative on the subject of this note.

As there will be occasion to resume these topics, in future pages,* the student will be content to read with great attention, the two elementary works on Roman law, now recommended, without further argument as to their utility to an American lawyer.

(Note 21.) SCHOMBERG'S ELEMENTS OF THE ROMAN LAW.—This little volume, the production of Alexander C. Schomberg, M. A. Fellow of Magdalen College, Oxford, was published in 1785; and is divided into two parts. The first division contains an historical and chronological view of the Roman law; and the second is composed of a series of notes and illustrations, which add greatly to the value of the work.

(Note 22.) JUSTINIAN'S INSTITUTES.—The legislative labours of the emperor Justinian have gained him a crown of imperishable fame. The Code, the Digest, and the Novels, would have been incomplete as a body of law without the Institutes, in which are orderly displayed the elementary or general principles of the *Corpus Juris Civilis*. Introductory to every code, the maxims and general rules of the entire science should be treated of: such an institutionary work may then be considered as a general index, which unfolds the science or philosophy of the whole system, and as a comprehensive outline or contour of the body of the law. In this point of view is the student to read the Institutes, which, with one

* Vide Title X, and Notes thereon. Vide also the Author's Introductory Lecture on the study of Roman Law, pp. 41. Baltimore, 1832.

remarkable exception, is an excellent compendium of Roman jurisprudence. The exception we allude to is the doctrine of *Evidence*, which is altogether omitted in the Institutes. To supply this deficiency we strongly recommend Domat's Civil Law, vol. 1, book 3d, title vi. '*Of Proofs and Presumptions and of an Oath*;' and an occasional reference to the pages of Everhardus' '*De Testibus et Fide Instrumentorum*,' Machardus' '*De Probationibus*,' Menochius' '*De Præsumptionibus*,' and Farinacius' '*De Testibus*,' who are the most distinguished authors on the civil law of evidence.* The best editions of the Institutes are by Arnold Vinnius, professor of law at Leyden in 1650, in the original, with excellent Latin annotations; and the English translation by Harris, and the one by Dr. Cooper, published at Philadelphia, in 1812. The student will of course read Dr. Cooper's edition, as it is decidedly superiour to any other, though no very fair specimen of the doctor's learning or industry.

* We do not desire the student *even to refer* to these works, when now reading Justinian's Institutes. But when he comes to study the Roman law, under the Tenth Title of this Course, we shall expect him to consult them with care.

PARTICULAR SYLLABUS.

TITLE III.

‘Emitit me mater Londinum, juris nostri capessendi gratiâ; cujus cùm vestibulum galatæsem, reperissemque linguam peregrinam, dialectum barbarum, methodum inoocinnam, molem non ingentem solum, sed perpetuis humeris sustinendam, excedit mihi fateor animus.’—*Spelman*.*

THE LAW OF REAL RIGHTS AND REAL REMEDIES.

(*Note 1.*)

I. THE LAW OF REAL RIGHTS. (*Note 2.*)

1st. Littleton’s Tenures. (*Note 3.*)

2d. Coke’s Commentary upon Littleton.

[*Hargrave and Butler’s edition.*] (*Note 4.*)

3d. Cruise’s Digest of the Real Law.

[*The following Select Titles only.*] (*Note 5.*)

VOLUME I.

Of the Feudal Laws.

Of the Ancient Tenures.

Of the Modern English Tenures.

(*Note 6.*)

}
TENURES OF
PROPERTY.

* Vide Note 5, on this Title.

Estates in Fee Simple.

Estate Tail. [*Two chapters.*]

Estate Tail after Possibility of Issue extinct.

Estate for Life. [*Two chapters.*]

Estate for years. [*Two chapters.*] (*Note 7.*)

Estate at Will and at Sufferance. } Treated

Estate from year to year. (*Note 8.*) } under the

Estate by Curtesy. [*Two chapters.*]

(*Note 9.*)

Estate in Dower. [*Five chapters.*] (*Note 10.*)

e. **Estate in Jointure.** [*Three chapters.*] (*Note 11.*)

VOLUME II.

Estate on Condition. [*Two chapters.*]

e. **Estates by Statute Merchant, &c.**

Mortgage. [*Six chapters.*] (*Note 12.*)

Remainder. [*Eight chapters.*] (*Note 13.*)

Reversion. [*§1 In lieu of the title 'REMAINDER'*
in Cruise's Digest, the Student may read
the following works:

Fearne on Remainders and Executory
Devises. (*Note 14.*)

Cornish on Remainders. (*Note 15.*)

Joint Tenancy. [*Two chapters.*]

Coparcenary.

Tenancy in Common.

} THE NUMBER
AND RELATION
OF OWNERS.

TIME OF ENJOYMENT OF THE ESTATE OR INTEREST WHICH MAY BE HAD IN REAL PROPERTY.
THE ESTATES.

VOLUME III.

Land, Tenement and Hereditament.*

(*Note 16.*)

Incorporeal Hereditaments.

[*The following only:*]

e. Common.

Ways.

e. Offices.

e. Franchises.

Rents.

(*Note 17.*)

Descent. [*Five chapters.*] (*Note 18.*)

Purchase: [*and herein of title by*

e. Escheat.

e. Prescription.

VOLUME IV.

Deed. [*Twenty-eight chapters.*]

VOLUME V.

e. Private Act of Parliament.

e. King's Grant.

Devise. [*Twenty chapters.*] (*Note 19.*)

VOLUME I.

Use.

Trust.

(*Note 20.*)

THE OBJECTS OF REAL PROPERTY.

THE MODES OF ACQUIRING A TITLE TO REAL PROPERTY.

* There is no such Title in Cruise. The import of these three significant words will be found under the title 'Fee Simple.' They are now inserted merely to remind the student that the OBJECTS of all real property, whether corporeal, or incorporeal, are referred, (but, perhaps not with entire accuracy,) to one or the other of those three heads.

- e. 4th. Preston's Treatise on Estates. (*Note 21.*)
- E. e. 5th. Randell's Essay on the Law of Perpetuity. (*Note 22.*)
- E. e. 6th. Hawkeshead's Essay on the word Issue, &c. (*Note 23.*)
- II. THE LAW OF REAL REMEDIES. (*Note 24.*)
- 1st. Comyn's Analysis of Real Actions.*
- 2d. Blackstone's Commentaries, 3d vol. 10th and 11th chapters.
- e. 3d. Stearne's Summary of the Law of Real Actions. (*Note 25.*)
- E. 4th. Jackson on the Pleadings and Practice of Real Actions. (*Note 26.*)

LORD COKE'S REPORTS.

[*Select Cases therein on the Law of Real Rights and Real Remedies.*]

[~~3~~ In recommending to the industrious student the earnest perusal, in lord Coke's Reports, of certain cases on the law of real property, we desire to impress him with the strongest sentiments of respect and veneration for the writings of this distinguished luminary of the law.

The youth who would drink deeply in English jurisprudence, must resort to the fountains; for although the waters of many of the streams which flow from them may be sweeter and more limpid, they are by no means so strongly nutritive: they may allay the thirst of the moment, but leave no very durable or profitable effect.

* Vide 1 Comyn's Digest, page 140.

The writings of lord Coke are to be regarded as a rich and abundant source of legal wisdom, which though strongly tainted with the affectation and pedantry of the age in which he lived, and almost devoid of that lucid order and harmony of style which characterize the legal works of the present day, possess a charm of a more lasting and useful character; and which, perhaps, is somewhat heightened by the very quaintness that so strongly distinguishes them from the productions of more recent times.

It would be no less than ingratitude in the anxious inquirer after legal knowledge, to disregard the labours of this great and estimable *sage* of the law; since he appears to have been ever anxious to simplify, and so elucidate his subject, as to reduce it to the level of the student's comprehension. How much do we find in his learned 'Commentary on Littleton,' and his prefaces to 'The Reports,' expressly designed to encourage the desponding student, to relieve his doubts, banish his fears, foster his hopes, and encourage his aspirations! How animating the assurance, and with what paternal anxiety is it given, that '*although he may not, at any one time, reach the meaning of his author; yet at some other time, and in some other place, his doubts will be cleared.*' 'Our student,' says he on another occasion, 'must remember that the knowledge of the law is like a deep well, out of which each man draweth according to the strength of his understanding. He that reacheth deepest, seeth the amiable and admirable secrets of the law, wherein I assure you the sages of the law in former times have had the deepest reach. And as the bucket in the *depth* is easily drawn to the uppermost part of the water, (for *nullum elementum in suo proprio loco est grave,*) yet if taken from the water, it cannot be drawn up but with great difficulty; so, albeit, the beginning of this

study seems difficult, yet when the professor of the law can dive into the depth, it is delightful, easy, and without any heavy burthen, so long as he keeps himself in his own proper element.'

These Reports consist of *thirteen* parts, usually in *seven* volumes. The first part was published in 1600, when Coke was attorney-general. The next ten parts appeared at different periods during his life, and the eleventh in the year 1615, when he was chief justice of the king's bench, under James I. The remaining two parts are posthumous; and were probably suppressed by the arbitrary power of the monarch, with whom he had frequent disputes. These contain numerous cases of a political character, and are extremely valuable, particularly to the English constitutional lawyer. Lord Coke's Reports are the fourth in the series of English Reports, there being none prior to them, except the Year Books, sir James Dyer's, and Plowden's Reports, usually called his 'Commentaries.' The Year Books, in eleven parts, properly commence in the reign of Edward I. and terminate in the twenty-seventh year of Henry VIII. They were taken down by government reporters, who were allowed an annual stipend. During this long period, of two hundred and thirty years, the cases, however, were very far from being uniformly reported. Many years often elapsed without a single reported case. The reign of the second Richard, and several years of the fifth Henry, are without cases,—and during the long reign of Henry VIII. we find the cases only of the 12th, 13th, 14th, 18th, 19th, 26th, and 27th years, that is, the cases of seven out of the thirty-eight years of that monarch's reign. Many of the omitted cases, however, are to be found in several of the abridgments of the law, as also in Dyer, Jenkins, Keelway, and Benloe's Reports. Plowden

is esteemed among the most accurate of all reporters,—and Dyer is not without merit.

At the period when lord Coke commenced the publication of his Reports, there was much need of authenticated memorials of the law of judicial decisions. His political enemies subjected him and his works to a very rigid scrutiny; and had it not been for the surprising firmness, and acknowledged learning of this great lawyer, his Reports would have been much garbled; but his bold appeal to his opponents, and the judges of England, to examine his Reports, and to certify their merits as well as demerits, eventuated in a complete triumph over the king, and his private enemies; and the eleven parts of his Reports were henceforth permitted to remain in their original integrity. Even lord Bacon, whose enmity against Coke was so often manifested, eventually eulogized them in his Proposition for the Amendment of the Law. ‘To give every man his due,’ says Lord Bacon, ‘had it not been for lord Coke’s Reports, which, though they have many 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 like a ship without ballast.*’

The student should also bear in mind that Coke’s manner of reporting differs essentially from that adopted by others, especially in our own time. The task must have been a great one, as we perceive from the Reports themselves, and from the account he has given of his method of reporting, which we transcribe from his report of Calvin’s case, 8 Report 4. *a.* ‘And now that I have taken upon myself to make a report of their arguments, I ought to do the same as fully, truly, and sincerely as possibly I can; howbeit, seeing that almost every judge had, in the course of his argument, a particular method,

and I must only hold myself to one, I shall give no just offence to any, if I challenge that which of right is due to every reporter, that is, to reduce the sum and effect of all to such a method as, upon consideration had of all the arguments, the reporter himself thinketh to be fittest and clearest for the right understanding of the true reasons and causes of the judgment and resolution of the case in question.'

We would also caution the student by no means to neglect the prefaces which accompany the several parts of these reports. They are designed for students, and are replete with interesting, curious and valuable information.

But notwithstanding we are thus grateful for the useful labours of this *Hercules* in the law, and thus friendly to his works, we would by no means carry our veneration so far as to sacrifice our Blackstone, Fearne, Hargrave, Butler, Powell, Cruise, Jones, &c. to 'The Reports,' or the pages of the 'Institutes.' We must not so prefer the undigested mass of learning of my lord Coke, as to neglect 'The Essay on Contingent Remainders and Executory Devises;' the valuable notes of the editors of the 'Commentary on Littleton,' or the learned and lucid 'Essay on the Law of Bailments,' whose illustrious author, as Gibbon remarks, 'was, perhaps, the only lawyer equally conversant with the Year Books of Westminster, the Commentaries of Ulpian, the Attick Pleadings of Isæus, and the Sentences of the Arabian and Persian Cadis.' Nor should we be faithful to the object of our undertaking, were we to recommend the entire perusal of my lord Coke's Reports, or other writings; for although our admiration be strong, yet an attentive examination of the whole has convinced us, that there are very many cases which would be of little or no utility to an American lawyer; and others, for various reasons, scarce worth the labour and time of perusal. It is our object, therefore, care-

fully to select for the student such as are most worthy his attentive study; and in order to render this selection as valuable as possible, we have, with no little care and labour, given a very concise abridgment of most of the cases recommended, and subjoined references to such leading and distinguished cases, and sources of information on the points contained in my lord Coke, as might present in one connected view, the entire learning of all that is particularly valuable in the law transmitted to us by this celebrated reporter.

The select cases recommended in this and Title IV. are scarce *one sixth* of the whole number contained in 'The Reports.' Our anxiety that the student should profit by our careful and laborious selection, induces us to state our confidence that it will be found judicious, and prove highly valuable to him. Let not the student, however, suppose that all the omitted cases are useless; this is far from being the case; our selection embraces only those of singular excellence.]

RULES TO BE OBSERVED IN READING LORD COKE'S REPORTS.

1st. Where the cases are preceded by the pleadings, read the pleadings with great attention; examine the points raised by them, and set these carefully down: the case should then be read, and the questions of law thus collected, should be compared with those litigated before the court.

2d. As lord Coke is generally desultory and diffuse, frequently blending points of law, neither raised by the pleadings nor agitated before the court, but suggested solely by his lordship, the student should attentively discriminate between the questions actually at issue, and the *obiter dicta*, the opinions of counsel *arguendo*, and those of the reporter; so that, in citing from these reports a point of law, as there

judicially established, it may not prove to have been merely an *obiter dictum*, the opinion of the litigants, or the idea of the reporter.

3d. Where the cases are followed by *nota*, give such *nota* a cursory reading, in order to judge of the necessity of a more attentive perusal. If important, (as many of them are,) read them again with attention.

4th. The leading cases in lord Coke's Reports being often referred to, and cited with distinguished respect, and being reported very much in detail, and with but little attention to method; so that the points adjudicated are not easily ascertained, but in order to arrive at them, require frequently an attentive perusal of the whole case; the student would be profitably employed in concisely abridging some of these difficult and involved cases; so that upon subsequent reference to such summaries, he may be at once informed of the points resolved in them, without the labour of a particular examination of the case at large.

*A List of the most important cases, on the Law of Real Property, in LORD COKE'S REPORTS; with concise abstracts of each case; and illustrative authorities, English and American; with occasional notes on controverted points.**

FIRST COKE. (Note 27.)

ARCHER'S CASE. 66. b.

It was in this case *resolved*, (Note 28,) that a devise to A. *for life*, remainder to his *next heir male*, and the heirs male of the body of such next heir male, is but an estate for life in

* For a similar enumeration of the most important cases in lord Coke's Reports, which relate to the law of Personal Rights and Personal Remedies, vide Title IV.

A, and that the contingent remainder to the heir male was destroyed by the feoffment of A.*

References } *Read* Burley's case, 1 Ventries, 230. Co. Litt.
to English } 8. b. Note 4. 2 Wm. Black. Rep. 1010. Poole v.
Authorities. } Poole. 3 Bos. & Pull. 620. Ambler's Rep. 459.

Preston on Estates, vol. 2, p. 8. 2 Wood. Lec. 276. [The foregoing authorities relate to the operation of the word 'heir,' in the singular number; the doctrine that it may be *nomen collectivum* in a deed, as well as in a will.] Purferoy v. Rogers, 2 Wms. Saund. Rep. 380, and Notes (1) (2.) 2 Cruise's Dig; and Cornish on Remainders, chap. iii. sec. v. 'Remainder,' chap. vi. These relate to the destruction of contingent remainders.

References } (Note 29.) *Read* 3 Binney's Rep. 374; 1 Pen-
to American } nington's New Jer. Rep. 291, and Kent's Comm.
Authorities. } 4 vol. p. 5, note *b*, as to the operation of the word
'heir,' in a will; and that it is *nomen collectivum*, and passes
the fee in a *deed* as well as in a will. [If the question
whether the word 'heir,' is *nomen collectivum* in a *deed*, as it
unquestionably is in a *will*, be regarded as a strictly technical
point, resting on authority, we conceive that it passes only a
life estate, and that we are justified in preferring the opinion of
lord Coke, and of Mr. Preston, (sustained as it is by the
principles and analogies of the law, applicable to the case,) to
the contrary opinion of Mr. Hargrave, Dr. Wooddeson, and
chancellor Kent. We have carefully examined every case
cited by Mr. Hargrave in opposition to lord Coke's doctrine,
as also the American cases, and find them, without exception,

* The little summary, which we now give of the cases here recommended, ought by no means to excuse the student from the undertaking just mentioned, viz, of abridging with care, some of the difficult and more involved cases.

cases arising on *devises*. The elementary books and digests, which adopt this latter doctrine, uniformly cite Mr. Hargrave's Note 4, on Coke Littleton; so that it rests on the high authority of his name. But as he and they have cited no case which occurred in a *deed*, (except 39 Ass. pl. 20, also cited by lord Coke, 1 Inst. 22. a, which rests on peculiar grounds,) we are compelled to regard the rule of lord Coke as still existing law.]

SHELLEY'S CASE. 93. b.

The great point decided in this case was, that if an estate of freehold be conveyed to A. and by the same gift or conveyance an estate be limited, either *mediately* or immediately, to his *heirs* in fee or in tail, in such case the inheritance and freehold coalesce in A. and the remainder is not contingent or in abeyance.

This important doctrine is denominated '*The Rule in Shelley's case*,' not that it was first resolved in that case, for we find it expressly recognized as early as the reign of Edw. II. in Abel's case, Year Book, 18 Edw. II. p. 577, and subsequently in the Provost of Beverly's case, 40 Edw. III. 9. but it is so called, because in Shelley's case it was more clearly defined, and finally established; and the report of this case is universally known as the depository of the principle or rule.

References } *General References.*—As to the origin, progress,
to English } and application of this rule, read Co. Litt. 376. b.
Authorities. } Note 1. Preston on Estates, vol. 1, chap. iii. page
263. Mr. Jus. Blackstone's Argument in the case of Perrin,
v. Blake, Hargrave's Law Tracts, 487. Hawkeshead's Essay,
chap. iv. page 330 to 410; and Hargrave's masterly '*View of
the Rule in Shelley's case*,' Hargrave's Law Tracts, 551.
[This essay should be familiar to every student, as Mr.

Hargrave has furnished, as we conceive, the true meaning of the rule, and the principle of its application; and has shed an interest and air of novelty on it, which we do not meet with in any previous view taken of this intricate doctrine.]

Particular References.—Bagshaw *v.* Spencer, 1 *Collectanea Juridica*, 378. Wright *v.* Pearson, *Ambler*, 358. Austin *v.* Taylor, *Ambler*, 376. Jones *v.* Morgan, 1 *Brown's C. R.* 206. Hodgson *v.* Ambrose, *Doug.* 337. Doe *v.* Fenneroe, *Doug.* 487. Pybus *v.* Mitford, 1 *Ventris*, 372. Luddington *v.* Kime, 1 *Ld. Ray.* 203. Coulson *v.* Coulson, 2 *Atk.* 246. Doe *v.* Colyear, 11 *East's Rep.* 548. Doe *v.* Harvey, 4 *Barnw. and Cress. Rep.* 610.

<p>References to American Authorities.</p>	}	<p>We find this important rule has excited considerable attention in the courts of this country, and that it has been argued with no less ability and learning than in the courts of Westminster. The student will find the following leading cases to be distinguished by great research.</p>
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Smith and Wife *v.* Chapman, 1 *Hen. and Munf.* 240. [This is the most valuable case to be found on this subject in the *American Reports.*] Brandt *v.* Gelston, (an able case,) 2 *John. Rep.* 384. M'Ginnis and Wife *v.* M'Peake, *Penn. Rep.* 291. Bishop *v.* Selleck, 1 *Day's Rep.* 299. Dott *v.* Cunningham, and Dott *v.* Wilson, 1 *Bay's Rep.* 453. 457. Shermer *v.* Shermer's Exs. 1 *Wash. Rep.* 267. Roy *v.* Garnett, 2 *Wash. Rep.* 9, (a good case.) Carr *v.* Porter, 1 *M'Cord's Ch. Rep.* 60. Horne *v.* Lyeth, 4 *Harr. and Johns. Rep.* 431. Lyles *v.* Digge, 6 *Harr. and Johns. Rep.* 364. [In these two last mentioned cases, the rule has been argued and decided with pre-eminent research.] ¶ In the state of New York, this ancient rule has lately been wholly abolished. Vide 1 *New York Revised Statutes*, vol. 1, 725, sec. 28. The learned commentator on

American law, after a brief, and very lucid examination of the rule, remarks, 'The juridical scholar, on whom his great master, Coke, has bestowed some portion of the 'gladsome light of jurisprudence,' will scarcely be able to withhold an involuntary sigh, as he casts a retrospective glance over the piles of learning, devoted to destruction by an edict, as sweeping and unrelenting as the torch of Omar. He must bid adieu for ever to the renowned discussions in *Shelley's case*, which were so vehement, and so protracted as to arouse the sceptre of the haughty Elizabeth. He may equally take leave of the multiplied specimens of profound logic, skilful criticism, and refined distinctions, which pervade the varied cases in law and equity, from those of *Shelley* and *Archer*, down to the direct collision between the courts of law and equity, in the time of lord Hardwicke. He will have no more concern with the powerful and animated discussions in *Perrin v. Blake*, which awakened all that was noble and illustrious in talent and endowment, through every precinct of Westminster Hall. He will have occasion no longer, in pursuit of the learning of that case, to tread the clear and bright paths, illuminated by sir *William Blackstone's* illustrations, or to study and admire the spirited and ingenious dissertation of Hargrave, the comprehensive and profound disquisition of *Fearne*, the acute and analytical essay of *Preston*, the neat and orderly abridgment of *Cruise*, and the severe and piercing criticism of *Reeve*. What I have, therefore, written on this subject, may be considered, *so far as my native state is concerned*, as a humble monument to the memory of departed learning.*

The foregoing eloquent note we could not resist inserting, but desire to caution students of other states, against per-

* 4 Kent's Commentaries, 226, Note a.

mitting it, in any degree, to lessen *their* ardour of research into the learning of this pervading rule of landed property. We cannot, however, but entertain some doubt whether even this express abolition of the rule in the state of New York, will be found to operate, (at least for a considerable time,) to the full extent predicted, in the above beautiful funeral eulogium of the learned jurist; which cannot fail, we presume, to be read with interest by those who rejoice, as well as by those who may weep over the effects of the late edict.

References on the other resolutions in Shelley's case.—On the first resolution, vide 5 Cru. Dig. p. 352, from sec. 5 to 14, both inclusive, as to the *relation* of the judgment; and as to the suing of execution against the issue in tail, where tenant in tail had died before execution awarded; vide Co. Litt. 361. b.—and 5 Cru. Dig. 428, sec. 13, 14.

E. e. CHUDLEIGH'S CASE. 120. a.

This case is important, as it argues and maintains the much controverted doctrine of *scintilla juris*, and of the destruction of contingent uses, by divesting this *possibility of a seisin*.

References.—Butler's note, (1,) Co. Litt. 273. a. Butler's Fearn, 291, note (y,) in which the student will find a satisfactory abridgment of Chudleigh's case: also in the same work, Appendix, No. 2, lord chief baron Gilbert's remarks on the doctrine of *scintilla juris*, or Mr. Sugden's edition of Gilbert on Uses and Trusts, 296, Note (10.) [Mr. Cornish, in his Essay on remainders, 29, 120, 204, strongly urges his views in favour of the doctrine of *scintilla juris*.]

E. e. THE RECTOR OF CHEDINGTON'S CASE. 153. a.

In this case it was held that a lease to A. for eighty years, if she so long live, and if she die, or alien within the said term, then to B. for as many years as should remain after A's death,

for and during the residue of said *term* of eighty years, was void as to B, on the principle that there could be no remainder of a term after a previous estate *for life*; also that it was a mere *possibility*; and that it was void for uncertainty of commencement.

References.—That a remainder of a *term* after a limitation for life is now held good, vide Manning's case, 8 Co. 95, and references: and that '*term*' not only signifies *interest* but *time*, and that such a remainder is valid, v. Plowden v. Cartwright, 1 Burr. 282. 2 Black. Comm. 144.

E. MILDMAY'S CASE. 175. a.

Of the consideration requisite to raise an use in a covenant to stand seized, or a deed of bargain and sale.

References.—Vide the doctrine of Mildmay's case fully considered in 2 Fonbl. on Equi. 25, sec. 2. Rob. on Sta. Frauds, 119, note. 4 Cru. Dig. tit. xxxii. ch. xvii. sec. 60, 61, 62. 2 Black. Comm. 296. Ward v. Lambert, Cro. Eliz. 394. Anonymous, 2 Vent. 35. Fisher v. Smith, Moor, 569. Bolton v. Bish. of Carlisle, 2 Hen. Black. 259. Hudson v. Chapman, 3 John. Rep. 484. Ware v. Carey, 2 Call. Rep. 263.

SECOND COKE.

e. MANSER'S CASE. 1. a.

A deed should be read to an *unlettered* man, if he require it, before he be compelled to sign it, and if in a language unknown to him, it must be translated to him: but if one be bound that another shall execute a deed, the person so bound must see, at his peril, that the deed be executed by this third person. The pleading in this case, was held bad for uncertainty.

References.—On the 1st *resolution* vide references to Thoroughood's case, 2 Coke 15. a. On the 2d *resolution* v. 1 Ba. Abr. 667. Co. Litt. 208. On the insufficiency of the plead-

ing, v. 2 Ba. Abr. 89. 5 Ba. Abr. 411. 2 Wms. Saund. 49. No. 1.

GODDARD'S CASE. 4. a.

That a deed takes effect only from delivery; so that if it want date, or have a false or impossible one, it is good; and the delivery ascertains the time from which it takes effect: only three essentials to a deed; viz: *writing, sealing and delivery.*

References.—As to *date* of a deed, v. Jacob's Law Dic. title 'Date.' As to *delivery*, v. Goodright v. Strahan, Cowper, 204. Hall v. Cazenove, 4 East 477. As to pleading that a deed was in fact made on a day different from its date, and that plaintiff is not estopped to plead thus, v. 4 East 477. As to *sealing*, v. the very able opinion of judge Haywood in Ingram v. Hall. Haywood's Rep. 193. That a *scrawl* of a pen is a seal in Virginia, v. Jones v. Logwood, Wash. Rep. 42: not so in New York. Warren v. Lynch, 5 John Rep. 239. But a deed made in Pennsylvania, and sealed with such a scrawl, which in that state is sufficient, may be sued upon as a sealed instrument in New York. Meredith v. Hinsdale, 3 Caine's Rep. 362.

THOROGOOD'S CASE. 15. a.

Fraud in the execution or obtaining of a deed vitiates it. Deed must be read to obligor, if required, and in the very words of the deed, and, if required, the very effect and purport must be declared.

References.—Fraud in the *consideration* of a deed cognizable only in chancery; *aliter* as to fraud in the *execution*. 3 Dun. and Ea. 428. Hayne v. Maltby. Bridgman v. Green, 2 Vez. 445, 627. Vid. the opinion of judge Rush on the 4th reason assigned for a new trial, in the case of Wright v. Tower,

Appendix to American edition of Douglas's Rep. 2d vol. Vrooman *v.* Phelps, 2 John. Rep. 177. But in Pennsylvania, fraud either in the *consideration* or *execution* of a deed, may be taken advantage of under the plea of payment, &c. 2 Binney's Rep. 154.

E. BUCKLER'S CASE. 55. a.

A. tenant for life, remainder to B. in fee. A. leases for four years to C. A. then granted *tenementa prædicta* to D. *habendum* from the next feast, for life: after the feast C. attorned, and his lease expired: D. then entered, and made a lease at will to E. to whom A. levied a fine *come ceo*, &c. B. the tenant in fee in remainder, entered and leased to the plaintiff, who brought ejectment against E. who had entered on the premises. Judgment for plaintiff and *resolved*,

1. That the grant to D. was void, as being an estate of *freehold* to commence *in futuro*.
2. That the grant being *ab initio* void, was not rendered good by the attornment.
3. That as D. entered under colour of a void grant, he was a disseisor.
4. That if the fine had been levied to D. himself, B. might have entered.
5. That the fine levied to E. is a forfeiture, and B. might enter.

References.—That a *freehold* cannot be granted *in futuro*, vide 3 Wilson's Bac. Abr. 148. Sasser *v.* Blyth, 1 Haywood's Rep. 259, (a very good case.) 1 Cru. Dig. tit. i. sec. 47, 48. 4 Cru. Dig. tit. xxxii. sec. 26, 27. Wallis *v.* Wallis, 4 Mass. Ter. Rep. 135. Frawbridge *v.* Dunbaugh, 1 John. Ca. 91.

THIRD, COKE.

BORASTON'S CASE. 19. a.

Devise to A. for eight years, remainder to testator's executors for the performance of his will, until such time as B. his son should accomplish his full age of twenty-one years; and *when* said B. shall attain to his full age, *then* to said B. in fee. B. died before twenty-one. Held that B. took a *vested* remainder; that the adverbs of time, *when* and *then*, only related to the vesting of the *possession*, and not the *interest*, and that the executors took an absolute estate until B. would have attained his full age.

References.—2 Cru. Dig. tit. xvi. ch. i. sec. 69, 70, 71, 72, *vid.* an able opinion by Fearne in his posthumous works, p. 191. *Wheedon v. Lea*, 3 Dun. and Ea. 41. *Hayward v. Whitby*, 1 Burr. 228. Cornish on Remainders, 101, 102, 103.

WALKER'S CASE. 22. a.

Debt lies against lessee, for rent accruing after assignment; *first*, because lessee cannot by his own act deprive lessor of that remedy which is given by the contract of lease; *secondly*, the lessee may assign the term to one unable to pay; and *thirdly*, there is a privity both of contract and estate, between lessor and lessee, notwithstanding the assignment.

References.—*Marsh v. Brace*, Cro. Jac. 334. *Marrow v. Turpin* Cro. Eliz. 715. *Taylor v. Shum*, 1 Bos. and Pull. 21, 1 Fonb. on Equi. 359, sec. vi. *Thursby v. Plant*, 1 Wms. Saund. 237, and notes 3, 4, 5. (A very valuable case.) *Devereux v. Barlow*, 2 Wms. Saund. 182. As to the difference between an *assignee* and an *under lessee*, *vide Holford v. Hatch*, Doug. 183, and the opinion of judge Tucker, 3 Hen. and Munf. 468. Note.

e. BUTLER AND BAKER'S CASE. 25. b.

This case is important, principally as it contains much valuable learning on the doctrine of *relation*. There is also much good matter *arguendo* on the construction of the statutes of devises: the whole is entitled to a studious reading.

References.—Read 18 Viner's Abridg. title '*Relation*,' 285 to 294. Jacob's Law Dic. title '*Relation*.' Thomson *v.* Leach, 2 Vent. 200. Jackson *ex dem.* Rensselaer *v.* Ball, 1 John. Ca. 81. Jackson *ex dem.* Griswold *v.* Bard, 4 John. 230.

As to the power of devising *vid.* Goodtitle *v.* Otway, 1 Bos. and Pull. 576. (A case of great learning.) Whether a *right of entry* be devisable, *vid.* an excellent case in 1 Taun. Rep. 577. Swift *ex dem.* Neal *v.* Roberts, 3 Burr, 1488. 8 East's Rep. 567.

FERMOR'S CASE. 77. a.

This is a very valuable case, illustrative of the odium attached by the law to every species of fraud. Its importance may be exemplified by comparing it in the *real* law, to what *Twyne's* celebrated case is in the *personal* law.

References.—Read 5 Cru. Dig. tit. xxxv. ch. xi. sec. 19, 20. Englefield *v.* Englefield, 1 Vern. 443. 'Fraud,' Jacob's Law Dic. Roberts on Frau. Convey, 596.

FOURTH COKE.

E. e. VERNON'S CASE. 1. a.

Of jointures within the statute 27 Hen. 8, ch. x. sec. 6, and of collateral satisfaction in bar of dower within this statute; since the statute of devises, 32 Hen. 8.

References.—1 Cru. Dig. tit. vii. ch. i. sec. 1, 2, 3, 4. 30, 31, 32. Ch. iii. the whole. Tit. vi. ch. v. sec. 22, to the end. Larabee *v.* Van Alstyne, 1 John. Rep. 307. Birmingham *v.*

Kirwan, 2 Scho. and Lef. 444. (A very good case.) The opinion of C. J. M'Keane in *Kennedy v. Nedrow*, 1 Dall. 415. *Webb v. Evans*, 1 Binney's Rep. 565, 4 Mass. Rep. 689.

E. e. FORSE AND HEMBLING'S CASE. 61. a.

Feme sole devises to B. in fee, whom she afterwards married. During her coverture she had often declared, that B. should not have the premises. Devisor died without issue. B. enfeoffed the defendant on whom C. entered, as heir to feme, who leased to the plaintiff.

Resolved, 1. That the making of a will is but an inception of it, and it is contrary to its nature to be irrevocable; and as feme during coverture cannot countermand it, being *sub potestate viri*, her marriage shall be a revocation in law.

2. That if it were otherwise, it would be very detrimental to women, since after marriage they cannot, for any cause, countermand their will.

3. That if the law permitted a woman to continue or revoke her will in such case, it would virtually be the will of her husband, since he might constrain her to continue or revoke at his pleasure. Judgment for the plaintiff.

References.—Read Roper on Revocation, p. 19, 20. *Doe v. Staple*, 2 Dun. and Ea. 684. *Brett v. Rigden*, Plow. 384, a. that will revives, if husband dies leaving the wife. *Sed vid.* *Mrs. Lucas' case*, 4 Burn's Eccl. Law, 48 contra. *Hodson v. Lloyd*, 2 Brown's Ch. Rep. 524. *Vid.* References to *Henstead's case*, 5 Co. 10. b.*—1 Bac. Abr. 484.

E. e. HERLACKENDEN'S CASE. 62. a.

This is a leading case on the law relative to waste, which though, in this country especially, and in no small degree in England, has been altered and ameliorated since lord Coke's time, is an important doctrine, and must not be neglected.

* *Vide Post*, p. 198.

References.—*Read* lord Bacon's excellent argument on the case of 'Impeachment of Waste,' Bacon's Law Tracts, 203. As to the operation of the clause 'Absque impetitione vasti,' that it does not merely exempt the tenant from a *suit*, but vests a *property* in him, *read* the seventh resolution in 11 Co. 83. 3. Woodd. Lectures, 401. 1 Du. and Ea. 56. 1 Cru. Dig. chap iii. sec. 61 to 71. As to the erections which an outgoing tenant may carry from the premises, *read* 2 Selwin's Nisi Prius, 1148, and note 5, 1150, and note 6; also 1 Wms. Saund. 323. b. No. 7, 2 vol. 259. No. 11, for a learned and perspicuous view of the law of waste. 6 John. Rep. 5. 2 Camp. Rep. 491.

e. NOKE'S CASE. 81. a.

A. leased a house to B, by the words *demise, grant, &c.* and *covenanted* that B. should enjoy it without eviction by lessor, or any claiming under him, and likewise that he would perform all agreements, articles, &c. in the indenture. B. assigned his term to C. from whom, in *ejectione firmæ*, the premises were recovered by D. In debt by B. against A. it was on demurrer resolved,

1. That the words *demise* and *grant* created a covenant in law which might be sued on by assignee.

2. That the obligation extended to covenants in law, as well as to covenants in deed.

3. That although the recovery was by verdict, plaintiff ought to have shewn that D. had an elder title, otherwise the covenant in law was not broken; and for this, judgment was given for defendant.

4. That the express covenant qualified the generality of the covenant in law, and so restrained it, by the mutual consent of the parties, that it should not extend further than the express covenant.

References.—That a *particular, express* covenant restrains a *general* covenant *in law*; vid. 1 Wms. Saund. 60. No. 2. Hale v. Deering, 11 Modern, 113. Hayes v. Bickerstaff, Vaughan 126. Co. Litt. 332 No. Kent v. Welch, 7 John. Rep. 258. Frost et al v. Raymon, 2 Caine's Rep. 188. That this doctrine of implied covenants is confined to *real* property, v. 3 Comyn's Digest, tit. Covenant, A. 4. 2 Selwin's Nisi Prius, 402. No. 12. 2 Bos. and Pull. 26.

E. e. DUMPOR'S CASE. 119. b.

A. leased to B. with a proviso that B. or his assigns should not alien the premises without special license. A. afterwards, by deed, licensed B. to alien or demise the whole or part to any person or persons. B. assigned the term to T. who devised it to his son, upon whose death it was assigned by the administrator to the defendant. A. entered for condition broken. *Resolved*, that the condition was *finally* determined by the license to B. for lessor cannot dispense with an alienation for a time, and afterwards make the same estate subject to the proviso; for the condition is entire.

References.—Read 2 Cru. Dig. tit. xiii. ch. i. sec. 32 to 48, Morgan v. Slaughter, 1 Day's Espinasse's Nisi Prius, Rep. 8. 2 Selwin's Nisi Prius, 408, sec. 5. Mitchinson v. Carter, 8 Dun. and East. 57. 1 Wms. Saund. Rep. 287. c. No. 16.

FIFTH COKE.

e. CLAYTON'S CASE. 1.

A lease was dated 26th May, for three years *from henceforth*, but not delivered till the 20th of June, at four o'clock in the afternoon, *Resolved*,

1. That *henceforth* shall be accounted from the *delivery*.

2. That the lease determined the 19th of June in the third year; for no fraction of a day is regarded in law.

3. That the day of delivery is *included*. But if a lease is to begin from the day of the making, or from the day of the date, the day is *excluded*. From the date, and from the day of the date, is all one.

[The decision in the third resolution has excited considerable legal controversy, some holding with lord Coke, that '*from the date,*' and '*from the day of the date,*' mean the same thing, while others contend that the former includes, the latter excludes the day: some hold that the authorities are contradictory and irreconcilable, and that these expressions may be construed either inclusive or exclusive, as is best adapted to effectuate the intention of the parties: and others have rejected the doctrine of inclusion and exclusion according to the supposed intention of the parties, and assert that the authorities are not at variance with each other.]

References.—Read *Pugh v. duke of Leeds*, Cowper's Rep. 714. [Lord Mansfield, in a very able opinion, decided in this case, that a power to lease in *possession* was well executed by a lease to commence *from the day of the date*, and that '*from*' may operate either inclusively or exclusively, according to the context and subject matter.] Powell on Powers, 433 to 541. [In this very learned and elaborate examination of this subject, Mr. Powell has with great industry and skill investigated and arranged all that has been advanced from the earliest times on this point, and, as we conceive, fully vindicated the authorities from the charge of contradiction; and has shewn that all these apparently variant cases are reconcilable, on a ground of distinction running through the whole current of authorities. This *very* admirable argument well merits an attentive reading. Should the student, however, decline reading it, he will

find a concise abridgment of it by Mr. Evans in his 'View of lord Mansfield's Decisions,' vol. i. 221 to 229.] The King *v.* the inhabitants of Gamlingay, 3 Du. and Ea. 513. Castle *v.* Burditt, p. 623. 3 East's Rep. 407, 10 East's R. 427. 2 Camp. Rep. 294.]

E. e. JEWEL'S CASE. 3. b.

Resolved, That a lease of a *fair*, being an *incorporeal* hereditament, is not a lease within the statute, 1 Eliz. ch. xix. and that such lease, though good by way of contract between lessor and lessee, is avoidable by the successor of the bishop who made the lease.

References.—*Read* the Dean and Chapter of Windsor *v.* Gover, 2 Wms. Saund. 302, and notes. Balley *v.* Wells, 3 Wilson's Rep. 32. Co. Litt. 44, b. note 3.

E. e. JUSTICE WINDHAM'S CASE. 8. a.

Where, by construction of law, *joint words* may be taken *respectively* and *severally*. This is a very celebrated case on that doctrine.

References.—*Read* Veal *v.* Roberts, Cro. Eliz. 199. Cook *v.* Gerrard, 1 Wms. Saund. 153, 154, 181. *Vid.* Slingby's case, 5 Co. 18, and references, where words *several* in their usual operation were disregarded, and the obligation containing them held to be *joint* in its effect, in respect to the *joint interest* to which it referred.

e. HENSTEAD'S CASE. 10. b.

If feme lessor or lessee at will take husband, the lease is not thereby determined, for this might prejudice the husband, and feme after marriage cannot determine the estate herself.

References.—*Read* 1 Wilson's Bac. Abr. 483. Co. Litt. 55. 1 Salk. 117, pl. 9.

E. e. IVES' CASE. 11. a.

A. leased to B. for thirty years, *except all woods and underwoods* growing on the manor; then made a second lease to him of all the woods and underwoods for sixty-two years, *absque impetitione vasti*; and afterwards made a third lease of the *manor* for thirty years, to commence from the expiration of the first lease for thirty years. The thirty years expire, and B. cut down trees. In waste it was resolved,

1. That by the exception of the woods, &c. the soil itself is excepted.

2. That notwithstanding this exception, the woods and underwoods passed by the lease of the manor.

3. That by acceptance of the third lease, though to commence *in futuro*, the second lease was immediately surrendered, for the lessor's ability to lease is thereby affirmed, and the trees being thus joined to the land, lessee was liable. Judgment for plaintiff.

References.—As to the first resolution, vid. Rich. Lifford's case, 11 Co. p. 49, b. 50. a. The opinion on the second objection made in that case. As to the nature of an *exception* in a deed, read Shepherd's Touchstone, 78. On the kind of interest which a grantee of trees has, read Clap v. Draper, 4 Mass. Rep. 266. On the third resolution read Doe ex dem. Earl of Berkley v. Abp. of York, 6 East, 100, the opinion of lord Ellenborough. Read also Davison v. Stanley, 4 Burr. 2210. Smith v. Maplebank, 1 Du. and Ea. 441. 1 Wms. Saund. 236. b. note.

e. THE COUNTESS OF SHREWSBURY'S CASE. 14. a.

The countess brought case against her *tenant at will* of a house, which had by accident burnt down. *Resolved*, that plaintiff could not maintain her suit, because at *common law*

lessee for life or years was not responsible for voluntary or permissive waste, as they came in by the act of the lessor; and so tenant at will is not answerable for permissive waste, not being within the statute of Gloucester, which gave remedy for waste committed by tenant for life or years. But lessee at will is liable in trespass for *voluntary* waste, for this is a determination of the will, and lessor may sue without entry.

References.—*Read* Hargrave's note 1. Co. Litt. 57. a. 1 Wms. Saund. 323. b. No. 7. 1 Cru. Dig. p. 78, sec. 59, 60, p. 257, sec. 11, p. 272, sec. 15. [This case is sometimes called the countess of Salop's case.] *Phillips v. Covert and Covert*, 7 John. Rep. 1. 12 John. Rep. 369. 4 Taunt. Rep. 764.

SPENCER'S CASE. 16. a.

This is a very leading and distinguished case on the rights and responsibilities of assignees to the covenants, expressed and implied, in an indenture of lease.

Read *Bally v. Wells*, 3 Wilson's Rep. 25. *Churchwardens of St. Saviour's, Southwark, v. Smith*, 3 Burr. 1271. *Tatem v. Chaplin*, 2 Hen. Black. 133. *Espinasse's Nisi Prius*, Gould's edi. vol. i. part ii. p. 145 to 155. *Webb v. Russell*, 3 Du. and Ea. 210. *Mayor of Congleton v. Patison*, 10 Ea. 130, and the following American cases. *Nesbit v. Nesbit*, Taylor's Rep. 82; (a very good case.) *Lot v. Thomas*, 1 Pennington's Rep. 407. *Pollard v. Shaffer*, 1 Dallas' Rep. 210. *Devisee of Van Rensselaer v. exrs. of Platner*, 2 John. Ca. 24. *Moale v. Tyson*, 2 Harris and M'Henry, 387.

THE LORD CHENEY'S CASE. 69. a.

Resolved in this case, that no averment out of a will shall be received; for a will concerning lands, &c. ought to be in writing, and the construction should be collected from the

words of the will, and not by any averment out of it. But if a man has two sons named John, an averment in such case may be received, in order to shew which of them the devisor meant,

References.—There are few doctrines in the law of greater importance, or attended with more difficulty, than the admissibility of parol and extrinsic testimony to affect written instruments. There has been much written on the subject, and innumerable cases of great learning on it are reported. We presume that we cannot do better than to refer the student to Mr. Roberts' very able chapter on this subject, in his Treatise on the Statute of Frauds, page 10 to 90; and the following valuable cases which Mr. Roberts has strangely omitted to notice. *Freeland v. Burt*, 1 Du. and Ea. 701. *The King v. Inhabitants of Scammonden*, 3 Du. and Ea. 474. *The King v. Inhabitants of Laindon*, 3 Du. and Ea. 379. And for the cases which have occurred in the American Courts, v. Randall's edit. of Peake's Evidence, p. 117, No. 5; or Bayard's Digest of American Cases on the Law of Evidence, p. 78 to 94, in both of which works the cases are concisely abridged and well arranged.

OLAND'S CASE. 116. b.

If A. holding lands *durante viduitate*, sows them, and then takes husband, she is not entitled to the *emblements*, for although her estate be uncertain, yet as it was determined by *her own act*, the emblements belong to him to whom the lands belong: but if baron and feme are lessees during coverture, and baron sow the lands, and they are divorced *causa præcontractus*, baron shall have the emblements, for *judicium redditur in invitum*.

References.—Read 2 Black. Com. 122, 145. Jacob's Law Dic. tit. 'Emblements.' *Latham v. Atwood*, Cro. Car. 515. 1 Haywood's Rep. 17.

SIXTH COKE.

E. e. TREPORT'S CASE. 15. b.

A. tenant for life, and B. remainder-man in fee, leased to C. who in *ejectione firmæ* declared on a *joint demise* by A. and B. *Resolved*, that this was the lease of A. during his life, and the confirmation of B. and after the death of A. that it was the lease of B. and the confirmation of A. and therefore the declaration on a *joint demise* was ill. It was further held that the deed, though *indented*, was no *conclusion*, as it enured by way of passing an interest.

References.—On this case *generally*, v. 2 Bac. Abr. 574, and on the point of *estoppel*, v. Co. Litt. 45. a. 47. b. 2 Wms. Saund. 418. No. 1. Blake v. Foster, 8 Dun. and Ea. 487. 1 John. Ca. 91. 2 Selwin's Nisi Prius, 456. 3 Bos. and Pull. 158.

e. COLLIER'S CASE. 16. b.

Devise to A. paying B. twenty shillings, is a devise in fee simple: for the law intends a devise to be beneficial to the devisee; and here he may after payment die without satisfaction; but if the payment is to be out of the *profits* of the land, devisee has but a life estate.

References.—Read 6 Cru. Dig. tit. xxxviii. ch. xi. sec. 49 to 71 inclusive. Id. ch. xiii. sec. 26 to 34 inclusive. Denn v. Mellor, 5 Du. and Ea. 558. Doe v. Allen, 8 Du. Ea. 497. Doe v. Clark, 5 Bos. and Pul. 343. (These are very leading cases.) That devisee does not take a fee, if the *estate* be plainly indicated, as he may reject it, read Cowper's Rep. 410, and Willis v. Bucher, 2 Binney's Rep. 463, opinion of C. J. Tilghman on the first question. Townsend v. Bull, 10 John. Rep. 148. (Very good cases.)

E. e. WILD'S CASE. 17. a.

Devise to baron and feme, and *after their decease* to their children, or *remainder* to their children: whether they have or have not children at the time, this is but an estate for life in baron and feme, remainder to their children. But if lands are devised to A. and his children or issue, he having none at the time, A. takes an estate tail; but if he have children at the time, he and his children take a joint estate for life.

References.—Read Hodges *v.* Middleton, Doug. 431. Powell on Devises, 505. Seale *v.* Barter, 2 Bos. and Pull. 485. [That devise to A. and his *issue*, he having children at the time, is an estate tail, and not a joint estate to A. and his issue for life, read Lampley *v.* Blower, 3 Atk. 397; for since Coke's time the word issue has become as proper a word of limitation, as the expression 'heirs of the body.']

MARQUIS OF WINCHESTER'S CASE. 24. a.

That the law does not merely require a testator, at the time of making his will, to be so possessed of memory as to be able to reply to familiar and usual questions, but he must have a *disposing memory*, so that he may devise his lands with reason and understanding; and this is what the law calls perfect memory.

References.—Williams on Executors, vol. i. 13 to 34. 1 Fonb. on Equity, 69. note. Burrows *v.* Burrows, 1 Haggard's Rep. 109. Hoby *v.* Hoby, *ibid.*, 149. Arbery *v.* Ash, *ibid.*, 214. Ross *v.* Chester, *ibid.*, 227. 2 Haggard, Groom *v.* Thomas, 434. Le Breton *v.* Fletcher, *ibid.*, 558. Bird *v.* Bird, *ibid.*, 142. Marsh *v.* Tyrrel, *ibid.*, 122. White *v.* Driver, 1 Phillimore's Rep. 88. Wood *v.* Wood, *ibid.*, 363. Cartwright *v.* Cartwright, *ibid.*, 90. Billingshurst *v.* Vickars, *ibid.*, 191. Kindleside *v.* Harrison, 2 Phillimore, 459. Brounker

v. Brounker, 2 Philli. 57. *Evans v. Knight*, 1 Addison's Rep. 239. *Scurby v. Fordham*, *ibid*, 90. *Dew v. Clarke*, *ibid*, 279. *Brogden v. Brown*, 2 Addi. 445. *Montefiori v. Montefiori*, *ibid*, 361. *Brogden v. Waters*, *ibid*, 449. Greenwood's case, 3 Addi. 90. 208. *Ayrey v. Hill*, 2 Addi. 206. 'Ingram *v. Wyatt*, 1 Hagg. 401. *Mackenzie v. Handiside*, 2 Hagg. 211. *McAdam v. Walker*, 1 Dow's Rep. 173. *Griffiths v. Robins*, 3 Maddock's Rep. 162. *Mountain v. Bennet*, 1 Cox's Rep 356. ¶ And the following American cases: *Rambler v. Tryon*, 7 Sergeant and Rawle, 90. *Dornick v. Reichenback*, 10 Serg. and Rawle, 84. *Heister v. Lynch*, 1 Yates' Penn. Rep. 108. *Jackson v. Van Dusen*, 5 John. 144. *Temple v. Temple*, 1 Henning and Munford, 476. *Brooks v. Barrett*, 7 Pickering's Rep. 94. *Van Alst. v. Hunter*, 5 John. Chan. Rep. 158. *Stanet v. Douglay*, 2 Yates, 48. *Hight v. Wilson*, 1 Dallas, 94. *Hathorn v. King*, 8 Mass. Rep. 372. *Maiks v. Bryant*, 4 Hen. and Munf. 91. *Den. v. Vancleve*, 2 Southard's New Jersey Rep. 589.

[The subject of the disposing *mind* and *memory* of a testator is one of such peculiar importance and intricacy, that we wish to invite the student's special attention to it. It is surprising that a doctrine of so much interest and nicety, should not have been the subject of a general treatise,—but we are not aware that an attempt has any where been made to collect and arrange the mass of law to which it has given rise. Copious materials exist in the jurisprudence of the continent, as well as in that of England, and of this country. The few authorities we have noted will fully justify the importance we attach to it, and will be found to present a general outline, and to embrace most of those defects of legal mind and memory, which have been urged as grounds for invalidating wills and testaments. These proceed from numerous causes,

and come under such heads as *general insanity, partial insanity, imbecility short of idiocy, frequent lapsus memoriæ, habitual ebriety, morbid eccentricity, morbid irritability, limited delusion, or hallucination, extreme old age, duress, &c.* The subject as various as confounding, and inscrutable as the operations of the human mind, would seem to embrace questions of physics as well as of mental philosophy. How far the law will distinguish between the various mental powers actually put in requisition by different kinds of wills, or parts of wills; or insist in all cases on the integrity of the mind; how far a competent *judgment* may remain, after *memory* has nearly passed away; to what extent memory, judgment, or both may be fitful; how far perfect as to some things, or classes of things, and yet equally defective as to others; and finally, how far the mental *status* may be more perfect in respect to contemplated dispositions of property, by reason of constantly dwelling on the subject, than it is on all other subjects, are topics of great moment, requiring accurate discrimination in those who are to argue, no less than in those who are to decide upon the validity of wills.

Can it be said to require the same disposing mind and memory to make a short and unimportant codicil, as a long and intricate will? If the reply be in the affirmative, what injustice may not arise!—and if in the negative, how shall we define the limits, where find the elements of distinction! A codicil often contains but a single provision,—and that dependant much more on judgment than memory—the proof goes to establish testator's judgment, but greatly to invalidate the claim to memory—a question of great importance hence arises; shall such a codicil, dependant mainly on judgment, be permitted to stand in the presence of such proofs of defective memory as would have invalidated the whole will, if made at the same

time with the codicil? Suppose a valid will, containing numerous and complex dispositions of property, be followed by a codicil made many years after, when memory was nearly gone, but judgment still active, and that codicil merely provided that if any legatee should institute proceedings to annul the will or any part thereof, his share should vest in the executors in trust for his legal representatives; would not such codicil be valid, though the evidence in respect to memory were such as would not have sustained the *will* if made at the same time? Would the law, in such cases, look to the nature of the testamentary disposition itself!—and distinguish between the various powers requisite for different purposes? Many similar and very nice questions could easily be put, but our only object in this note, has been to intimate the general nature of the class to which they belong. Students of such subjects can scarce hope to understand them, unless considerable attention has been paid to the history of the human mind, in its vicissitudes from infancy to extreme old age; to man's temperaments; his physical and mental idiosyncracies; to such diseases as affect the healthy action of the mind; and finally, to all those phenomena which the mental philosophy of our age has so amply recorded, and illustrated. On these subjects we refer the student to the following works. *Rush on the Mind. Willis on Mental Derangement. Abercrombie on the Intellectual Powers.*]*

E. SIR ANTHONY MILDMAÏ'S CASE. 40. b.

This is a great case on the subject of *perpetuities*, repugnant and void conditions, and particularly on the illegality of such provisos and conditions as destroy the incidents to an estate tail.

* Vide also the works under the head of Medical Jurisprudence, in this Course.

References.—Read Butler's *Fearne*, 252 to 262. 1 Wils. Bac. Abr. 647. (L.) and *Fearne's* posthumous works, 335. 3 John. Rep. 484. 2 John. Cases, 376. *Ware v. Carey*, 2 Call's Rep. 263. 271.

SEVENTH COKE.

E. BEDEL'S CASE. 40. b.

This is a noted case as to the *consideration* requisite in a covenant to stand seized. A use will arise to a wife without expressing any consideration in the covenant, and though the consideration which is expressed, runneth not to the wife, yet a consideration which stands with the deed may be *averred*. What is a covenant to stand seized, and what a bargain and sale.

References.—On the covenant to stand seized to uses, read 7 Bac. Abr. 94 to 103. 2 Fonb. on Equi. 26. No. (h.) That sometimes a deed which cannot operate in one way, may in another, and sometimes either way, at the election of the party, read 2 Wms. Saund. 97. No. 1. *Jackson v. Dunsbaugh*, 1 John. Ca. particularly the opinion of Lewis J. p. 69, that in the state of New York, a deed from a father to his son, with a *pecuniary* consideration, may operate as a covenant to stand seized, as was the case in England prior to the statute 27 Hen. 8. ch. xvi. of enrolments, as that statute is *local* in its provisions, and consequently inoperative in that state.

EIGHTH COKE.

E. FOX'S CASE. 93. a.

A deed may operate as a bargain and sale, though the words bargain and sell be not used. An actual seisin in the bargainor is not requisite. A chattel interest in land cannot be conveyed by bargain and sale, though one who is seized may bargain and sell for years.

References.—*Read* 4 Cru. Dig. tit. xxxii. ch. xi. sec. 4, 5, 6 7. 15, 16. 21.

e. MATTHEW MANNING'S CASE. 96. a.

This and Lampet's case, 10 Co. 46, established the law, that after a previous devise of the *use and occupation* of a term, or the term itself, for *life*, a limitation over is good, by way of executory devise. In this case there were five points resolved, after which sir William Cordell's case, in part, is subjoined, and, in the note, Welden's case, the most important resolution in which was, that vendee under a lawful judgment and execution, has a good title, although the judgment be afterwards reversed.

References.—On the 1st, 3d, and 4th resolutions, viz: as to the executory devise of chattels, real and personal, *read* Butler's Fearné, p. 401 to 415, and p. 421, sec. 3. 6 Cru. Dig. tit. xxxvii. ch. xix. sec. 1. et seq. As to the 5th resolution, and Cordell's case, *read* Cro. Eliz. 316, and *White v. Simpson*, 5 Ea. 162, where this point in Cordell's case is fully considered. As to the title of vendee under a lawful judgment and execution, although judgment be reversed, *read* 2 Wils. Bac. Abr. 505. 740. 'Execution,' (Q.) *Carter v. Simpson*, 7 John. Rep. 535. *Burnley v. Lambert*, 1 Wash. Rep. 308. 2 Binney's Rep. 47. 2 Scho. and Lef. 571.

NINTH COKE.

THOROUGHGOOD'S CASE. 136. b.

A deed cannot be delivered as an *escrow* to the party to whom it is made; delivery must be to a stranger. Delivery of a deed of feoffment on the land does not amount to livery of seisin, but, if delivered in the name of seisin, this has *eo instanti* a two-fold operation, viz: as livery of seisin, and a delivery of the deed.

References.—Of an escrow, read 4 Cru. Dig. tit. xxxii. ch. ii. sec. 54, 55, 56, 57. 58, *Wheelright v. Wheelright*, 2 Mass. Rep. 447. *Pect v. Goodwin*, Kirby's Rep. 64. *Babcock v. Steadman*, 1 Root's Rep. 87.

TENTH COKE.

e. LAMPET'S CASE. 46. b.

Termor for five thousand years devised the term to A. for life, and made him his executor, remainder to B. and the heirs of her body. B. and her husband release to A. who demises to C. the defendant. B's husband dies, and A. dies, and B's second husband demised to the plaintiff. Judgment for the defendant, and resolved,

1. That a devise of the *use* of a term for life, remainder for life, is good by way of executory devise.
2. That such a devise of the *term itself* is good.
3. The executory devise is not defeasible by any act of the first devisee.
4. A's assent, as executor, to the devise to him, enured to B.
5. That if the executor in such a devise enters *generally*, he takes it as executor, which is his first and general authority, and not as legatee, unless there be some further act of assent.
6. That B's executory interest was not assignable.
7. That such executory interest might be granted or released to him in possession.
8. That by the release A. had an absolute estate in the residue of the term.
9. That A's assent to take the term as legatee, was sufficiently evidenced by the request and acceptance of the release.

References.—On the 1st, 2d, and 3d resolutions, in addition to the 3d and 4th resolutions in Matthew Manning's case, 8 Co. 96, and the references thereto stated by us, read Mr. Hargrave's very learned and able historical view of the rise and progress of executory devises, in his argument in *Thelluson v. Woodford*, 4 Vez. Jun. 247. [If Mr. Hargrave's Juridical Arguments be accessible to the student, he will find the argument in *Thelluson's* case more fully reported in that work.]

On the 5th and 9th resolutions, read *Holmes v. Young*, 1 Strange, 70. 4 *Espinasse's Nisi Prius Cases*, 154. *Say and Sele v. Guy, exr.* Same parties, 3 East, 120.

On the 6th resolution, read 1 Fonb. on Equ. p. 212 to 228, and *Butler's Fearnè*, p. 548, sec. 19, and note 1.

On the 7th resolution, read 5 Ba. Abr. 704. (H.)

e. EDWARD SEYMOUR'S CASE. 96. a.

Tenant in tail with reversion in fee, after remainder in tail to B. bargained and sold to C. in fee, and a year after levied a *Fine* to him with general warranty. C. enfeoffed D. who died, leaving E. his heir. B. died, leaving issue F. Tenant in tail died without issue, and in ejectione firmæ by E. as heir of feoffee, against F. claiming as heir to the remainder in tail, judgment was given for defendant, and resolved,

1. That C. the bargaineer, had by the bargain and sale, an estate descendible to his heirs, during *the life* of the bargainer; that of this his wife might be endowed, and also that he had the reversion in fee expectant upon B's remainder in tail.

2. That the *fine* to the bargaineer created no discontinuance, as tenant in tail, at the time it was levied, had no estate of freshold, but that it merely confirmed the bargaineer's estate.

3. That the *warranty* did not bar the remainder.

4. That a warranty cannot operate by way of enlargement of an estate.

5. That the *feoffment* of C. was no discontinuance of B's remainder, as none can discontinue but tenant in tail himself.

6. That the warranty, if it bound, might, if not pleaded, be given in evidence.

References.—*Read Doe ex dem. Odiarne v. Whitehead*, 2 Burr. 702. *Goodright ex dem. Tyrrel v. Mead and Shelson*, 3 Burr. 1703. *Took v. Glascock*, 1 Wms. Saund. 260 and notes, in which the doctrines in Seymour's case are fully considered.

e. WILLIAM CLUNN'S CASE. 127. a.

This is a good case on the subject of the *réservation* and apportionment of rent.

References.—*Read 2 Fonb. on Equ.* 383, sec. ix. and notes. *Glover v. Archer*, 4 Leonard's Rep. 247. 2 Wms. Saund. 288. a. note 17. 2 John. Cases, 17.

ELEVENTH COKE.

RICHARD LIFORD'S CASE. 46. a.

This case is full of useful learning as to the interest of lessor and lessee in the trees on the demised premises; the operation of an exception of the trees in the lease, and the interest which an assignee of the reversion has in such excepted trees. (This case should receive a very attentive reading.)

References.—*Co. Litt.* 57. a. note 2. 1 Wms. Saund. Rep. 322, note 5. *Berry v. Heard*. Cro. Car. 242. *Bewick v. Whitfield*, 1 Cox's P. Wms. 267. 4 Mass. Rep. 266. 2 Camp. Rep. 491. 3 John. Rep. 468.

☞ NOTE.—The remaining *twelfth* and *thirteenth* parts of Coke's Reports, contain no cases on the law of real property which merit a place in the above selection.

MISCELLANEOUS. (*Note 30.*)

[The following select essays, and legal opinions on real law, and matters connected therewith, are of such high merit, as to deserve the student's special attention; and if they cannot be read in immediate connection with the present title, they may be taken up at such times as the student may find more convenient, and some of them after he has completed his regular studies, and has been admitted to the bar.]

E. e. 1. Opinions of three eminent counsel on the doctrine of tacking prior and subsequent securities, and upon the statute 4 and 5, William and Mary, ch. xvi. which respects frauds by clandestine mortgages. 2 *Collectanea Juridica*, 241.

E. 2. Sir William Jones' translation of the speeches of Isæus concerning the law of succession to property at Athens, with a prefatory discourse, notes, critical and historical, and a commentary. *Sir W. Jones' works*, vol. ix.

E. e. 3. Opinion of Luther Martin, Esq. on the question of the nature of the recovery in case of real covenants of warranty, and of the proper measure of damages on the modern covenants of warranty, seisin, &c. 4 *Hall's Law Journal*, 129.

e. 4. Essays on the law and practice of conveyancing, with critical remarks on some popular writers on real law. *London Law Magazine*, vol. i. 54, 266, 546, vol. ii. 60, 256, vol. iii. 341.

5. Essay on the modes of proceeding against tenants holding over. *Law Magazine*, vol. i. 82.

6. Essay on the question, whether payment of the purchase money will take a parol agreement for the sale of lands out of the statute of frauds. *Law Magazine*, vol. i. 115.

E. e. 7. Essay on the doctrine of estoppel with reference to the transfer of contingent and executory interests. *Law Magazine*, vol. i. 76.

8. Essay on the payment of rent, after destruction of the demised premises. *Law Magazine*, vol. ii. 290.

E. e. 9. Essay on the requisites of deeds. *Law Magazine*, vol. iii. 355.

10. Essay on the tenant's right to dispute his landlord's title. *Law Magazine*, vol. iii. 375.

E. e. 11. Essay on the vesting of estates, particularly under devises of land referring to the attainment of a given age by the devisee. *Law Magazine*, vol. iv. 61.

E. e. 12. An article on the compensation given by the statutes of Massachusetts, for improvements made on lands by persons holding under defective titles. *American Jurist*, vol. ii. 294.

13. Opinion as to the legal mode of executing deeds in virtue of powers of attorney; on the assignability of possibilities, &c. *American Jurist*, vol. iii. 86.

14. Essay on the question whether, in Virginia, on the conveyance of land in fee simple, reserving rent, the feoffer has a right of distress, if there be no express stipulation to that effect. *American Jurist*, vol. v. 233. [*This is a very learned and well written essay.*]

E. e. 15. Observations on the law of mortgages in the Island of Cuba. *American Jurist*, vol. v. 243.

E. e. 16. Opinion on the nature and use of a writ of right. *American Jurist*, vol. viii. 51, 330. [*These are very learned essays on the question, whether an unsuccessful party in a real action can support a writ of right, if he has not a title or evidence which he could not have had the benefit of in the former action.*]

17. On the distinction between conditions and limitations in deeds and devises. *American Jurist*, vol. x. 42.

NOTES ON THE THIRD TITLE.

(*Note 1.*) OBSERVATIONS ON THE STUDENT'S COMPLETION OF HIS ELEMENTARY STUDIES.

In the first and second titles of this Course, we have designed to present to our student, the most approved sources of elementary knowledge, on all the branches of English, American, and Roman jurisprudence; and which are to serve as a basis only, of his future researches into the minute learning of these various departments. In a science so extensive as that of law, the outlines are themselves necessarily of considerable extent; but if they have been pursued with due industry and care, a solid foundation must have been laid, on which a vast superstructure may be raised, with comparative ease and certainty. No error, however, can be more fatal to distinction in the law, than a too confident reliance on elementary attainments. It is the rock on which students often make shipwreck of their brightest hopes, and of the most flattering promises made to their friends. After having selected the plants, and fixed them, with sufficient care, in a rich and fertile soil, they permit them to languish, and sometimes to perish, from the want of sun and moisture; not remembering that these are to be constantly supplied, and in abundance, if they are to expand and ripen into perfect trees, producing fruit.

The difference between elementary acquirements (even of the most respectable kind,) and the minute learning of their several departments, cannot be well comprehended by the student, at this time. He must, consequently, rely on the

assurances of others, in whom he may have confidence, that the region which separates them (though partaking of the general features of the country which he has just travelled) is still of vast extent, full of mountains, and rocks, of rivers, and streams; all of which must be carefully explored to their sources, and in all of their parts. In his previous course, he has acquired little more than the art of travelling; how to observe with accuracy; what are the objects most worthy of note; how they are to be viewed separately, and in connection, and finally, the means of treasuring up the numerous particulars which are constantly obtruding themselves on his notice. But, to drop the metaphor,—we again earnestly exhort our student to regard his Blackstone, his Kent, and the Institutes of Justinian, as text books, the great commentaries on which are to be found in Coke, Fearne, Preston, Starkie, Chitty, Story, the various books of reports; and finally, in the pages of those masters of the science who have separately treated, with philosophical research, the infinite topics of this vast science. We have stated to him throughout our work, many grounds of encouragement; and we now repeat that there is no just cause for despondency in any student, of moderate abilities, and of laudable industry; especially if he has been regardful of method. And none will despond, who has studied the two preliminary titles, in the mode already sufficiently dwelt on.

(Note 2.) OBSERVATIONS ON THE STUDY OF THE REAL LAW.—Some may be inclined to suppose that too much stress has been laid on the study of the intricate and abtruse doctrines of real rights, and real remedies; and perhaps may be disposed to condemn the extent to which we have recommended an attention to the ancient law generally. If there

be such among those who may resort to these pages, we would remind them of the fallacy of that expectation which looks for a vigorous and manly expansion of the intellect as the result of juvenile pursuits; we would interrogate them in the language of Horace,

Amphora cæpit

Institui; currente rotâ cur urceus exit?

The reply is obvious: the workmanship of the potter is inevitably inferior, if the plastic qualities of the clay, and the power of the moulding hand, be not nicely and fully regarded; so if the student expect to become a great and enlightened lawyer, by attention to detached portions, regardless of the many nice connections and intimate dependencies which the law continually presents; if, in the vast gothic structure of that science, he hopes to become the secure tenant of those cheerful and commodious apartments, which, with infinite labour, have been accommodated to modern and daily use, through any other approaches than the moated ramparts and embattled towers;* like some ancient knight, he may take 'Disappointment' for his motto. That which gave the promise of a great and valuable piece of workmanship, terminates in an ordinary bauble.

We are too sensible of the inestimable value of time, especially to a student of law, to advise the perusal of a single page, without the deepest conviction of its utility; and in no instance has any thing been recommended without mature deliberation. We feel assured that the only certain avenue to legal pre-eminence is through the abtruse learning of the real law; that he who aspires to fame in this science must explore all its devious windings; must with cheerfulness proceed, whether accompanied by the faint light of a taper, or the efful-

* 3 Black. Com. 268.

gence of noon-day; and, finally, that he who desires a thorough knowledge of the modern and practical law, must, as his predecessors in fame have done, content himself with elaborately separating ore from dross: for no modern lawyer ever attained an eminence at any bar, who neglecting the mysteries of ancient law, (simple indeed when properly studied,) derives his knowledge from by-paths, and culls the showy, but perishable flowers which spring up in profusion from the shallow soil on their borders. Such students may close this book after the second title; to those who rest satisfied with elementary attainments, we ingenuously declare that this volume can be of little further service; as its remaining leading object is to facilitate the formation of learned and accomplished lawyers.

Justice Blackstone, in treating even the elements, is very explicit in his opinion on this subject. 'We shall have occasion,' says he, 'to search pretty highly into the antiquities of English jurisprudence; yet surely no industrious student will imagine his time misemployed, when he is led to consider that the obsolete doctrines of our laws are frequently the foundation, upon which what remains is erected; and that it is *impracticable to comprehend many rules of modern law*, in a scholar-like and scientific manner, without having recourse to the *ancient*: nor will these researches be altogether void of *rational entertainments* as well as *use*; as in viewing the majestic ruins of Rome or Athens, of Balbec or Palmyra, it administers both pleasure and instruction, to compare them with the draughts of the same edifices in their pristine proportion and splendour.'

Indeed, in taking even an exterior view of the great system of English jurisprudence, we cannot but be surprised that any could be found willing to advocate a doctrine opposite to that which we have advanced; for so manifest is its truth to us,

that we must suppose such contrary opinion to be confined to the sciolous alone; to those who from idleness, necessity, want of talent, or other causes, have but glanced at the surface of this august system.

The scheme of English jurisprudence, as we have before taken occasion to remark, is not the well digested code of an enlightened prince, nor the grand result of the simultaneous deliberations of a body of learned and scientific lawyers; but the slow and progressive work of ages, suffering many and various alterations, and gradually matured by time and experience into a vast, well-proportioned, and sublime structure. A system of such infinite combinations, the great *chef d'œuvre* of the jurisprudential skill and wisdom of ages, cannot but present much, the origin and motives of which are now involved in obscurity or doubt, and the present utility of which may not be obvious; but the links of that vast chain which unites the whole, in order to its full comprehension, must be examined separately, and in connection,—each link in proportion to its strength and influence in the great whole; and though some of them may not have retained their primary force and operation, they all serve for connection; and the power of *all* is only to be fully comprehended by an examination of their divisions. The student, when he has walked thus far in the path we have prescribed, will be well aware that a great portion of the law has its foundations in feudal learning; and that this learning is nearly as much the object of research, as if he lived in the midst of feudal times: so likewise, in his further progress, he may read much law, where not only the causes, but the law itself have ceased to operate: but let him not hence infer that he has employed his time in useless matter, for, in many instances, though the very law be not at present in force, he has however acquired

principles; and has treasured up much that will cast a pleasing light on what were otherwise obscurities in the present law of the land. On this subject we have the additional testimony of Mr. Hawkins, the learned author of the 'Treatise on the Pleas of the Crown,' and the 'Abridgment of the First Institutes.' In his preface to the latter work he says, that 'many have been discouraged from laying the foundation of their studies in those excellent books,' alluding to books of *ancient law learning*, 'because a great part of them is not law at this day; and and they cannot easily persuade themselves to read so much obsolete learning, with that attention which is necessary to the perfect understanding of it. But whoever considers how great a coherence there is between the several parts of the law, and how much the reason of one case opens and depends upon that of the other, will, I presume, be far from thinking *any of the old learning* useless, which will conduce so much to the perfect understanding of the *modern*.'

It is at once conceded that the practical use of the doctrines of the real law is not of as frequent recurrence as many others; and for a very manifest reason. Real property, more permanent in its character than any other, is less frequently the subject of contract or disposition, and of consequence is less often the subject of judicial litigation; but as this law relates to the most valuable species of property, and as it is a more elaborate and refined system, and more difficult to be vividly and durably impressed on the mind, we are from these circumstances, if from no other, furnished with a strong reason for making this law a subject of devoted and earnest inquiry; for it is the experience of all, that what we have once thoroughly learned, seldom or never forsakes us; that when its practical application is required, though comparatively but seldom, we feel a cheering confidence in the abundance of

our stores, and solve the questions proposed with little or no difficulty: whereas, if contented with a superficial knowledge of this law, we rely on our ability to investigate these questions of abstruse real learning, as they occur in practice, we will certainly find our error to be radical, perhaps incurable; as our time has then become too valuable, and too much occupied to be devoted to long and severe study. On the other hand, the other branches of the law are generally more simple and easy of acquisition, and not difficult to be retained in the memory: much may be treasured up in the course even of an extensive practice; and as it is of daily recurrence, it is less likely to fade from the memory, though not very carefully or profoundly studied at first. The *real* law, therefore, should at once, if practicable, be acquired in the detail; and so strongly impressed on the mind of the student, that, like his alphabet, it should be incapable of being forgotten, or like the incidents of early youth, be so incorporated with his mind that, although the direct occasion to revive its recollection should not very frequently happen, yet when it does occur, this law should at once present itself in all its original vivacity. Let me, therefore, under the assurance of ample recompense, urge my young friends to accord their devoted attention to this learning; and let me re-assure them that, if they would gain a mastery over this subject, nothing more is requisite than an attentive study of the course of real law here prescribed.*

[* We pray leave here to observe, that a very respectable writer in the *North American Review*,† in treating of the life and writing of sir Edward Coke, takes occasion to find fault with the place we assigned to *Coke upon Littleton*, in the first edition of this work, viz: at the head of the Third Title. His remarks are such as justify us in supposing that he could not have examined the previous parts of the work, with the care due to an author, when he is to be censured. The reviewer, after stating his own opinion, adds, 'this we cannot but think preferable to the method recommended by Hoffman, in pursuance of general custom, rather than for the

† 13 Vol. Oct. 1821, page 284.

(Note 3.) LITTLETON'S TENURES.—The practice of reading Littleton's Tenures only in connection with the Commentary of lord Coke, has been so universal, that the course herein prescribed, of reading it in the first instance separately,

soundest reasons, of placing Coke upon Littleton at the head of the doctrine of real rights, and almost at the very opening of municipal law. Condemning the student, at such an early period of his novitiate, to the revolting task of toiling through the confused, harsh, uncouth and antiquated pages of Coke, is not very likely to conciliate his mind to legal inquiries, nor to give it those habits of systematic investigation, which are peculiarly needful in the science of law. Besides a student cannot then peruse Coke upon Littleton with advantage; because it is impossible for him to comprehend fully a large portion of it, and still more impossible for him to discriminate between what is law at the present day, and what is not, especially considering the difference between the common law as acted upon in the United States, and as understood in England.' We are somewhat surprised at the foregoing observations, as we are not fairly chargeable in that edition with having placed Coke upon Littleton, 'at the head of the doctrine of real rights, and almost at the very opening of municipal law.' In the Second Title we had recommended the careful study of not less than seven works which treat of the doctrines of the realty, in not less than perhaps two thousand octavo pages; viz: Dalrymple, Sullivan, Blackstone, Wooddson, Hale, and Reeves, sufficient, as we supposed, to exempt us from the charge of 'condemning the student at a too early period of his novitiate' to grope with the difficulties of the *First Institute*; and to have freed us of the imputation of hurrying him *in medias res*, before he had acquired 'those habits of systematic investigation, which are peculiarly needful in the science of law.' We still think that if students of the seventeenth century, without the aid of the preliminary works we have mentioned, had reason to be grateful to lord Coke, for this (at that time,) comparatively elementary work, and which it then *was possible* for them to peruse with advantage, we have committed no serious error, in 'pursuance of custom rather than of sound reason,' in recommending at this day the perusal of Coke upon Littleton, (with the notes of Hargrave and Butler,) in the manner so strongly objected to in the passage we have quoted. The works previously recommended are as we think quite sufficient, to enable the student to 'discriminate between what is law at the present day, and what is not;' and as to the objection that the common law has suffered changes in the United States, and that Coke upon Littleton is not comprehensible, until these modifications are known, we differ from the reviewer *toto cælo*; but if not, sufficient will be found in Tucker's edition of Blackstone, which we recommended, to remove the difficulty, if there be one. Were the fact, however, at all as stated, incautiously, by the reviewer, we should have great pleasure in correcting the error in the present edition. We have so far consulted his general views on this point, as to add a few more preliminary works on the learning of the realty; but have still assigned Littleton, and Coke upon Littleton, the same place as formerly; which, though at the head of the Third Title, can with no propriety be said to be 'at the head of the doctrine of real rights, and almost at the very opening of municipal law.']

seems to require some reason, in addition to our recommendation, though made on the high authority of Mr. Butler. That very able writer, and competent judge of such matters, has omitted to state any reason, but merely says, 'The student should begin by reading Littleton's Tenures, with extreme attention, meditating on every word, and framing every section into a diagram, abstaining altogether from the commentary, but perusing Gilbert's Tenures.*' This opinion we are perfectly satisfied is correct, and have, therefore, followed it. The previous and separate reading of Littleton appears strongly advisable, as the sections of that admirable little production are often so closely connected with, and dependant upon each other, that the meaning of the author cannot well be collected, unless these sections be read continuously, which is not done in reading Coke upon Littleton. The very nature, also, of Coke's exposition of the text, (it being often a commentary on *words* merely, as they arise in the section, without reference to the main object of that section,) interrupts the continuity of Littleton's argument, and the student loses sight of the principal doctrine treated of, whilst pursuing the numerous, and often devious paths, of the elaborate and very learned commentary. In addition to these, we have annotations on the commentary, *nota super nota* in such close profusion, that a previous acquaintance with the text seems to be essential, if the student would avoid that confusion of thought, and even vexation of spirit, which arises from multiplicity of subjects not very obviously connected with each other. The student has first to encounter the text; then follows an erudite, and manifold commentary; after which are the notes of lord Hale, or of lord Nottingham, and these close with the annotations of Mr. Hargrave, or of Mr. Butler. All these, like Ossa on

* Butler's Reminiscences, p. 64.

Pelion, and Pelion upon Ossa, may raise the student to great elevations; but he is often placed there amid murky clouds, with a boundless horizon, and a prospect, numerous in objects, but with nothing very distinctly visible. To avoid confusion, arising from multiplicity of subjects, and to enable the student to reap the fullest advantage from the great research of all these commentators, we have been careful to point out a good deal of preliminary matter, to be carefully studied by him, (among which is *Gilbert's Tenures*.) Still, nothing would be so effectual as a thorough acquaintance with Littleton's text, before he undertakes to grapple with the body of learning to which we have adverted.

Sir Thomas Littleton's Tenures were first published in 1481, in the reign of Henry VI. They were composed for the use of his son, and treat exclusively of the doctrines of the realty. We know of no production in the whole *bibliotheca legum* which equals this in simplicity, perspicuity of style, and the beauty and order of its arrangement: not a word is redundant; and, perhaps, none are wanting to express with clearness the full meaning of the author. Lord Coke in the preface to his commentary says, that 'this book is the ornament of the common law, and the most perfect and absolute work that was ever written in any human science, and I take upon me to maintain against all opposers whatsoever, that it is a work of absolute perfection in its kind, and as free from error, as any book I have known to be written upon any human learning.' And sir William Jones, when recommending the works of Pothier to the notice of English lawyers, remarks, that 'if their great master, Littleton, has given them, as it must be presumed, a taste for luminous method, apposite examples, and a clear manly style, in which nothing is redundant, nothing deficient, he will surely be delighted with the

works of the French lawyer, in which all those advantages are combined, and the greatest portion of which is law at Westminster as well as at Orleans.' Since the publication of Coke's Commentary, in 1628, there have been only three editions of the 'Tenures;' viz: one in 1656, another in 1813, by H. B. Kerr; and one still more recent; both of which late editions appear to have been published in reference to the opinion expressed by Mr. Butler, that the text should be previously, and independently studied. Prior to 1628, the editions, which were very numerous, are mostly in the French language, the first English edition being in 1528. If the student cannot procure either of the recent English editions, he can read Littleton separately, in Coke upon Littleton; taking care to disregard, for the present, all other matter. If he has a very slight, or even no acquaintance with French, it will be a very profitable exercise to read in Coke upon Littleton, the French as well as the English sections: this will not prove difficult after he has carefully read in this manner, two or three of the titles. We need not at this time inform the student how much an acquaintance with the French language would open to him various avenues for the enlargement of his knowledge of law as a science, by the facility it would afford him in the cultivation of what is appropriately called comparative or universal jurisprudence. On this topic we shall have occasion to dwell in another place: but we now urge upon him to be mindful of the necessity of such an acquaintance with that language, as will, at least, enable him to refer occasionally to such of the reports, and other works, as still remain, in what is usually called Norman French, which, if not understood to this extent, will sometimes greatly embarrass his studies.

(*Note 4.*) COKE'S COMMENTARY UPON LITTLETON'S TENURES.—Sir Edward Coke's Commentary upon the Tenures of sir Thomas Littleton, was published in 1628, nearly a century and a half after the first publication of the text. It is the first in a series of four works, entitled by him 'Institutes,' because, as he says, 'my desire is, they should institute and instruct the studious, and guide him in a ready way to the knowledge of the laws of England.' The First Institute, in common with the rest, is nevertheless, not a very elementary work; sometimes it is strictly so, but its general character is not that of an institute. And though, at the time of its publication, it was better adapted to the use of early students, than, perhaps, any other then known; the improved ideas of modern times have assigned it a different rank, to be read only by those who, in more elementary works, have made some progress in the great outlines of English jurisprudence. The Commentary, though defective in arrangement and method; though interlarded, perhaps, with some useless learning, and greatly infected with the pedantry and quaintness of the times, remains the bible of the law. The profound and extensive learning to be found in this work; the numerous points and illustrative examples; the many cases propounded and solved, with their nice, acute, and well founded doctrines; the perpetual commentary on the text; the carefulness of the author to sustain his positions by the most apt, and approved authorities; and to trace the great principles of law under all their modifications; the amiable encouragements so often given to the student; and finally, the tendency even of his redundancy and quaintness to plant all these in the memory of his reader, must forever recommend the work to the student's special regard, notwithstanding the more condensed and methodical digests and treatises of a

latter day. It is, as we think, a very mistaken idea, entertained by some, that Mr. Cruise's Digest of Real Law, has superseded the necessity of reading Coke upon Littleton. The error is radical, as no two works can differ more, not only in matter, but in their tendency; both possessing extraordinary merit, but still so essentially different, that the utility of both remains unimpaired. It is entirely out of the question to lay this work on the shelf, for we know of no others that have fully supplied its place. Here we may again appeal to Mr. Butler, who, after admitting the excellency of Cruise's Digest, still speaks thus of the abiding claims of the First Institute. 'The Reminiscent may appear to recommend too much attention to Littleton and Coke; but he never has yet met with a person thoroughly conversant in the law of real property, who did not think with him that *he* is the best lawyer, and will succeed best in his profession, who best understands Coke upon Littleton. Against one error he begs leave particularly to caution the student;—not to suspect for a moment, that because he himself does not see the utility of what he reads in this work, or the application of the parts of it which he is reading to any practical purpose, it is therefore, useless. There is not in the whole of the golden book, a single line which the student will not, in his professional career, find on more than one occasion, eminently useful.'*

Mr. Hawkeshead, also, in his recent masterly, but very eccentric Essay on the operation of the word 'issue,' &c. in a will, remarks, 'we must not yet quit sir Edward; quaint as he is, we must go through another chapter or two, otherwise we shall not be able to split hairs with Mr. Fearne, when we come to contingent remainders; for, unless we lay our ground work in the pages of sir Edward Coke, whatever superstruc-

* Butler's Reminiscences, p. 64.

ture we may raise, will be like a house built upon the sand; for Coke 'is not a name only,' but, (as to these matters,) *the law itself.**

And let not the American student of law suppose that the same necessity does not here exist, as in England, to make this 'golden book,' his principal guide in the real law. All precedent in this country contradicts such an idea. The present generation of distinguished lawyers, as well as that which has just passed away, have given ample proofs of their familiarity with the writings of lord Coke; and our numerous volumes of reports daily illustrate that, with trivial exceptions, what is the law of real property at Westminster Hall, is equally so in the various tribunals throughout our extensive country.

The various forms under which this work has appeared, manifest very decidedly, its high estimation. With these the student should be well acquainted. We now present them, in the chronological order in which they have appeared, with a few remarks upon each.

LIST OF THE PRINCIPAL EDITIONS, ABRIDGMENTS, ANALYSES,
AND OTHER FORMS IN WHICH THE COMMENTARY UPON
LITTLETON HAS APPEARED.

1. HAWKIN'S Abridgment of the First Institute, with great additions, explaining many of the difficult cases, and showing in what points the law has been altered by late decisions, and acts of parliament, with an analytical index. London, 1751. ¶ This is a work of very considerable merit, and those who cannot obtain the more recent productions, hereafter mentioned, would do well to read it contemporaneously with the larger work, reviewing in the former, in one day, what he had read in the latter on the preceding. We remember to have found this method very serviceable,

* Hawkes. Essay, p. 76.

2. HARGRAVE AND BUTLER'S edition of Coke upon Littleton. This was the thirteenth edition of the original work, and first appeared in 1788. The fourteenth, with additional notes, in 1789. The fifteenth, with further notes, &c. and those of lord chancellor Nottingham, in 1794. The two first editions by Hargrave and Butler are in folio—the last in three volumes, octavo; the notes being comprised in the third volume.

Mr. Hargrave was engaged in these annotations more than ten years, and completed them with pre-eminent ability, as far as folio 190. b, or page 380, which is twenty-six pages less than one-half of the entire work. Imperious circumstances compelled him to relinquish the enterprise, which was then taken up and completed, with equal learning, by Charles Butler, esq. in 1788. On the subject of the comparative merits of these two great annotators, opinions have been remarkably variant; for example, Mr. Hawkeshead says, 'One cannot help observing the striking contrast which there is between the two annotators of Coke Littleton, and how much the annotations of Mr. Butler excel those of his predecessor, Mr. Hargrave, both in succinctness of order, comprehensiveness of style, and eloquence of diction. The notes of Mr. Hargrave are for the most part short, and the language bald; and appear to be the fruits of severe and unwearied application of a mind, not originally intended or fitted by nature for the task; every thing appears to have been brought forth with painful throes,' &c.* In the London Magazine, it is said, that Mr. Butler had written nothing to entitle him to the rank of a first rate jurist; and that he was excelled by Mr. Hargrave in depth of research. And again, 'A worthy edition of Coke upon Littleton we now despair of ever seeing: the hope died with Mr. Hargrave; of all who have illustrated the first Institute, the only man whose, talents,

* Vide Hawkeshead's Essay on the word 'Issue,' &c. p. 26.

learning, and industry qualified him for the task.' And still again, speaking of Mr. Butler, 'he was wanting in talent for refined analysis, and in capacity for profound and various research; the value of his notes is derived from their merit as insulated essays,' &c.*

We apprehend that an overweening attachment to Mr. Hargrave, on the one hand; and political dislike to Mr. Butler on the other, must account for this discrepancy in opinion, as both are indisputably, very competent judges.

3. In 1817, appeared the seventeenth edition, with all the previous notes of Hale, Nottingham, Hargrave, and Butler, and further notes by that eminent lawyer, with a new and compendious index by G. Canning, esq. in two volumes, royal octavo.

4. In 1818, J. H. THOMAS, ESQ. published an edition on a plan wholly new. It is in three volumes, octavo; and contains the previous annotations, excepting of Mr. Butler, together with many very able notes by the editor. The entire work has been re-written, and systematically arranged on the plan of lord Hale's Analysis of the English Law, which the student may better understand by comparing it with that of Blackstone's Commentaries.

This edition has been prepared with immense industry, and is a very creditable monument of the learning of Mr. Thomas. We should nevertheless, prefer for students, the original form of Hargrave and Butler's Coke upon Littleton, as we believe they would read it with more ease, and with greater profit; and we would extend this remark to the folio editions, which we prefer to those in distinct volumes.

5. Thomas' edition of Coke upon Littleton has been republished in this country, with the addition of Mr. Butler's notes.

* 4 Law Magazine, 95, 127.

6. FISK'S ANALYSIS OF COKE ON LITTLETON, comprised in a series of questions to be answered by the student in the course of his study of that work. London, 1824. [This work cannot fail to prove inestimable to the student desirous of a thorough knowledge of the First Institute. It is recommended that a copy be bound, interleaved with blank paper, and that short answers to the questions, be written by the student in the progress of his reading Coke on Littleton.]

7. COVENTRY'S NEW AND READABLE edition of Coke upon Littleton, adapted to the present day, in one volume, royal octavo. London, 1830. [In this work, certain parts, regarded as *antiquated* are omitted, which we regard, however, as a defect, more than a recommendation.]

8. A Commentary on the Tenures of Littleton; written prior to the publication of Coke upon Littleton: edited from a copy in the Harleian collection of manuscripts, by HENRY CARY. London, 1829. [We give this a place under the present head, though it has no relationship with the First Institute. The manuscript from which it is now for the first time published, though it has slept in oblivion for more than two centuries, was not absolutely unknown to the present generation. It is mentioned by Mr. Hargrave in his edition, but attracted no notice from prior or subsequent writers, until Mr. Cary, with a laudable spirit, brought it to light, for which we tender to him our humble thanks as, after a careful perusal, prompted in no small degree by curiosity, we can justly say that the learned commentator was remarkably exempt from the vanity of authorship, who could permit such a production to remain unknown, and even without a name. The London Magazine in noticing it, remarks, 'If this work does not exhibit such variety of information, and acuteness of reasoning as the First Institute, we think it nevertheless, in some

points decidedly superior. The annotator has throughout made his commentary subordinate to the text which it is his object to verify and explain, and hence the reader may pass from one section of Littleton to another, without losing sight of their beautiful dependence.* The defect of Coke's Commentary in this respect we had occasion to remark in a former page, and hence urged upon the student the propriety of reading the Tenures separately, in the first instance. We therefore, recommend Mr. Cary's edition to such students, if there be any, as rely mainly on Cruise's Digest, and cannot be brought to a careful study of lord Coke's Commentary. The industrious lawyer, and zealous admirer of the learning of the realty, will not fail at least to look over the pages of this *first commentator* on Littleton's Tenures. The editorial labours of Mr. Cary have been executed with great fidelity, and have rendered the work more authoritative than a naked anonymous manuscript, could possibly have been.]

(Note 5.) CRUISE'S DIGEST OF THE REAL LAW.—The feelings of sir Henry Spelman at his first entrance upon the study of law, so naturally described in the extract which we have placed as the motto to this third title of our Course, were by no means peculiar to that distinguished man, but must have been felt by every student of those days, however pre-eminent his talents. At that period there was no treatise on the doctrines of the municipal law, and especially on that difficult portion of it embraced by this title, which was in any way calculated to remove or illumine the difficulties so feelingly lamented by Spelman. The legal dialect was foreign and barbarous, and the subjects were often destitute of any method. The novice was left to grope his way in darkness.

* 3 vol. London Magazine, 153.

This, however, is at present by no means the case. The most abstruse doctrines, even of the real law, are now so simplified, and philosophically explained, that no future Spelman, surveying the luminous pages of Cruise, and of Fearn, will ever have occasion to despond, or to exclaim 'excedit mihi fateor animus.' The student, moreover, should bear in mind that, without the aids which he possesses, Spelman conquered all difficulties, and became a profound jurist, and an eminent authority in the science, whose very aspect seemed to his youthful mind so extremely forbidding.

Mr. Cruise's Digest is principally remarkable for the perspicuity of its analytical arrangement. It has but little original matter, the 'ita lex scripta est' seems almost exclusively to have guided his pen; and we are often led to regret that points of difficulty, and many which still remain *veritate questiones*, are frequently, either not at all noticed by him, or so slightly, as to furnish no new light. We should be at no loss to point out numerous instances of this defect, were such extensive legal criticism within the design of our volume. This Digest was first published in 1804, afterwards in 1807, with some additional chapters, and other considerable improvements. The fourth and last English edition, is by Henry Hopley White, esq. in 1834. The work has been carefully revised, and much improved, by the addition of numerous cases, and the late important modifications of the real law. There have been four American editions, the best are by Edward D. Ingraham, in 1823, with references to American decisions: and the fourth edition in 1834, from the third London edition, by Thomas Huntingdon.

(Note 6.) OF MODERN TENURES, AND OF LAND TITLES IN THE UNITED STATES.—Our student having become fami-

liar with the English doctrine of tenures, and land titles in general, has still before him an extensive subject, having the common law for its basis, but, in its principles and practice, altogether dissimilar, and peculiar to our country. The establishment of colonies in a new world could not fail to create a primary regard for the enjoyment of landed property. The modes in which grants by the crown were made, of the jurisdiction and soil; the various forms of the proprietary and provincial governments; the numerous conflicting proprietary or governmental grants of lands, the result either of frauds practised by purchasers, or of the ignorance, and inattention of surveyors; the boundless extent of the lands conveyed, covered, in most cases, with immense forests, and penetrated in every direction, by vast rivers, and numerous streams, and the consequent difficulty of defining with accuracy their boundaries; the loss, decay, and destruction of landmarks; the variation of the compass; the return of lands to the government, by escheats and confiscations, and the enforcement of the conditions of plantations; disregard of the necessary forms in the completion of titles, under the rules of the land offices; the loss of warrants and of certificates; the irregular issuing of grants, without previous surveys, &c. &c. were, each and all of them, very abundant sources of defective titles, which gave rise to an extensive system of legislation, of judicial inquiry, and of customary law. From these, and numerous other causes, there gradually arose a vast body of land law, extremely intricate, and nice; and as curiously refined, as perhaps, any doctrines ever known to the jurisprudence of the mother country. This system of ejectment law, founded on *location*, and on the *practice of the land offices*, in regard to certificates, warrants, surveys, patents, &c. exercised the legal acumen of our most distinguished lawyers,

and tended, in a remarkable degree, to render them skilful, and acute,—and to fashion their minds to the closest thought, and the deepest and most accurate research. Much of this cunning learning continued to be almost wholly traditionary, a *lex non scripta* of great importance, resident only in the fleeting and perishable recollections of those with whom it grew up, from small beginnings, till it became an extensive, and well regulated, though refined system. The like causes, in our western states, have generated a body of law of very similar character with the one alluded to, as of such primary importance in the atlantic states, until after the lapse of more than a century, (the titles becoming settled, and the irregularities cured by legislation or by judicial decision,) *location* law has nearly disappeared in the land of its birth, and is now to be sought chiefly in the courts on the other side of the Alleghanies. Much of this law, moreover, though no where systematically treated, may now be found in our numerous volumes of reports; and in the notes or essays appended to various editions of the statute law of the states; and, in some degree, in several treatises on titles of the law of landed property in this country—and finally, in Dr. Tucker's edition of Blackstone. How desirable it is that this knowledge, now grown into a science, should be set forth in a more matured, regular, and elementary form, by some conscript father of the law, can only be understood by those who have carefully examined the early volumes of the Maryland and Virginia reports—and those of Hardin, Overton, Hughes, Pecke, Haywood, Bibb, Marshall, &c. &c. of more recent times, and of the more recent states of our union. In addition to these sources of information on the subject of this note, we refer the student to the following:

WORKS OF REFERENCE ON THE TENURE, AND LAND TITLES
IN THE UNITED STATES.

1. Lecture LI. Kent's Commentaries, vol. iii. 'Of the Foundation of Title to Land.'
2. Story's Commentaries on the Constitution, vol. i. book 1.
3. Sullivan's History of Land Titles in Massachusetts, page 1 to 64.
4. Kilty's Land Holder's Assistant. [*Baltimore*, 1808.
§ A very thorough and practical work.]
5. McHenry's Ejectment Law of Maryland, relating to the title and location of land. [*Frederick*, 1822.]

(Note 7.) ESTATE FOR YEARS.—The student should bear in mind that under the title, 'Estate for Years,' the learned author treats principally of the nature of this estate, in reference to the quantity of interest enjoyed by such a tenant. The boundaries which separate the various divisions of law, did not permit Mr. Cruise to treat of the relationship of landlord and tenant, a learning of great importance, and which gives rise to perhaps more legal controversy than any other known to the law. Nor will he find this subject treated under the head of 'Lease,' as a component part of the generical title 'Deed,' in the fourth volume of his Digest. The student being at this time engaged in the extensive doctrine of *real rights and real remedies*, must postpone, for the present, his examination into the important learning which grows out of the above mentioned relationship. He will find the most approved sources of this knowledge pointed out to him in their proper place in this Course. They more appropriately belong to the head of personal law, and are found in all the treatises on the law of personal actions. But there are separate

treatises on the subject, the most recent and approved of which it may not be out of place here merely to mention.

Woodfall's Law of Landlord and Tenant, with Precedents. SEVENTH edition, with considerable alterations and additions, by John Tidd Pratt, 1 vol. royal octavo. London, 1829.

Bingham's Digest of the Law of Landlord and Tenant, 1 vol. 8vo. London, 1821.

Paul's Law of Landlord and Tenant. Ninth edition, 1801.

Brady's Treatise on the Law of Distresses. ADAMS' edition, 1828. [Vide, 1 vol. of 'Law Library.' Philadelphia, 1833.]

Comyn's Treatise on the Law of Landlord and Tenant. CHILTON'S edition, [vide 6 vol. 'Law Library,' Phila. 1834.]

(Note 8.) ESTATE FROM YEAR TO YEAR.—The remarks made in the preceding note apply with equal force to this practical and very important branch of law. The entire doctrine is of recent growth; and the subject of '*Notice to quit*,' which forms the most material part of this law, will be found ably treated in Adam's on Ejectment—in Woodfall's, and particularly in Comyn's Landlord and Tenant. Book 3, chap. 1.

(Note 9.) ESTATE BY CURTESY.—This subject involves some of the most abstruse doctrines of the law. In common with the law of Dower, it embraces the entire learning of *seisin, disseisin, abatement, &c.* as also incidentally, the equally extensive doctrine of lawful *marriages*. The law relating to *seisin* is alone sufficient, were it fully treated, to occupy a volume, and that of marriage is quite as multifarious, and full of difficult questions. All of these subjects are ably and learnedly treated, and yet in a very elementary form, in the late works of Park, on the Law of Dower, and Poynter on

Marriage and Divorce. These may be advantageously referred to by the student, in connection with the chapters on Curtesy and Dower, in Cruise's Digest.

(*Note 10.*) **ESTATE IN DOWER.**—The observations in the preceding note on the subject of Curtesy, apply with, perhaps greater force to that of dower. The admirable treatise on that law by Mr. Park, has exhausted its learning, as far as relates to the English doctrine. Considerable modifications, however, have taken place in the law of dower, in most of the American states; the principal of which may have been noted by the student when engaged in reading Kent's Commentaries, or the editions of Blackstone, by Dr. Tucker, or judge Reed. Much information respecting these changes may also be easily found by consulting Griffith's Law Register, under the head of Dower and Curtesy.

(*Note 11.*) **ESTATE IN JOINTURE.**—The law of jointure is, practically, very little known to American jurisprudence,—but its learning is so systematic, curious, and acute; and so nearly allied to other more useful topics of the real law, that we scarce know of any branch of the English law, which is, at once so little used by us, and yet so proper to be studied for its collateral advantages.

The law of settlements of every kind, is indeed, comparatively, of rare occurrence in our country; but, as wealth increases, jointures and settlements, if not as artificial and complex as those of England, cannot fail to become more frequent, among us than they now are, and to derive their essential character from the law on these subjects, of the mother country. Law, as a science, accommodates itself to the growing requisitions of the times; and that which may be only curious learning, or at most, but law in *posse*, may,

in a very short time, in a country like ours, become law *in esse*; so that young students of the present day, especially in the more populous and wealthy parts of our land, in time, may have occasion for the practical use of much that is now read, only with the incidental view we have mentioned. The law of jointures is recognized in most of the states of the union. We will mention a few of these recognitions, to which the student may refer, in order to obtain an idea of their general nature. Colony Law of Massachusetts, 1644. 7 Mass. Rep. 153. New York. Revised Statutes, 1 vol. 741, sec. 9, 10, &c. Swift's Dig. Connecticut Law, 1 vol. 86. Statute of Conn. 1672. Treadwell's Laws of Conn. p. 259. Report on British Statutes in 1808, to the Legislature of Pennsylvania. 3 Binney's Rep. 619. *Shaw v. Boyd*. 5 Sarg. and Rawl. 311. 1 Dallas' Rep. 417. 4 Hen. and Munf. Virginia Rep. 23. 3 Hen. and Munf. 279. Statute of Virginia, 1794, sec. 11. Statute of Kentucky, 1796. 1 Harr. and McHenry's Maryland Rep. 568. Kilty's British Statutes, in force in Maryland, page 231.

(Note 12.) THE LAW OF MORTGAGES.—This is a most extensive doctrine in the American, no less than in the English law,—from which it differs in no very essential particulars, most of which will be found in the American editions of English law treatises. The subject has been much and ably written on. The following are the works of most note. Coventry's edition of Powell, on Mortgages, 2 vols. 8vo. Rand's American edition. Wilmot on Mortgages, with Precedents, 1 vol. 8vo. 1819. Coot's Treatise on the Law of Mortgage, 1 vol. 8vo. Trollope on the Mortgage of Ships, as affected by the registry acts. London, 1823, 1 vol. 8vo. Trowbridge's Reading on the Law of Mortgage. 8 Mass. Rep. 554. Appendix.

(*Note 13.*) **THE LAW OF REMAINDERS.**—The law of remainders may be regarded as a system peculiar to the jurisprudence of England.* It has not its likeness, (*as a system*) in the code of any other nation, ancient, or modern. Though composed of an infinite variety of materials, the gradual accretion of ages, it is a structure of the most surprising beauty and regularity, in which the several parts are admirably connected, and mutually dependant upon each other. Being principally of feudal origin, and of an age peculiarly addicted to technical and refined distinctions; and being, moreover, the progressively elaborated work of many minds, through a long period of time, we have reason to be struck with its symmetry, and with the surprising rareness (if there be any) of conflicting elements. The Roman law, cannot, perhaps, be said to be entirely unacquainted with remainders, literally so called. The likeness to a remainder, however, is not to be found in either the vulgar, pupillary, or quasi pupillary substitutions,—which were nothing more than the substitution of one taker, in lieu of another, in consequence of the non-acceptance, or incompetency of the first appointee,—and therefore would more resemble one species of executory devise, or conditional limitation. But the fidei commissary substitution agreed in many essential points, with our remainders; and Mr. Brown, in his volume on the civil law, shows conclusively, that remainders in their simple form, unaffected by the rigid rules which we refer to the feudists, were in some degree known and practised among the Romans.†

The truth, as we apprehend, is that the doctrine of remainder, or the subdivision of the entire interest of an estate so

* Not excluding, of course, the United States.

† 1 Brown's Civil and Admiralty Law, 213, &c. and vide, also, Cornish on Remainders, p. 3.

that various persons may successively enjoy it, in various portions of interest, is so natural a suggestion of the mind, that it will be found, in its primitive form, to have belonged to the jurisprudence of most countries; but the origin of feudal property, and the consequent limitations on its alienation, introduced such a series of complex refinements, as to cause us to lose sight of the subject in its original simplicity. As a *system* it is certainly peculiar to the common law; but as a mode of limitation, it seems to be going quite too far to restrict it either to the law of England and the United States, or even to modern times.

(Note 14.) FEARNE ON REMAINDERS.*—This work, modestly denominated an 'Essay,' is a masterly production on a doctrine, generally admitted as one of the most abstruse in the whole system of English law. The enlightened and scientific manner in which this difficult topic has been treated by Mr. Ferne, has imparted to it an interest before unfelt, and strongly illustrates the infinite importance of a progressive and strictly analytical method in the discussion of dry and abstruse doctrines. The law of remainders and executory devises is proverbially the most recondite of all legal subjects; but in the luminous pages of the 'Essay,' all is as clear, unembarrassed, and even as simple, as the nature of its topics possibly admitted. It was originally a small and unpretending volume, which appeared in 1772, and new editions were published in 1773, 1776, and 1791. The subject was then confined to the learning of remainders, but in 1795, a new edition appeared with notes, by Mr. Powell, embracing Mr. Ferne's essay on the law of executory devises;

* Vide the succeeding note on Cornish on Remainders, for further remarks on Mr. Ferne's work.

both of which were considerably improved by a further edition in 1801. The one now in constant use, published in 1809, is by Charles Butler, esq. who has added numerous notes, and an analytical index. Mr. Butler's great legal learning, especially on the subject of the realty, gave assurance of the excellence and utility of his annotations; and in the main he has certainly redeemed the pledge. It must be conceded, however, that the notes are sometimes objectionable, as being little else than mere repetitions of the language and ideas of the author on whom he comments. The analytical index is extremely valuable, not to students only, but to lawyers, in the course of their professional researches; but it is to be regretted that the index is not alphabetical. A much more valuable aid, however, of this sort, is Mr. Coote's work, published in 1814, entitled 'An Analysis of Mr. Fearne's Essay on Contingent Remainders and Executory Devises, and of Mr. Butler's Notes.' Every topic to be found in the text and notes, is concisely abridged by Mr. Coote, and the whole is alphabetically arranged. This small volume should ever be in view, whilst the student is engaged with the great original. Butler's edition of Fearne's Essay, has been republished in this country, and is probably accessible to most students; but if not, the edition of 1801, aided by Coote's Analysis, will answer every purpose.

The profound learning, and apparently logical disposition of this much admired work of Mr. Fearne, have, until lately, almost closed the eyes of his readers to some minor errors, which undoubtedly are to be found in his pages. His arrangement of a very abstruse subject; the orderly classification of contingent remainders, as also of executory devises; the clearness and sprightliness of his style, and the fact, that, the field, until then, had remained, comparatively, unexplored,

all united, not only to beguile the learned author into some erroneous views of his subject, but, as is usual, have tended to perpetuate, and to consecrate them. We entirely concur with one of the best of judges, on this and all other matters touching our science, and its bibliography,* that 'it was reserved for Mr. Fearnæ to honour the profession by a treatise so profound and accurate, that it became the guide of the ablest lawyers, yet so luminous in method and explanations, that it is level to the capacity of every attentive student; and this *chef d'œuvre* will for ever remain a monument of his skill, acuteness, and research. All that the most accomplished lawyer can reasonably hope is to add a commentary of new cases and principles as they arise, without venturing to touch the sacred fabric of his master.'

The spirit of this eulogium on the merits of this work, is certainly just; and we concur in it, as we do not conceive that Mr. Fearnæ's partially erroneous classification, and the occasional want of legal accuracy in his definitions, can be said to affect the 'fabric' of his work; nor should it lessen our admiration and gratitude for the deep skill and ability with which he has treated his subject, and the real benefit conferred by him on the profession. In works of such superior excellence, however, it is due to the student, to apprise him of the fact that, even in them he is not to rely on total exemption from error. On more than one occasion we have stated, that it does not fall within the scope of this work to enter into legal discussions: but where the bibliography of our science is so essentially connected with the topics treated of, as to render it difficult to impress the student with just and accurate views of an author; and especially where his reputation is so pre-eminent as to render it probable that students will be little

* Mr. Justice Story.

inclined to criticise, but rather to take all on trust, it becomes our duty to intimate at least, our opinion, and to point out briefly, what have occurred to us, or to others, as erroneous statements in the law. In so doing, however, we need not note every objection (with humility be it said,) which might be made, and be fully sustained; nor, as to the few which we shall make, need we justify them by any elaborate discussion: all that, on such an occasion, we can with propriety aim at, is to advert to them, with such brief remarks and authorities, as may render the objections comprehensible, and show that they are not without other sanctions than the humble author of this volume. We are the more inclined to present them to the student, and to rely on them as valid, because, in most instances, they have occurred to us without the least previous suggestion from others; but have been subsequently gratifyingly confirmed, by recent productions of great respectability.

1. On the doctrine of *abeyance*, whether of the inheritance, or of the freehold, and as to the distinctions, in regard to the former, between conveyances at common law, and those which operate by way of use or devise, it behoves the American student to have defined and accurate ideas. These doctrines, though mainly of feudal parentage, have been frequently and ably discussed in our courts. Mr. Fearné's opinion that abeyance is unknown to the law, met with a prompt opposition; and, as we suppose, must now be regarded as utterly repudiated. That the fee is not in abeyance during a contingency on a conveyance to uses, seems at all times to have been freely admitted. So also, in the case of a like contingency created by devise, though lord Talbot was inclined to regard the inheritance as in abeyance,* yet it may now be considered as settled law, that there is no abeyance of the fee in any case

* *Carter v. Barnardiston*, 1 P. Wms. 517. *Vick v. Edwards*, 3 P. Wms. 371.

arising on devises; and that they, and uses stand in this respect, on precisely the same grounds. But Mr. Fearne desired to extend the doctrine of *non-abeyance* equally to conveyances at common law; and treats the subject as if the question remains still open for discussion; and as if the common opinion, that the fee in such cases is in abeyance, is a traditional error, unsustained by express judicial sanction, and based on a mistaken application of first principles. In reply to this, (though we do not mean to argue the point) it may be asked, what better evidence can be required of the law, in a given case, than uninterrupted judicial assent, and the concurrent opinion of legal writers, through a series of ages? But we think the whole of Mr. Fearne's reasoning on this point essentially erroneous.* The very authorities cited by him for explanation, are based on the doctrine of abeyance, and are by no means explained away. But, were the point still questionable, the operation of feoffments and grants; the law of tenures; the doctrine of conditions; and the well known distinction between a reversion, and a possibility of reverter must all be abandoned, in some of their essential principles, before Mr. Fearne's reasoning (that nothing passes from the grantor but the particular estates, until, and unless the contingency arises,) can be sustained.†

The American law student should also bear in mind that, although feoffments are no longer in use with us, and conveyances under the statute of uses are the most usual; still the doctrine of abeyance applies to a *grant*, which is a common law assurance. In some states, all conveyances are made to operate *as grants*. So also, in states where this is not the

* Vide Butler's Fearne, §59, sec. iii.

† For further information on this subject, vide Preston's Abst. of Titles, vol. ii. p. 103. 106. Hawkeshead's Essay, 74. 90. Cornish on Remainders, 175.

case, a conveyance to uses inoperative as such, may operate as a grant, and involve in its consequences all of the doctrines of abeyance of the fee and freehold.*

2. In connection with the foregoing subject, we may mention Mr. Ferne's classification of remainders, which we have always regarded as essentially erroneous. Classification, like a logical definition, should ever be based on distinguishing and pervading characteristics. Hence, contingent remainders, in their primary classification, cannot be distinguished beyond two kinds, viz: those which regard unascertained persons, and those which respect contingent events. Mr. Cornish, in his very ingenious Essay on the doctrine of remainders enforces this classification with much zeal, and with all requisite learning. The subject is not rendered quite as clear as it might have been, and as it, no doubt will be, when the author comes to enlarge and improve his work in a new edition,† which we have no doubt will soon be called for. The obvious meaning of Mr. Cornish, though not *exactly* so stated by him, is that contingent remainders may be considered.

I. In regard to their contingency, which may be either

1st. On account of the event on which it is made dependant; or

2d. On account of the unascertained person to whom it is limited.

II. In regard to the assurance by which it may be created; which may be,

1st. At common law.

2d. By use or devise.‡

* Vide 7 Smith's Penn. Laws, 44. 1 Reed's Penn. Blackstone, 365. Town of Pawlet v. Clarke, 9 Cranch, 292.

† Vide Post, 246.—Note.

‡ Vide Cornish on Remainders, 154. 174.

Mr. Fearne's three-fold subdivision of remainders, which are contingent on account of the *event*, is wholly repudiated by Mr. Cornish, and similar objections are also made to it in the London Magazine;* and in respect to the second class, viz: such as are contingent on account of the *person*, Mr. Cornish urges that the illustrative examples given by Mr. Fearne, with one exception, *may* be referred, with more philosophical accuracy to the head of remainders contingent on account of the event. He contends that no other strictly correct example of this second class, has been given, than the usual one of a remainder limited to the *survivor* of several particular tenants: here, says he, the remainder is contingent, merely because it is uncertain which person will be the survivor, and hence entitled to take. In this example the student will perceive that there is no other contingency than that which respects the individual who is to take; and who takes, only because he is the survivor; for the possibility of there being no survivor, that is, that both will die *eo instanti*, is not regarded by the law, as a contingency at all; but on the contrary, there is a legal presumption that one will survive the other. And, as to the only remaining contingency in this case, viz: that which arises from the *power of the tenant of the freehold* to destroy the remainder, by a tortious alienation, this is also a contingency which does not in law constitute a circumstance which gives to the remainder its denomination of contingent. So that in the example stated, the only quality of contingency relates to the person. Mr. Cornish, however, admits that other remainders, *said* to be contingent on account of the person, though in truth referable to the first class, may be permitted to remain under this second, because their *qualities* are precisely the

* Vol. i. p. 120. [This article in the Law Magazine, we have reason to believe is the production of Mr. Cornish, of whose lamented death we had no knowledge, when the foregoing observations were written.]

same; and because, in all of the illustrative examples, it will be found that the contingency partly respects the *person*, and partly the *event*:—and though, even in these cases, it *primarily* respects the *event*; yet he allows them to retain their place under the head of remainders, contingent on account of the *person*, because, their *qualities* are the same with those of the solitary case stated by him, or of such as might be supposed to exist. Had Mr. Cornish introduced these views, as to the illustrative examples of the second class of remainders, in a somewhat different manner than he has done, we should have been better content.

Refined distinctions, when of no practical utility, especially when made only to be abandoned, are still, on some minds productive of mischief. The two kinds of remainders which have been mentioned, do not arise out of a mere arbitrary classification; but involve important practical results: for it is a received doctrine that contingent remainders, denominated such because of the *person*, are not devisable; whereas those which are contingent on account of the *event*, are devisable. We entirely agree with Mr. Cornish in the two-fold division of remainders; but consider as sheer refinement, his cautious admission into this second class, those cases in which he regards the contingency as of a mixed character, that is appertaining to the event as well as the person. This double contingency, the one part 'primary' and 'predominating,' affecting the event; the other 'secondary,' affecting the person, and yet that the former should be disregarded, and the latter place the remainder under the second class, because these have common properties with the solitary, or only apt examples of the first class, appear to us as distinctions without any practical or useful differences; and are of so little import that we think they might have been more appropriately introduced inciden-

tally, or by way of intimation in a note, than in the substantive manner in which they appear. The same remark may perhaps be extended to Mr. Fearnø's three classes of remainders, denominated contingent from the nature of the event; for there can be no essential difference in the remainders themselves, because of the various kinds of events on which they may be limited. Such matters are no just grounds for classification; but still may be advantageously adverted to in the manner just stated. We may here introduce some appropriate remarks of Mr. Cornish, in the correctness of which we fully concur. 'However much,' says that writer, 'Mr. Fearnø's classification of contingent remainders may have contributed to impart to his Essay that beautiful and scientific arrangement for which it is so generally celebrated, it is submitted, that from what has been said, its justness may be amply disproved. For whatever may be *the kind of event*, upon which the remainder is made to depend; whether it be one which must certainly happen or not; whether it determine the particular estate, by forming the boundary of its prescribed duration; or whether it be a collateral appendage to the limitation, forming merely the point of time at which the remainder is to vest in interest; it is contingent for precisely the same reason, viz: the uncertainty of the events occurring before the determination of the particular estate: and since the *nature of the event* does not in the slightest degree affect the *qualities of the remainder*, it follows that Mr. Fearnø's classification is untenable.' And again he remarks 'it will not be denied, that the only reason for affirming one contingent remainder to be of a different sort from another, is a difference in its properties: whereas all three of Mr. Fearnø's sorts are, in *this* respect, avowedly *identical*.'*

* Vide Cornish on Remainders, 180. [And these remarks, as we apprehend are equally just, as far as classification of the different sorts of remainders are concerned,

It will be remembered, as we have already stated, that Mr. Cornish's *secondary* division of contingent remainders, is based exclusively on the properties imparted to them by the nature of the *assurance* by which they are created. If they originate in conveyances to uses, or in devises, the *fee* is not put in abeyance; but if they arise from any conveyance at common law, the *fee* must, during the pendency of the contingent event, be in abeyance. Mr. Cornish remarks, and very justly, on this subject, that, 'Mr. Fearne might, indeed, consistently pass by this distinction, because he has strenuously contended that the *fee* is *never placed in abeyance*.*' And we may add that, in Mr. Fearne's system, the *properties* of the remainders themselves have given place to the *nature of the events*, which led him very naturally into the distribution which he has made; and in which it is evident that he constantly endeavours to make every thing bend to an arbitrary classification; captivating, indeed, to the lovers of method, and of the semblance of scientific arrangement, but erroneous, if philosophically, and closely inspected. Mr. Fearne's division, however, possesses the essential distinctions, viz: of remainders contingent because of the doubtful nature of the event, and of the uncertainty of the person to take; the venial error consists in unnecessarily extending the classification, on a basis which, perhaps, would equally have admitted of still further divisions—and which seems to have induced, in some degree, his theory of abeyance,

although it be fully conceded that Mr. Fearne had not the least idea of limiting contingent events to four sorts, (they being in their nature indefinite,) but that he intended merely to assert that contingent events of all kinds, and however numerous, can only be connected in point of time, with the determination of the prior estate, in the four modes pointed out in his classification. This is evidently Mr. Fearne's meaning; but we do not perceive that it materially varies the force of the objection, which is confined to the classification of remainders into the four genera,—each of which is substantively commented on in that able work, as generically different.]

* Essay, p. 175.

and his erroneous definition of a contingent remainder; a few remarks on which we shall now proceed to give.

3. Mr. Ferne's definition of a contingent remainder is, 'one that is limited so as to depend on an *event* or *condition* which may never happen or be performed, or which may not happen or be performed till after the determination of the preceding estate.'^{*} Now it is evident that this definition does not embrace his fourth class of remainders, viz: those contingent because 'limited to a person not ascertained, or not in being at the time when such limitation is made.'[†] In such remainders it is obvious that the moment the person becomes legally ascertained, there is an immediate capacity to take either the *interest*, or the interest clothed with the *possession*. If for example, the estate be limited to A. for life, remainder to the right heirs of B. it becomes vested in *interest*, the moment B. dies, leaving an heir,—and if the remainder be limited to the survivor of two tenants of a particular estate, it becomes vested in interest and *possession*, *eo instante* that one dies. It consequently follows that this fourth class is either wholly useless, and that such remainders are embraced in Mr. Ferne's other divisions,—or that the contingency alluded to is wholly connected with the *person* to be ascertained as competent to take.

4. Another imperfection in Mr. Ferne's classification, is in his not properly distinguishing between the legal import of the word '*estate*' as distinguished from the word '*right*.' Under his arrangement conditional limitations and executory devises, during the pendency of the contingency, are classed among *estates*: but as the whole estate must necessarily be exhausted, either by its residing still in the creator of the limitations,—or being in abeyance, no *estate* has been created; nothing passes but a *right* to an estate, which is neither a *vested* nor a

* Ferne on Rem. p. 3.

† Ferne's C. R. p. 9.

contingent estate. Mr. Butler has no hesitation in admitting this oversight in Mr. Fearne.* In the case of contingent *remainders* it is obvious that the contingent right may well be denominated an *estate*. These are distinctions which lead to results of practical importance; but which we cannot notice, as it would be foreign to the immediate object of the present note.

5. Nor is Mr. Fearne entirely correct in considering that his division of estates into *vested* and *contingent*, embraces all possible interests. Mr. Preston shows very satisfactorily that a further division of interests, viz: into *executed* and *executory*, is essential, since there are executory interests which are neither vested nor contingent. All contingent interests are necessarily executory, but all executory interests are not contingent, nor need they be vested. We mention this in connection with the preceding, as it is nothing more than an extension of that objection. We have not time to dwell on it further, or to illustrate it by examples; but refer the student to Preston on Estates,† and Preston on Abstracts of Titles.

6. In Mr. Fearne's first sort of contingent remainders, the student finds that the remainder depends entirely on a contingent determination of the *precedent estate itself*. As the contingent event *does of itself* determine the prior estate, it has been supposed by some writers, that this species of interest partakes more of the nature of a conditional limitation, than of a contingent remainder. In this idea we cannot concur. The student will find it ably considered by Mr. Douglas, in a note appended to the case of *Goodtitle v. Bellington*;‡ and by Mr. Hawkeshead, in his *Essay on the words*

* Vide Butler's Fearne, pages 1, 2. Notes (a.) (b.)

† Vol. i, pages 63. 88.

‡ Doug. Rep. 725.

'Issue,' &c.* as also by Mr. Cornish, who again differs from Mr. Fearne.†

Mr. Fearne, in speaking of the application of the rule in Shelly's case, where the freehold is limited to A. during the life of B. in *trust* for B. remainder to the heirs of the body of A. rejects the application of the rule. The error here consists in not distinguishing in this case, between courts of law and equity. In the former the freehold and inheritance would certainly coalesce under the rule in Shelly's case; in the latter, they would not, because courts of equity notice and protect trusts,—whereas at law the legal estate is alone regarded. The student will find this noticed by Mr. Butler.‡

The foregoing remarks on some of the erroneous, or doubtful matters, contained in Mr. Fearne's elaborate and admirable treatise, are now adverted to with the sole view of exciting the student's critical acumen, when entering upon the careful study of that justly celebrated volume. His previous elementary acquaintance with the doctrine of remainders, will be quite sufficient to enable him to understand the remarks we have just made: and our brief, and concentrated view, of the objections which have been taken to this treatise, will enable him to read it, with just ideas of its high claim to his confidence; but with such knowledge of its probable defects, as may guard him against a too implicit reliance; whilst it stimulates him to a more close and thorough investigation of the many abstruse, (and also the few erroneous or doubtful) points in which the volume abounds.§

Parting with this, perhaps, too protracted legal inquiry, we proceed to such a brief notice of Mr. Fearne's life and character, as the scanty materials afforded us, will allow. These,

* Page 275. † Cornish on Rem. 55, &c. ‡ Butler's Fearne, 35.

§ Vide the succeeding note for some further remarks on Mr. Fearne's doctrines.

though familiar to some of the gentlemen of the profession, are perhaps, inaccessible to many; and to the student at least, may possess the interest of novelty. Charles Fearne was born in 1739, and died in 1784, aged about 45. The death of his father left him with very limited means, whilst a student in the Inner Temple; and the little patrimony which he had, he promptly relinquished to his brother and sister; having conceived that his education at Westminster school, and a few law books presented to him by his father, had been attended with an expense fully equal to his portion of the estate. When at school, he had been particularly remarkable for his attachment to mathematics, the physical sciences, and the classics; and Mr. Butler, in his *Reminiscences*, states that Mr. Fearne 'was a general scholar, profoundly versed in mathematics, chemistry, and mechanics.' He obtained a patent for dying scarlet, and solicited one for a preparation of porcelain. He had composed a treatise on the *Greek accent*; another on *the retreat of the ten thousand*. A friend of his having communicated to an eminent gun-smith a project of a musket of greater power, and much smaller size than that in common use, the gun-smith pointed out to him its defects, and observed, that 'a Mr. Fearne, an obscure lawman, in Beame's buildings, Chancery lane, had invented a musket, which although defective, was much nearer to the attainment of the object.' Mr. Butler continues to state, that Mr. Fearne mentioned to him 'that when he resolved to dedicate himself to the study of the law, he burned his profane library and wept over the flames; and that the works which he most regretted were the homilies of St. John Chrysostom to the people of Antioch, and the comedies of Aristophanes.*' How zealous must have been his devotion to the science, and how assured must he have

* Vide Butler's *Reminis.* vol. i. 118, 119.

been of the necessity of this singleness of heart, to insure complete success, when he could at once separate himself, as he then supposed, forever, from his earliest attachments, and from all the natural biasses of his mind, and restrict himself to a study, imposed by necessity, and one, so generally esteemed peculiarly arduous and uninviting! And how sensible and prophetic was his choice! Who would have *known* Mr. Fearne, the mathematician, the chemist, and the mechanist? Or who would have heard of his Greek essays, had not his immortal labours in the science of remainders and of executory devises, added an interest and a lustre to all his other doings? He came to the bar late; and his career was distinguished rather by solidity, than brilliancy. His legal opinions are remarkable for clearness, brevity, and accuracy: and his posthumous works, published by Mr. Shadwell, in 1797, consisting of these opinions; a Reading on the Statute of Inrollments; and his celebrated argument in the case of the representatives of gen. Stanwix, show that the once 'obscure lawman of Beames' buildings,' became an eminent and philosophical practiser of the most 'honourable, laudable, and profitable,' of all professions; and his works generally have left him a name that will be highly revered as long as our science endures,—and an example, also, which is worthy of all praise, and of all emulation.

It is related of Mr. Fearne that his resolution to devote himself singly to the law, was occasioned by pecuniary losses, which he encountered in unsuccessful experiments to carry into effect his supposed discovery of the art of dying morocco; and these, together with his characteristic indifference, through life, to money; and his devotion to study, left him, at his death, with but little more of it, than what he had when he first came to the bar. How much his memory was respected,

and the need in which he left his widow, are indicated by the fact that his posthumous works, consisting only of one volume, was published by the aid of a subscription, a most generous one, indeed, the list of which records the numerous names of most of the legal characters of the day.

Although Mr. Fearne devoted himself, with extraordinary zeal, to the acquisition of legal learning; and, whilst a student of law faithfully remembered *why* he had committed to the flames his 'profane library;' yet the force of his natural inclinations revived, and became too strong for him, a short time after he came to the bar. He then resumed his philosophical studies and employments, and apportioned to his clients, (but still with zeal and industry,) just as much time, and no more, as enabled him to derive from that source sufficient to supply his absolute demands. During these hours of philosophical retirement, he invented a machine for transposing the keys in music; also several improvements in optical glasses, and in the art of dying; the principles of which, it is said, he unhesitatingly communicated to others, engaged in like pursuits, and gave to many the results of his laborious experiments.* Mr. Fearne's first work is a chart of landed property in England, from the time of the Saxons; displaying at one view, by means of lines and coloured columns, the *tenures*, mode of *descent*, and *power of alienation* of lands at all times during this period. It was published in 1769, and an improved edition in 1791. His published opinions relate, almost exclusively, to the law of real estates. His Reading on the Statute of Inrollments, though it has been, in some respects, found fault with, contains much to recommend it, particularly his view of the true and technical meaning of the word *hereditament*,—and his reason for regarding *remainders* and *reversions* as equally

* Vide Chalmers' Dictionary, vol. xvi. p. 159, &c. 4 Law Mag. 115.

entitled to be ranked with hereditaments, and we suppose *incorporeal*, as those which are enumerated by sir William Blackstone.

(*Note 15.*) CORNISH ON REMAINDERS.*—William Floyer Cornish, author of the *Essay on Remainders*, on which we are now to remark, was a young lawyer of very high promise; who during the fleeting span of only three years, which intervened between his call to the bar, by the society of the Inner Temple, at Hilary term, 1827, and his death, which occurred in August, 1830, reaped many laurels, and became distinguished as an author on several of the most recondite branches of the law. Such was his zeal in the cultivation of the learning of our science, as found in the writings of Coke, and Fearne, and Butler, and Preston, that he commenced authorship, and published a treatise on the law of Uses, several years before his admission to the bar. In the short notice made of this interesting young author, in the *London Magazine*, and to which we are in some degree indebted in our present biographical remarks, lord Coke, next to Shakspeare, is said to have been ‘the god of his idolatry;’ and that next to the law his principal attention had been devoted to the best writers of the golden ages of English literature, those of Elizabeth and of Ann.†

In a few months after Mr. Cornish had been admitted to the bar, he published his *Essay on the law of Remainders*; and in 1829, appeared his *Treatise on Purchase Deeds*, a very creditable production, better suited, however, for English conveyances, than for this country: and in 1830, he was industriously engaged in preparing a treatise on the law of Settlements, when death terminated his labours, and his usefulness, but we

* Vide the preceding note.

† 1 vol. *Law Mag.* 518.

trust not his fame; that being consecrated by his works, which though few, will be protected by the discerning judgment and grateful recollections of his readers, and especially by those who kindly remember his early death,—the difficulties of the science in which he was engaged,—and the originality and depth of his researches. There is something most grateful in the rare opportunity of bestowing praise on youthful industry, and modest worth; on the conquests of devoted zeal, over the impediments of science; on those clear insights into the hidden recesses of knowledge, which baffle ordinary minds, or intimidate customary exertion; and finally on that perspicacity which dispels the illusions that environ authority, and high names, and enables one, so young as was Mr. Cornish, successfully to point out the consecrated errors of such a master as Mr. Fearne. In no science has biography been so sparing of her researches, as in that of jurisprudence. Industry, the most unwearied; genius, the most exalted; legal attainments, the most minute and varied; morals, and piety, and amiableness, the most pure and captivating, have all sunk into the tomb, often without a memorial even of the day of their birth, or that of their death: and the poor apology tritely given, is, that the lives of lawyers must necessarily be but a brief chronicle of ordinary events. That this is a great mistake we have no doubt; and we cannot but think that the moral influence, and the pleasing recreation which would be afforded by even legal biography, would render it popular, and consequently profitable, no less in fame than lucre, to those who should dedicate themselves to this long neglected service. But to proceed to Mr. Cornish's Essay on Remainders. The student will find from our remarks, in the preceding note, on Mr. Fearne's arrangement of contingent remainders, that Mr. Cornish fearlessly aims at an entire change in that long accepted

classification. His views are stated with modesty, but with that confidence which an accurate knowledge of his subject justly inspired. But, let it not for a moment be supposed by the student, that this author desired, or contemplated, to diminish the value and merited reputation of Mr. Fearne's treatise; on the contrary, his knowledge of the subject, in common with others, being mainly gained from the pages of that great work; and his admiration of its learning and various excellences, being in no degree stinted, he presumes to think for himself, and differently from Mr. Fearne, on some subjects; and, if successful in all of his views, he does not undermine the edifice, because, in truth, Mr. Fearne's Essay, though *formally* built on a certain classification remains a stupendous fabric, should every part of his three-fold formal division of remainders, contingent from the nature of the event, be utterly demolished. It is not possible, within the compass of a note, to explain, satisfactorily, Mr. Cornish's views; and to show how much he has done for the subject of remainders, by many acute and very philosophical suggestions and amendments; and how it is that his new classification may be maintained, without materially impairing the usefulness of Mr. Fearne's treatise. The fact is that the two systems might be combined with only a little variation in the phraseology of Mr. Fearne's arrangement; and profitable results would accrue from each system. But passing from this, Mr. Cornish's Essay contains a variety of entirely new matter, or at least of such combinations of well known elements, as produce new and striking results. After tracing, from the earliest English history, the progress of the law of settlements, a topic somewhat connected with that of remainders, all of which is in his introduction; he treats, in his first chapter, of the nature of a remainder, *analytically* applied to the learning of conditions, of future

uses, conditional limitations, and executory devises; points out the true distinction between remainders, and these several modes of limitation; and concludes with a *synthetical* definition of a remainder, deduced from the preceding matter.

In this chapter he adopts, for the moment, lord Coke's definition of a remainder, which he makes the topic of an able commentary, illustrative of its inaccuracy, and promises at the close of the chapter his own synthetical definition, which shall avoid the defects of the one he has commented on. The learned author justifies this course by stating that 'as a definition is the result of *examination*, it ought, in the order of things, to *follow*, not to *precede* it.' On this point we are inclined to think differently. It is to be presumed that before an author proceeds to write, he has mastered his subject sufficiently at least, to give his synthetical definition. But, if an author (as is sometimes the case) writes himself into a thorough knowledge of his subject, and is only then capacitated to frame his definition, it may still be advantageously placed in the initial chapter of his work. It seems to us better, in all cases, that the definition *relied* on, should precede the development of the subject: that it should be full and synthetical, so that it may shadow forth the essential properties of the matter defined; and be the subject of perpetual commentary; and that the total subsequent examination may be little else than an amplification of the previous definition. The first chapter is divided into fifteen sections, which treat of all the nice questions which relate to the technical and feudal nature of a remainder, as connected with the particular estate. There is a great deal of ingenuity and originality in the views taken in this chapter, as well as in the entire work: and though we greatly admire the production as is evident from what has fallen from us in the previous, and in the present

note, there are many doctrines advanced by him in which we by no means concur. It must be confessed that his zeal has occasionally betrayed him into untenable and even glaring refinements, some of which must have occasioned the rather cavalier remark of the learned and amiable commentator on American law, in one of his notes;* for we find that on several other occasions he speaks of Mr. Cornish's learning and acumen, with marked respect.

The author's inquiry into the *abstract nature of a remainder*, without reference to its vestedness or contingency, is very satisfactory; and is accompanied with the discussion of various topics, which, as he remarks, were never before brought together.

His definition of a remainder, with which he closes the chapter, is 'an estate in lands, hereditaments, or chattels real, limited to one who may take a new estate therein on the natural determination of a particular estate in the same subject matter, created either in fact, or in contemplation of law, together with such particular estate, and forming, to certain purposes, but one estate therewith.' We have no objection to make to the foregoing definition, except that we are at a loss to comprehend why *tenements* are not equally susceptible of being limited by way of remainder, with the other three subjects mentioned. Taking the word tenement, *strito sensu*, as contrasted with the others, also considered in the same strictly technical sense, and which may be illustrated by any *incorporeal interest for life*, we perceive no reason why it may not be limited in remainder. The grantee of a *feign for life*, for example, has neither *land, hereditament, nor chattel real* in the *res*; but he may, no doubt, grant it to A. for twenty years, remainder to B. for the life of the grantor of the remainder;

* Vol. iv. Kent's Commentaries, 239, note b.

and if so, the definition is defective in thus, *ex industria*, omitting the word tenement. The chapter is replete with the most subtle learning; but, on the whole, we respect it, in common with the residue of the work, as generally philosophical; and, with some exceptions, as critically and authoritatively correct. The second chapter treats of *vested* remainders, which the author conceives has not been hitherto discussed in detail. His definition, however, of a vested remainder is, as we conceive, by no means a happy one. He says, 'a vested remainder may be defined to be a *remainder*, which is simply limited to take *effect* upon the determination of the particular estate.'^{*} It is objectionable, we think, in several respects. It imparts no idea as to what a *remainder* is; nor in what respect it is *vested*; nor how that which *is vested*, may subsequently become clothed with the *possession*; nor does it state what it is that is to take '*effect*, upon the determination of the particular estate.' The author of course alludes to something beyond the mere previously *vested interest*, and this can be nothing but the *possession*: that possession, however, he insists, *needs not* vest immediately, in all cases, upon the determination of the particular estate; which doctrine seems to come in collision with the definition. If so the following definition, which we submit, may perhaps, avoid these difficulties; *sed omnis definitio periculosa est*. If we understand Mr. Cornish in respect to his doctrine as to taking actual possession, and if we fully concurred with him on the point, we should then define a vested remainder to be, *a portion of an estate in either land, tenement, hereditament, or chattel real, so limited, after a previous particular estate, created at the same time, as to VEST THE INTEREST, but postpone the possession, either to the time of the determination of the previous estate, or in SOME SPECIAL*

* Cor. on Rem. 98.

CASES, to a period subsequent to the ending of that estate; but which possession, (intervening between the determination of the particular estate, and the ACTUAL vesting of it in the remainder-man,) is not a vacant possession, or one in abeyance, but remains in others, until the period arrives in which he in remainder is, by the terms of the limitation, or by other circumstances, competent to take the possession.

The foregoing definition, we confess is a very long one; but, we apprehend, this is attended with less inconvenience than were it terse, but pregnant with erroneous innuendoes. If Mr. Cornish be correct in departing from Mr. Fearne, who conceives it to be a pervading and *universal* criterion distinguishing a vested from a contingent remainder, that in the former there must be a present capacity to take the *actual possession*, *eo instanti* the particular estate determines, be the cause of that determination what it may; his doctrine would seem to require the emendation we have made in his definition. There appear to be some cases, though of rare occurrence, in which the particular estate, *qua such*, determines, and yet the remainder-man is not authorized to take the actual possession, though he has the *interest vested* in him.* In such cases, there seems to be a species of *possession in law*, as distinguished from a *possession in deed*, analogous to the seisin in law, or in deed. The doctrine, however, is full of difficulty; and we have thrown out the foregoing observations on it, merely as hints, and by no means as our very deliberate opinions.

In the remaining portions of this chapter, the author treats of the transfer of vested remainders; their destruction, &c. and sheds much light on several knotty points connected with

* Vide Margaret Podger's case, 1 Wms. Saund. 151. Wright v. Cartwright, 1 Burr. Rep. 282. Cor. on Rem. 101, &c. Co. Litt. 298, a.

these subjects. The third and last chapter of the work is, perhaps, the most learned and elaborate: it treats pretty fully of contingent remainders; and advances a new classification, on which we have already sufficiently dwelt in this, and the preceding note. We have enlarged more fully on this volume than we at first contemplated; but as it is really full of interesting and valuable matter on the law of remainders, and is, at present, nearly unknown to the American profession, we have been desirous to bring it more formally to their notice than by merely giving it a place in the syllabus of works recommended.

(Note 16.) LAND, TENEMENT, HEREDITAMENT.—These three significant words arrest the student's attention at an early period of his legal inquiries. We are inclined to believe they have been no where defined with that clearness, accuracy, and philosophical precision, essential to a perfect classification of the objects of real property.

That every object of real property is referrible to one or the other of these three terms, cannot be predicated with legal accuracy: and yet this has been the universal classification.

So likewise, the well known division of *things*, into REAL, PERSONAL and MIXED, has been equally general—and, as we conceive, equally defective. And lastly,—the *decimal* enumeration of INCORPOREAL HEREDITAMENTS has been traditional for ages; and yet there are many species of property which have an equal claim to be ranged under the same head; perhaps as many more as have been usually enumerated. It will be readily admitted that the facility of acquisition, no less than the preservation from error, of any science, depend greatly on the accuracy of its classification, and the precision and expressiveness of its nomenclature. We have long

entertained the opinion that the common law, in these respects, is materially defective; that the jealousy of innovation has perpetuated some imperfections which ought not to have escaped the searching inquiries of elementary writers; and that the natural force of traditionary error has been strengthened by the narrow and misapplied saying—*Stat Anglia legibus antiquis*. The subject is too ample for our note, and is now only intimated, that students may thereby be stimulated to acquire the most perfect legal ideas of the words *things, rights, property, land, tenement, hereditament, real, personal, mixed*,—in order that they may ascertain the imperfections to which we allude, in the usual classification of the objects of property; and in the long accepted decimal enumeration of incorporeal hereditaments.

In conclusion, we beg leave to suggest a few questions to our student, that he may test the clearness and accuracy of his ideas as to the proper classification of the objects of real property, and the imperfection of the existing terminology, and definitions in these respects.

1. Why are the interests, which we legally enjoy in the air, the ocean, the light of heaven, wild beasts, &c.—in reputation, life, liberty, &c.—referred to the head of *rights*, and excluded from that of *property*!*

2. Why are villains regardant, slaves in this country (when attached to the soil,) heir-looms, terms for years, &c. mixed property!

3. Why is an annuity for life, a personal office for life, a dignity for life, &c.—neither land, tenement, nor heredi-

* If our definition of *property* be correct, viz: that **EXCLUSIVE interest which one has in any EXTERNAL thing, be it corporeal or incorporeal**, the student will readily perceive the reason; and also, how it differs from *rights*, which are always characterized by the fact, that, either the entity to which they appertain, is not *external*, or the interest to be enjoyed, is not *exclusive*.

tament; nor property, real, personal, or mixed—and when granted in fee, how shall they be classed?

4. To what head, in strictness, would you refer estates at will, and at sufferance?

5. Suppose A. be seized in fee of the manor of B. subject to a rent charge in fee, which by matter, *ex post facto*, becomes an annuity—and to which manor an advowson is appendant, and also a dignity, as an earldom, annexed. Under what heads would you class the manor, the rent charge, the annuity, the advowson, and the dignity?

6. Why should not the class of incorporeal hereditaments embrace conditions, remainders, reversions, founderships, pews in churches, and shares in companies deriving their emoluments mainly from real estate?

7. To what head would you refer executory devises, uses, trusts, and equities of redemption, when in fee?

8. Under what head of property would you class *scintilla juris*, possibility of reverter, right of entry, title of entry, and a possibility, relating to land, coupled with an interest?

9. Which of the incorporeal hereditaments are always real, which are always personal, which are always mixed, and which may be either personal or mixed?

The foregoing are a few of the numerous questions which might readily be propounded in order to arrive at a more systematic classification of the objects of real property. The utility of such an arrangement cannot be questioned, and yet none would accomplish the object unless the student would thereby be enabled at once to refer every conceivable species of right and of property to its only and proper head.

(*Note 17.*) INCORPOREAL HEREDITAMENT.—Hereditament is a word which embraces the single idea of *inheritableness*.

The *corpus* or *res ipsa* to which this quality is attached, may be inheritable, either *ex natural*, as in the case of land; or, *ex permissione legis*, by way of exception to the general law of the land; as is the case with annuities,* heir-looms, slaves attached to the soil, &c. which, though *personal*, in their nature, and consequently descendible in general to executors, are permitted to go in a course of descent.

Hereditaments are either corporeal or incorporeal—the latter are subdivided into *real*, *personal*, and *mixed*, and are usually said to be of *ten* kinds. In the preceding note we have objected to this decimal division, and intimated our opinion that the list might probably be extended to more than twice that number. There is much accurate learning on this subject in Preston's Treatise on Estates; and some very useful and ingenious views on the various kinds of hereditaments in Mr. Fearne's able Reading on the statute of Inrollments—vide his posthumous works, p. 1. We also refer with pleasure to Angell's Essay on Incorporeal Hereditaments. With the exception of rents, there is no species of incorporeal hereditament of so much importance in American jurisprudence as the learning of ways, easements, and aquatic rights—these topics have been separately and ably treated. We refer the student to the following English and American works on these subjects. WOOLRYCH *on Ways and Highways*, 1 vol. 8vo. London, 1829. Law Library, vol. iv. Phil. 1834. WOOLRYCH *on the Law of Waters*. London, 1830, 1 vol. 8vo. ANGELL *on the Right of Property in Tide Waters and their Shores*. Boston, 1826. ANGELL *on the Common Law relating to Water Courses*. Boston, 1824. The arguments of Mr. Jefferson, and of Mr. Livingston, in reply, on the subject of the

* Vide 2 Preston on Estates, 506. Sed. vide *Aubin v. Daly*, 4 Bar. and Alder. 59, and Chitty on Descents, 12, 196 *contra*, as to annuities.

Batture, at New Orleans. Vide 5 Hall's Law Journal, p. 1 to 300. And for the more matured scholar in the law we refer to the following continental works. AYMI, *De Alluvionibus Tractatus*. Lipsiæ, 1601, 1 vol. fol. BUTEUS *De Fluviatricis insulis, secundum jus civile dividendi*, 1550. POTHEIR, *Traité du droit du domaine de propriété*, p. 100, &c. *La Tiberiade di* BARTOLE DA SASFERRATO *del modo di dividere l'alluvioni*, &c. 1 vol. 4to.—1587. *Traité du droit d'Alluvion*, par M. Chardon. Paris, 1830, 1 vol. 8vo.

Tractatus de Servitutibus. Barth. Cœpollæ, 1759, 4to.

De Servitutibus prædorum. H. F. Dandini, 1741, 4to.

De Servitutibus luminum, &c. Griesinger. Lipsiæ, 1819, 8vo.

Traité des Servitudes ou services fonciers, par J. M. Pardessus. Paris, 1823, 1 vol. 8vo.

Recueil des lois, siglemens et actes de l'administration publique concernant les cours d'eau, par Le Pasquier. Rouen, 1826. And similar works by Dubreuil, 1817. Daviel, 1824. Garnier, 1825.

(Note 18.) ON TITLE BY DESCENT.—The English law of descents, though regulated by only seven canons or rules, each apparently very clear and simple, is still a doctrine, often of much nicety, in its application of these rules to cases as they arise, being frequently dependent on some of the most subtle learning of the feudal times. The questions to which we allude, arise principally out of the first, fourth, fifth, and sixth canons. These involve the subject of *seisin*; the rule *non jus, sed seisinam facit stipitem*; succession *per stirpes*, in contradistinction to that *per capita*; the rule in regard to the actual, or the supposed *first purchaser*; the doctrine or fiction of *feudum novum*, held *ut antiquum*; the exclusion of the *half blood*; the inapplicability of this rule to *estates tail*; the

rule of *possessio fratris, &c.* and its applications; the descent of *remainders* and *reversions*, and how the *whole blood* may be excluded by the half blood; the controversy respecting the preference of class No. 10 over class No. 11, and of No. 11 over No. 14;* the modes of computing the degrees of consanguinity, by the common and canon law, and by the civil law, &c.

It is, indeed, very true that the legislative canons of descent generally adopted in this country, have aimed at the removal of many of these difficulties; still, it must be admitted, *first* that the English law of descent is so fundamentally blended with the doctrines of the realty, that the American law student cannot neglect it. *Secondly*, that cases of common law descent, or cases involving the discussion of that law, often arise, notwithstanding the statutory changes effected in our law; and *thirdly*, that no lawyer can cherish confidence in his knowledge of the American rules of descent; who feels himself unacquainted with those of the common law, in all of their varied applications. There has been much legislation in this country on the subject of descents; but we believe with less clearness, and more evident unacquaintance with the subject, in its multifarious operation, than on any other doctrine of legislative enactment. Nearly all of the states agree on a few leading rules; but in the details they differ exceedingly. A homogeneous system of the law of inheritance; one which could claim to be national, is certainly very desirable; but is not probable ever to take place. The system of descent, as known in this country, affords eight canons, some of which are operative in all of the states. How extremely refined the subject still remains with us, may be seen by reference to the

* Vide 2 Black. Com. 233. Watkins on Desc. 171 to 200. Hawkeshead's Essay, 203, &c. Reeves' His. Eng. Law, vol. v. 150 to 155.

very curious, elaborate, and very satisfactory treatise of chief justice Reeves,—of which work, perhaps it is not too much to say, that if not read, an American lawyer can scarce be said thoroughly to understand the law of descents of this country. It is written with characteristic simplicity, but still with that fullness of detail, and illustration, which generally mark the other productions of that venerable man.

On the English law of descent, the student will not fail to read Watkins' masterly treatise,—and in the absence of that, Rowe on descent—or Chitty's treatise, which, like all of his other works, is good, but not excellent. The chapter on descent, in Petersdorff's Abridgment, vol. viii. page 33 to 77, contains a very satisfactory arrangement of the subject, and also many valuable notes. There are also, some polite, and collateral matters, in relation to the doctrines of descent and inheritance, which the philosophical student of law ought not to pass by. And though time may not permit him thus to indulge, during his regular studies, yet in less consecrated hours, or in after times, he may embellish his legal mind, with a careful examination at least, of some of them. We allude principally to such topics as the following: the law of intestate succession among the Hebrews, Greeks, Romans,* the Mahomedan law,† the Hindu law of successions,‡ succes-

* Vide Hale's His. Com. Law, chap. xi. Sir Wm. Jones' translation of the speeches of Isæus, in cases concerning the law of succession to property at Athens, with a prefatory discourse, notes critical and historical, 1779, 4to. vide his works. Taylor's Civil Law, 537 to 544. Montesquieu, book xxvii. Kames' Historical Law Tracts; Tract cxi. p. 114 to 154. Tract xiii. p. 402 to 416. Vide also that truly admirable and philosophical Essay, entitled, 'Considerations on the Law of Forfeiture,' *passim*.

† Translated from the Arabic, by sir Wm. Jones, 1782, 4to.—vide his works.

‡ Translated from the Sanscrit, by Colebrooke, 1796; vide his Digest of the Hindu Laws. London, 1801, 3 vols. 8vo.

sions in France.* The arguments in favour of, and against primogeniture.†

(Note 19.) ON TITLE BY DEVISE.—The law of devises is a very important and comprehensive branch of our jurisprudence, though it, in common with many other departments of the common law, has been considerably modified and improved by legislation in the various states of our Union. Still, it is mainly dependant on the English system. During several centuries the courts have been actively employed in adjudicating on questions of devise, out of which has arisen an extensive, orderly, and varied scheme of law, which taken in its integrity, comprehends a very large portion of the most refined learning in the law. Among many other abstruse subjects, it embraces the whole learning of *executory devises*; and also the larger number of the inquiries under the *rule in Shelly's case*, which have originated in devises. *Will* is a generical term, and imports a disposition of real and personal estate, or of either, to be operative only after the death of the maker. The word *devise*, in strictness, refers to such a disposition of *real estate*; and the term *legacy* is strictly confined to a bequest of some chattel—the instrument being then usually called a *testament*.‡ It must be admitted, there is not that fixed precision, so desirable in legal phraseology. A treatise on devises, indeed, is limited to the realty; but a treatise on wills, (or even on testaments,) may be on both, or on either,§

* *Traité*s divers sur les Successions, par M. Pothier, 2 vols. 8vo. Paris, 1812, and the works of M. Pailliet, 1816, 1823, 3 vols. 8vo. of M. Dupin, 1804. M. Malpel, 1825.

† Smith's *Wealth of Nations*, 1 vol. book iii. chap. xi. p. 272. *Edinburgh Review*, July, 1824, p. 353, &c.

‡ But Sheppard in his *Touchstone* uses the word *testament*, as equally applicable to real and personal estate.

§ Vide (Note 8,) on Title iv.

and it cannot be known from the *short title* of the work, whether or not the author treats on real, or on personal wills, or on both. This is some inconvenience, and might easily be avoided, not only by the use of more definite language, but by uniformly treating the two subjects distinctly.

The most noted sources of information on this subject are *Bacon's Abridgment*, 'Devise.' *Comyn's Digest*, 'Devise.' Gilbert on Devises. Swinburne on Testaments and Wills. *Powell on Devises*, 2 vols. 8vo. Jarman's edit. 1830. *Preston on Estates*, 2 vol. 68 to 288. *Fearne on Executory Devises*. Ram's Treatise on the Exposition of Wills of landed property, 1827. *Crosley on Wills*, 1828. *Roberts' Treatise on Wills and Codicils*, 2 vols. 8vo. [This is a pretty thorough but rather irregular treatise on real and personal wills.]

(*Note 20.*) USE AND TRUST.—These titles are clearly and methodically treated by Mr. Cruise. The learning of uses is so intimately interwoven with the history of the law of landed estates in England, and so closely allied to its offspring, trusts, that students must be content to submit themselves to a thorough investigation of what, in truth, is an unnatural, and refined, anomaly, a useless, curious, system, a learned, methodical scheme, of no inherent value—the creature of exigencies, the whole of which might be extinguished, without detriment, and yet so firmly fixed as an integral portion of English jurisprudence, that the entire doctrine is probable to endure as long as even the constitution of that great and meritorious people. We refer the student to the following sources.

'*Lord Bacon's Reading on the Statute of Uses.*' Vide Bacon's Law Tracts, 299. '*Gilbert on Uses and Trusts,*' Sugden's admirable edition, 1811, 1 vol. 8vo. This edition is preceded by a valuable historical detail of the rise and progress

of uses, down to the statute of uses, 27 Henry VIII. '*Sander's Essay on Uses and Trusts*,' 3d edition, 2 vols. 1813. '*An Essay on Uses*,' by Wm. Floyer Cornish. London, 1830, vide American edition, 3 vol. 'Law Library,' Philad. 1834. ~~¶~~ Every thing from the pen of Mr. Cornish is learned, and able.*

(Note 21.) PRESTON'S WORKS.—Mr. Preston is a distinguished writer on most of the knotty points of real law. During nearly fifty years he maintained an elevated rank as a conveyancer and barrister, and enjoyed a more extensive practice than, perhaps, was ever accorded to any other individual. It is related of him that copies of his opinions were carefully preserved, and that they occupy no less than one hundred and twenty-four quarto volumes of more than four hundred pages each. His printed works are numerous, and manifest, without exception, the deepest researches, and the most perfect acquaintance with his subjects. His style, however, is not good; and his over anxiety to be methodical induced him to classify too much; and rendered some of his works rather confused and quaint in their arrangement. Still, we know of but few works on the doctrines of the realty that we should be more unwilling to part with, than those of Mr. Preston. His first treatise, published in 1791, was an *Essay on the Quantity of Estates*, which has been since much enlarged and improved in 2 vols. 8vo. His *Essay on the rule in Shelley's case* appeared in 1794, and a few years after, he published his *Tracts on 'Cross Remainders,' 'Fines,' 'Recoveries,' 'Merger,' 'Remitter,' 'Extinguishment,' &c.*—all of which have since appeared in a more enlarged and advantageous form. The treatise on

* Vide ante p. 256, Note 15, for some account of the life and writings of this interesting, and very promising young lawyer, now deceased.

Conveyancing, in three volumes; the Essay on Abstracts of Titles, also in three volumes, and his treatise on Estates, in two volumes, all appeared between 1813 and 1819, and are works of established merit. He has likewise edited with great ability Watkins' Principles of Conveyancing, and Sheppard's Touchstone of Assurances. But his *chef d'œuvre* is certainly the treatise on the law of *Merger*, &c. which forms the third volume of this work on Conveyancing, but which has been separately published. From careful examination of Mr. Preston's various publications (though we are not insensible to their peculiar defects,) we cannot but regard him as one of the ablest of the real lawyers, and his works, as among the most valuable known to the law.

(Note 22.) RANDELL ON PERPETUITIES.—The title of this very able work is '*An Essay on the Law of Perpetuity, and on Trusts of Accumulation: with an Introduction containing the History of Alienation,*' 1 vol. 8vo. London, 1822. The law of this important and intricate doctrine, hitherto diffused through the books under numerous heads, such as settlements, executory devises and bequests, estates tail, conditional limitations, shifting, springing, and future uses, &c. is here concentrated, and orderly arranged in three books; the first of which treats of the rule of perpetuity, its limitations, and applications as decided by the courts, under the above enumerated heads. The second book is occupied in examining the three cases in which valid perpetuities may be created—and the third book treats of trusts of accumulation, prior and subsequent to the statute 39 and 40 Geo. iii. c. 98. The work is properly accompanied by an introductory history of the *jus disponendi* in England. We confidently recommend this

little volume, no less for the subject, than for the clear and learned manner in which it is treated.

(*Note 23.*) **HAWKESHEAD'S ESSAY.**—This learned, highly eccentric, shrewdly sensible, and charming production, though called an 'Essay,' is a volume of nearly six hundred pages, and appears to have been written by Mr. Hawkeshead, out of pure love for these subtle topics, as we infer that he is a gentleman retired from practice, and now revelling in the enjoyments of thinking deeply, and writing acutely on some of the moot doctrines of the real law. His title page is unusually long, and fully expresses the general contents of his volume. It is entitled, '*An Essay on the operation in wills of the word issue; and also of the words heirs of the body, dying without issue, and dying without leaving issue; and the periphrases of them; with a familiar illustration of that ancient rule of law, commonly called the rule in Shelley's case; and a short historical deduction of the rule from its feudal origin. With three introductory chapters on the nature of estates at common law, remainders, conditions, conditional limitations, and executory devises. By James Hawkeshead, Gent. London, 1826.*'

In his preface, dated July, 1822, he dismisses his work with 'wishing it may afford the reader as much pleasure in the perusal, as it has done the author in the compilation.' This we believe cannot fail to be the case, as it is, perhaps, the only instance of an extremely searching inquiry into the very *penetralia* of a learned and recondite subject, which is, at the same time, conducted throughout with a remarkable buoyancy of spirit, a jocoseness of matter and manner, an eccentricity and naiveté, often, happily blended with the soundest common sense. How far depth of research and accuracy of learning may be united with the most elementary matter and manner,

is clearly shown by this work, which is pre-eminently a student's book, whilst the accurate scholar in the law of which it treats, will find it a fit companion to be consulted with Fearne, and Preston and Cornish. All the Latin and French technicals are carefully translated; and he seldom loses an occasion to make allusions or references to the classics, and to such general literature as he hopes may illustrate his views. The work is too extensive to be analyzed in a note; but that the student may form some idea of its peculiarities, as already stated, we add a few extracts. In speaking of the technical nature of a remainder, and how intimately it is connected with its particular estate, the learned writer says, 'If I, at nine o'clock in the morning, enfeoff A. of an acre of ground, and at ten o'clock of the same morning, by *another* deed, reciting the previous feoffment, grant all the *remainder* of my estate and interest in this land to B. and his heirs, by this grant the *reversion* will pass, and B. does not take a *remainder*, nor can he be called a remainder-man, although I use the very word remainder; but B. by this grant, is a grantee of the reversion, and has all the powers and privileges of such grantee, some of which differ from those of a *remainder man* in fee,* and yet the estate to B. may be said to be an estate *limited* to take effect, and be enjoyed after another estate (viz: A's life estate,) is determined; but then it does not satisfy the other part of lord Coke's description, of being created *together with* the particular estate *at one time*, for it was granted to B. a full hour after A's particular estate was given to him: but if by *one deed* I give lands to A. for life, and at his death limit them to B. and his heirs, this latter is a remainder, falling strictly within my lord Coke's definition; and even if in this

* A grantee of the reversion cannot sue for waste done before his grant, 2 Roll. 285.

latter case I were to say that the *reversion* of the land at A's death should go to B. and his heirs, yet it is a remainder, being created *together with* the particular estate at one time; and that there is no *magic in words* we are told by high authority.* Again, in the following extract, in which we shall, for convenience, add the notes to the text, the author says, 'A man cannot be *heir* until the *death* of his ancestor; for he cannot be sure of surviving him. Co. Litt. 8. b. This is the maxim *nemo est hæres viventis*; i. e. no one can be actual heir to another person *during* that person's *life*. This is of great importance to the subject of these pages and to the rule in Shelley's case, and in cases of *designatio personæ*. Therefore, if a man have, as the fabled Niobe had,

'Seven' fair daughters of a form divine,
And seven brave sons, an indefinite line;†

yet he has no *heir*; but when he dies his eldest son will be his heir *then*, and not before. But though a man cannot have an *actual heir* during his own life, yet he may have an *heir apparent*; his eldest son is his heir apparent. This distinction between *actual* heir, and heir *apparent* is of importance in considering the cases of *designatio personæ*, which are *excepted* out of the operation of the rule in Shelley's case, and which will be treated on in a subsequent page.‡

The subject of taking in the *per*, in the *per et cui*, and in the *post*, so often perplexing to students, and sometimes to practitioners, is thus explained by Mr. Hawkeshead. 'A remainder-man is in privity of estate with the particular tenant, and comes in by and under him; i. e. he is in the *per*, which means that he does not come in *over*, *after*, or *adversely* to him. But to make this clear: suppose I politely and civilly ask A. to grant me a lease of his house for my life, and he

* Vide Hawks. Essay, 171. † Ovid. Meta. fab. 5. ‡ Hawk. Essay, 9.

does so, and I enter: now I am in *by*, from, and under A. But suppose I take a loaded pistol, and go up to A. with it, and tell him to give me possession of his house, and he does so, and I enter; now I am not in *by*, from, or under A. but over, after (*post*,) and against him; and if any man having a previous right to this house, sues out a writ of entry against me, as the tenant of the freehold in possession, he must say in the former case, 'that I have not entry into this house unless *by* A. who demised it to me,' but in the latter case of the pistol scene, he must, in his writ, say, 'into which house I have not entry, but *after* A. (*post*) whom I unjustly and without judgment disseised. The *per et cui* is equally simple stuff. If I assign my lease to B. then the stranger's writ of entry must say that B. has entry *by* me, *cui* (to whom) A. demised the land in question.'*

When treating of the nature of a fee simple, he remarks, 'I must here inform the reader, in addition to what Littleton and Coke have said, that a fee simple has one of the properties of *matter*, it is *indestructible*; an estate tail, or for life, or for years, may be destroyed, but a fee simple *never can be destroyed*. Lawyers are sometimes puzzled where to put it, but some where it must be; sometimes it is in the *clouds*, (in nubibus,) sometimes in the *sea*, (in mare,) sometimes buried in the *earth*, (in terrâ)-sometimes in the bosom or womb of the law, (in gremio legis,) such being the metaphorical phraseology of Westminster Hall,) but it is *never* destroyed. But when the fee simple is not in any living person, it is commonly said to be in *abeyance*, i. e. in expectation: the logicians call this being *in posse*, i. e. being in a state of *possibility to be*; and the civilians call it *hæreditas jacens*, i. e. a fee lying idle or unoccupied, or not vested.†

* Hawks. Essay, 174, 175.

† Ibid. 74.

We are fully sensible that these extracts can give no just idea of the work, and possibly may impart an erroneous one. These are occasional flights of the author's vivacious mind; but the volume is full of accurate learning, and close research. We will finish the note with one more extract. 'In order to have a clear idea of a *remainder*,' says Mr. H. 'the reader must figure to himself a *cloth-yard*, which is an integer capable of being divided into fractional parts, and liken the *abstract estate* of inheritance in fee simple to it, the *invisible* and *intangible* right of the fee, so laboriously described by Bracton.* Now if a foot be cut off the cloth-yard and be given to A. and the remainder of it be given at the same time to B. this is a very simple operation, but not more simple than giving an *estate* in lands to A. for life, and the remainder of the fee simple estate to B. and his heirs, the life estate and the remainder making up the estate in fee, as the one foot, and the remaining two feet make up the yard. So if I give lands to A. for life, remainder to B. and the heirs of *his body*, remainder to C. and the heirs of *his body*, remainder to D. and so on to E. F. G. remainder to H. and *his heirs general*, these several estates are fractions of the integral fee simple, just as inches are fractions of a foot, and feet fractions of a yard: it is the *abstract estate*, and not the land, which undergoes a division into fractional parts.†

We particularly recommend the author's remarks on the technical meaning of the word '*purchase*;' on purchase, as distinguished from descent; on the *rule of perpetuity*; on the doctrine of *feudum novum*, held *ut antiquum*, and particularly on Mandeville's case.

(Note 24.) THE LAW OF REAL REMEDIES.—The *jura rerum* involve the consideration, not only of the *rights* of

* Lib. 1. c. 5. fo. 4.

† Ibid. 174.

things, but of the various *remediés* established by law for their enforcement. The rights respecting real property having been carefully, and, in a great measure, separately investigated, the student now proceeds to the examination of the remedies, denominated real, or *feudal actions*, some of which have been entirely disused for several centuries, others much neglected, and some of which still retain their practical usefulness; and all of them reflect light on many of the personal and mixed actions in daily use.

Some acquaintance with most of these ancient remedies is not only advisable, but essential, even to lawyers practising in such of the states of our Union as have permitted these actions to go into total disuse. Students, however, must bear in mind that in some of the states, real actions are much used, and that much of the law relating to them, which has been long since obsolete in England, is almost of daily occurrence in some of our states. The admirable treatises on the learning of real actions, by professor Stearnes, and judge Jackson of Massachusetts, conclusively prove, not only the flourishing state of this ancient law of real remedies in that state, but that these feudal actions, and the learning appertaining to them, have been admirably adapted to modern use, and in many respects, claim a decided preference over the remedies which have so generally superseded them. Real actions, in England, have gone into disuse to a greater extent than in several of the American states: still, they are occasionally used in England, more particularly the writs of right, of formedon, of dower, waste, and quare impedit. But in Massachusetts, New York, Kentucky, Tennessee and Virginia, we find various real actions resorted to, and in the first named state, they are in frequent use.*

* We refer the student to a few of the cases in American courts, to show the elaborate and familiar acquaintance with which our lawyers have

But, it is not only the occasional recurrence of these actions in some of our courts, and the familiar use of them in others, which recommend them to the regard of our student; for unless he be somewhat acquainted with them, he cannot be master of the modern actions which have so generally supplied their place; and can scarce read with facility and understanding, the various treatises on real law. The period of his novitiate, moreover, is the proper time for devotion to such studies. A student's time is exclusively his own; in after times this probably will not be the case; and however strongly, from interest, or other causes, he may then desire to treasure up such knowledge, he will find such numerous impediments to arise during his professional career, as to render such dry and severe studies extremely difficult, if not impracticable, especially if he has been in the habit of neglecting feudal learning in general. In the case of *Ashford v. Thornton*, 1 Barnwall and Alderson, 405, the trial by *wager of battle* was brought forward, after a repose for some centuries, and argued with all requisite learning. So likewise, in our own courts, the trial by *wager of law*, was brought on for discussion; and much antiquated learning was to be resorted to, in order to show its inapplicability to the instrument sued on, and to the institutions and habits of our country. We allude to these cases, that students may be satisfied of the fact, that there is

argued them, and in confirmation of our recommendation that the law of real actions must by no means be passed by. *Green v. Liler*, 8 Cranch, 229. *Green v. Watkins*, 7 Wheaton, 27. *Inglis v. The Trustees of the Sailors' Snug Harbour*, 3 Peters, 133. *Liler et al v. Green*, 2 Wheaton, 306. *St. Croix v. Sands*, 1 John. N. Y. Rep. 323. *Nase v. Peck*, 3 John. Cases, 128. *Swift v. Livingston*, Coleman's N. Y. Cases, 122. *Whittington v. Polk*, 1 Harris and John. 236, and the Reports of *Hardin, Hughes, Overton, Taylor, Bibb, Peck, Marshall, Cameron and Norwood, Henning and Munford, &c.* and particularly to *Tyng's*, and *Pickering's* Massachusetts Reports, *passim*.

scarce a doctrine of the most obsolete, and long unthought of law, which may not, directly, or indirectly be called in question in our courts.

In respect to real actions, we are inclined to the opinion that they are destined rather to gain than lose favour in our times. It has been questioned by some able writers, whether their exchange for personal and mixed actions, has not, on the whole, proved disadvantageous. On this subject, Mr. Reeves remarks, 'on the one hand it has been said that real actions were in their nature so special, and in their application, so unaccommodating, that they were very unmanageable instruments in the hands of the practiser. Some of them were to be brought in a particular court; some lay only between particular persons; others, for and against those only who had particular estates, with various other circumstances that were requisite antecedent to bringing the action: all these were at once supplied by an *ejectment*, which requires nothing but a present possession in the defendant, and a right to it in the plaintiff. On the other hand, the *precision* of the proceedings in real actions, where the matter in question was thoroughly canvassed in *pleading*, and reduced to a *simple point*, before it was trusted to a jury, is thought to be ill exchanged for the present course by ejectment, where the whole question is at once sent in the gross to trial upon the general issue, without any previous attempt to simplify, or decide it with less circuitry and expense. As to the length of process, and other delays in real actions, they, it is said, might have been easily corrected by act of parliament.* How much may be done by the legislature, and by the courts, to adapt these feudal remedies to modern use, will be seen in the treatises of Stearnes and Jackson. And that real actions are still regarded as of

* Vide Reeves' His. Eng. Law, vol. iv. p. 69.

growing importance in England, is indicated by the excellent treatise of Henry Roscoe, esq. on the law of actions relating to real property, in two volumes, one-half of which is dedicated to the consideration of real actions. We cannot too strongly recommend the entire work to the notice of students; not only as it is the only English work of merit on these ancient remedies, but likewise as it brings into concentrated view, all the other remedies relating to real property. Mr. Roscoe's work was published in 1825, and no doubt would have been republished in this country had not the law relating to real actions been so satisfactorily treated in the American works already mentioned.

(Note 25.) STEARNES ON REAL ACTIONS.—When we contrast this '*Summary of the Law and Practice of Real Actions*,' published by Mr. Stearnes in 1824, with the only English work, at that time known, by Booth, we cannot but be struck, either with the great improvement of our science, and the general mode of treating it, at the present day, or with the great disparity of mind brought to the task, by these two authors. Professor Stearnes' work considering the inherent nature of the subject, is spirited, and (we crave pardon of some, perhaps, less zealous in such matters,) even charming. The work of Booth, on the other hand, is more dry, and dull, than his subject; and it needed the able pen of Mr. Roscoe to make English students know that the law, even of real actions, can be made interesting. In 1832, a new edition of Stearnes' Summary was published.

(Note 26.) JACKSON ON REAL ACTIONS.—This work is entitled, a '*Treatise on the Pleadings and Practice in Real Actions; with precedents of pleadings.*' The learned author,

with that modesty which sometimes marks the character of distinguished worth, seems disposed to apologize for the publication of his work, in the presence of those of professor Stearnes, and of Mr. Roscoe. The student, however, who cannot but think very highly of the preceding works, would have had just cause of regret, had judge Jackson withheld his very satisfactory treatise. The three works, seem to us, all that we can desire on the learning of real actions, as it stands at present in England and in this country, as the unimportant differences that may exist in the practice, in some of the other states, may be easily supplied.

(*Note 27.*) THE MODE OF REFERRING TO COKE'S REPORTS.—Although the year books and the reports of lord chief justice Dyer and Mr. Plowden are of great merit, those of lord Coke have attained a celebrity which has nearly obscured the labours of his predecessors, for it is comparatively but seldom that we are referred to the pages of Plowden, Dyer, or the year books; yet when these works are cited, it is with great respect for their authority. The Reports of lord Coke, have, at all times, been highly valued, and as an indication of permanent merit, are usually cited as 1, 2, 3, Rep. the author ever being understood. The work is divided into *thirteen* books, which are cited by Coke himself, as Lib. 1, 2, 3, &c. The first *eleven* books were published by lord Coke, and of their authenticity there never was a doubt. The *twelfth* part was published some time after his death, and is certified by Bulstrode as the genuine production of lord Coke. The *thirteenth* book is represented in a preface by J. G. to be from the same distinguished reporter.

In respect to the paging, also, of Coke's reports, it is proper to apprise the student, that, although it is generally paged like

the First Institute,—there are some editions which have adopted the ordinary mode; which, if not known, may produce some inconvenience in referring. Thus, for example, Spencer's case, in the one edition, would be cited as of p. 16. a. and in the other, as of 32. a. The student, in such cases, has nothing more to do, when he fails to find the case at the place cited, than to either double, or halve the number.

(Note 28.) ON THE WORD 'RESOLVED,' IN COKE'S REPORTS.—In the rules we have given the student, to be observed by him in reading lord Coke's Reports, we have cautioned him to discriminate between the extra-judicial opinions of the court, those of counsel, and the reporter, and the points expressly decided. In the case of *Yates v. the people*, 6 John. Rep. 441, the chancellor observes that the word '*Resolved*,' imports an express adjudication, not an *obiter dictum*. This is a technical legal word, made use of appropriately to distinguish the opinions of the court, (through the whole of Coke's Reports, and several other reporters,) from loose sayings of their judges, which have not the weight or authority of strict judicial decision.

(Note 29.) AMERICAN REPORTS.—In examining the history of knowledge and learning in this country, nothing is more remarkable than the rapid advancement which has been made in public and municipal law. If literature and many of the sciences and fine arts have advanced but slowly, the science of jurisprudence has been carefully and assiduously cultivated by us, and with a talent and zeal no way inferior to what are displayed in the trans-atlantic world. The philosophy of *government* has been unfolded, theoretically and practically, and more advantageously displayed than perhaps in any other

nation. Private or municipal law has been fostered and improved to such a degree, that the liberal minded and learned men in the land of our progenitors will shortly, no doubt, resort to the decisions of our courts with confidence and pleasure, and find in them all the evidences of deep thought and profound research, which the pages of Coke, Burrow, Douglas, Cowper, East, &c. so amply afford.

Notwithstanding law has been studied and practised in this country with the most brilliant success for more than half a century, and the bench and the bar have been ornamented by legal talents and learning of the most distinguished order, it is only within the last few years that this science has been written upon, at least to any extent; and that the decisions of our courts of justice have been preserved by printed reports. Five hundred years have passed since the first publication of judicial decisions took place in England, and from that period to the present time, with but few chasms, we have a regular history of the law, as evidenced by the decisions of the various courts of that country.

The unwritten or common law, and the various applications and constructions of the statute law, are chiefly derived from this source. We therefore, have no cause of surprise, that this branch of the English law occupies at least six hundred volumes of reports, more than one hundred of which are folios. To this copious source, until lately, was the American lawyer compelled to resort for instruction; for we had no reports until Connecticut set the example; and which was soon followed, in the year 1790, by the reports of Alexander James Dallas, of Pennsylvania. From that time until 1803, there were only a few books of reports published; but from that period to the present, the catalogue has been increasing more than monthly. We doubt not that an enumeration of the American books of

reports will prove useful and acceptable to our student, for which we refer him to the title 'Legal Bibliography,' of this Course.

(*Note 30.*) 'MISCELLANEOUS.'—Under this head, which is annexed to most of the titles in this Course, are embraced such readings, essays, pamphlets and opinions of eminent lawyers, &c. as are well entitled to a place in this work; but which on account of the ephemeral form in which they are sometimes given to the world, and the consequent difficulty of obtaining them, and their being chiefly censorial or speculative, we have placed rather as an appendage, than an invariably essential, or integral part of this Course.

It is certain, however, that legal essays, opinions, and such like occasional productions of the learned, frequently display the genius and entire strength of their authors, unfold in a clear, solid and argumentative manner the true merits of a subject; are sometimes the distillation of the most elaborate research, and are often better entitled to be resorted to, than the regular treatise, or deliberate judicial opinion. In the selection we have made of this species of matter, we have been specially cautious; the student, therefore, if really zealous in the pursuit of legal knowledge, will place a high value on these selections; and, if practicable, will procure and read the articles, with due care.*

* For additional remarks on this subject, vide *Note 10*, on the thirteenth title.

PARTICULAR SYLLABUS.

TITLE IV.

In *tutelis, societatibus, fiduciis, mandatis, rebus emptis, venditis, conductis, locatis*, quibus vitæ societas continetur; in his *discipuli* est *intelligere*, quid quemque cuique præstare oporteret.—*Cic. De Off. Lib. iii. sec. 17.*

THE LAW OF PERSONAL RIGHTS, AND PERSONAL REMEDIES.

I. THE LAW OF PERSONAL RIGHTS. (*Note 1.*)

e. 1. Kent's Commentaries. [*The second volume, which treats of Personal Rights, and of Personal Property, to be at this time carefully reviewed.*]

(*Note 2.*)

2. Bacon's Abridgment. [*The following select chapters, to be studied in the order now stated.*]

(*Note 3.*)

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| 1. Marriage and Divorce. | } | (Note 4.) |
| 2. Baron and Feme. | | |
| 3. Bastardy. | | |
| 4. Guardian and Ward. | } | (Note 5.) |
| 5. Infancy and Age. | | |
| 6. Idiots and Lunatics. | | |
| 7. Aliens. | } | (Note 6.) |
| 8. Ambassadors. | | |
| 9. Prerogative. | | |
| 10. Corporations. | } | (Note 7.) |
| 11. By-Laws. | | |
| 12. Statutes. | | |

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|-----------------------------------|---|------------|
| 13. Wills and Testaments. | } | (Note 8.) |
| 14. Executors and Administrators. | | |
| 15. Legacies. | | |
| 16. Agreement. | } | (Note 9.) |
| 17. Obligations. | | |
| 18. Assignment. | | |
| 19. Authority. | | |
| 20. Bailment. | } | (Note 10.) |
| 21. Fraud. | | |
| 22. Duress. | | |

[After this inquiry into the law of personal *rights*, and previously to an investigation into the various *remedies* established by law for their enforcement, the student's attention should be directed to the organization of the various tribunals or courts, whose peculiar province it is, in order that right and justice may be rendered to all who have a claim to the protection of the laws, to ascertain and define these rights, to judge of the propriety of the selected remedy, and finally to execute their judgments. On this subject we recommend the following chapters in Bacon's Abridgment:]

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|--|---|---------|
| 1. Courts and their jurisdiction in general. | } | COURTS. |
| 2. Court of Parliament. | | |
| 3. Court of King's Bench. | | |
| 4. Court of Common Pleas. | | |
| 5. Court of Exchequer. | | |
| 6. Court of the Justices of Assize and Nisi Prius. | | |
| 7. Ecclesiastical Courts. | | |

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|--------------------------|---|--------------------|------------|
| 8. Attorney. | } | OFFICERS OF COURT. | (Note 11.) |
| 9. Sheriff. | | | |
| 10. Coroner. | | | |
| 11. Constable. | | | |
| 12. Attachment. | } | POWERS OF COURTS. | |
| 13. Fine and Amercement. | | | |
| 14. Habeas Corpus. | | | |
| 15. Prohibition. | | | |
| 16. Certiorari. | | | |
| 17. Mandamus. | | | |

II. THE LAW OF PERSONAL REMEDIES.

e. 1. The third volume of Blackstone's Commentaries, which treats of Remedies, to be reviewed.

2. The following titles in Bacon's Abridgment.

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|---------------------------|---|
| 1. Actions in general. | } |
| 2. Action of Account. | |
| 3. Debt. | |
| 4. Covenant.* | |
| 5. Detinue. | |
| 6. Trover. | |
| 7. Replevin & Avowry.† | |
| 8. On the Case. | |
| 9. Trespass. | |
| 10. Ejectment. (Note 12.) | |
| 11. Slander. (Note 13.) | |
| 12. Libel. (Note 14.) | |
| 13. Assault and Battery. | |
| 14. Qui Tam. | |

* There is a recent very able work on the subject by Platt. London, 1829, republished in 3d volume of 'The Law Library.' Phila. 1834.

† Mr. Wilkinson's late treatise on this subject, will be found in the 6th volume of 'The Law Library.'

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|------------------------------------|--------------|
| 15. Actions local and transitory. | } |
| 16. Venue. | |
| 17. Abatement. | |
| 18. Misnomer and Addition. | } |
| 19. Pleas and Pleading. (Note 15.) | |
| 20. Amendment and Jeofail. | |
| 21. Nonsuit. | |
| 22. Summons and Severance. | |
| 23. Arbitrament and Award. | } (Note 16.) |
| 24. Accord and Satisfaction. | |
| 25. Escape in Civil Cases. | } |
| 26. Rescue. | |
| 27. Bail in Civil Cases. | } |
| 28. Juries. | |
| 29. Evidence. (Note 17.) | |
| 30. Trial. | |
| 31. Verdict. | |
| 32. Damages. | |
| 33. Costs. | |
| 34. Bills of Exception. | |
| 35. Errour. | |
| 36. Supersedeas. | |
| 37. Scire Facias. | } |
| 38. Audita Querela. | |
| 39. Injunction. | |
| 40. Execution. | |

☞ [The student will observe that the above titles are arranged in the order, in which they necessarily present themselves in practice, and hence, as we apprehend, the proper order in which they should be studied. There is that kind of relation between those various subjects, which should by no means be disregarded by the methodical student.

They are so linked together, and arise so naturally out of each other, that if this connection be not regarded, much of the life and philosophy of the subjects are obscured: thus disconnected, they are difficult of comprehension, and still more so of retention; they appear somewhat unmeaning and arbitrary, and are nearly destitute of that interest which results from an acquaintance with and examination of all the minute and various relations of a complex system. May we not attribute to this limited view, which confines the mental eye to the parts of a great whole, and leaves blanks in the vision at the points connecting these parts, that disgust of even pleasing subjects, which students sometimes entertain? If this be the case, how necessary is it, in a work like this, to pretermit no occasion of designating the method which discloses these relations, and thereby imparts an increasing and progressive interest. The arrangement here offered is very simple, as it rests on the natural and ordinary evolution of a suit, from its inception to its termination. It is manifest, that an inquiry into the modes of enforcing our rights in a court of justice, is to be commenced with an investigation of the *general* nature of *actions*: their *several* kinds, suited to the various species of right, next claim attention. If a suit is to be instituted, after the remedy or particular kind of action is selected, the place or jurisdiction is to be ascertained, in which the defendant may be cited to respond, or the plaintiff be entitled to have his action tried. Hence arises the distinction between '*Actions local and transitory*,' closely connected with which is the doctrine of '*Venue*.' As the jurisdiction may have been mistaken, or the party sued under a wrong name, or the addition of his estate, degree, or mystery may have been omitted, or an improper one used, or as there may have been a nonjoinder or misjoinder of the proper parties, whether plaintiffs or defen-

dants, or some disagreement or variance between the declaration and writ, or the form of action itself may have been misconceived, all of which matters are or were remedied by plea in *'abatement,'* the learning on this subject and that of *'misnomer and addition,'* follow in regular order, and serve as an introduction to the more extensive and important doctrine of *'Pleas and Pleading.'* Connected with this are the subjects of *'Amendment and Jeofail,' 'Nonsuit,' 'Summons and Severance.'* If the defendant be taken, he may escape or be rescued, or he may yield and give bail; thus the law of *'Escape,' 'Rescue,'* and *'Bail,'* succeeds. The various kinds of *'Juries,'* and *'Trials,'* the *'Evidence'* offered by the respective parties to these juries or on these trials, the doctrine of *'Verdicts,' 'Damages,'* and *'Costs,'* are introduced in the order in which they arise. If in the course of these proceedings any irregularity has taken place, with respect to the law or fact, *'New Trials,' 'Bills of Exception,'* and *'Writs of Error,'* present themselves as the appropriate remedies; or if a party is otherwise aggrieved by the verdict or judgment, or owing to some supervenient cause, has a legal ground for delay of the execution, the writs of *'Supersedeas,' 'Scire Facias,' 'Audita Querela,'* and *'Injunction,'* occur as the suitable means of redress. If, however, none of these circumstances obtain, the plaintiff, in the regular progression of his suit, resorts to an *'Execution,'* which in all cases is favoured by the courts, as it puts him in possession of the right for which he prosecuted, and is the very aim, life, and effect of the law; *'fructus, finis, et effectus legis.'*]

[* If the student has industriously read the chapters recommended in Bacon's Abridgment, he will no doubt be possessed of a general and tolerably comprehensive view of the law of personal rights, and the various remedies provided by law for

their enforcement. This, however, is by no means sufficient for our purpose; nor should it satisfy the student. We should be happy, could we with propriety close the labours of the student in this branch of our Course, with the chapters in Bacon; but we are assured that these will not effect the object of strongly impressing on his mind this very important department of our subject. The works, which we now in addition recommend, are among the most valuable in our law libraries; and must be read with that earnestness and attention to which their important contents, and the masterly manner in which the subjects have been treated in them, so justly entitle them.]

3. Selwyn's *Nisi Prius*. (*Note 18.*)
- E. 4. Tidd's *Practice in Personal Actions*.
(*Note 19, and Note 20.*)
- e. 5. Conkling's *Practice of the Courts of the United States*. (*Note 21.*)
- e. 6. Stephen's *Principles of Pleading in Civil Actions*. (*Note 22.*)
- e. 7. Gould's *Treatise on Pleading in Civil Actions*. (*Note 23.*)
8. Phillip's *Law of Evidence*. (*Note 24.*)
- e. 9. Comyn on *Contracts not under Seal*.
(*Note 25.*)
10. Sergeant's *Law of Attachment*. (*Note 26.*)
11. Babbington on *Set off*.
12. Ram on *Legal Judgment*. (*Note 27.*)

LORD COKE'S REPORTS.*

[*Select Cases therein on the Law of Personal Rights and Personal Remedies.*†]

NOTE.—The *first* and *second* books contain no cases on the law of personal rights and remedies.

THIRD COKE.

E. SIR WILLIAM HARBERT'S CASE. 11. a.

This case points out what things, by the common law, were liable to execution in personal actions at the suit of the king, or a private person; and the alterations introduced by several statutes. Cases, at common law, are stated of *contribution* in execution, and several errors in the record, illustrative of practice, are noticed.

References. Read 2 Bac. Abr. 685. 'Execution.' (A.) 2 Wms. Saund. 68. a. note 1, page 7, note 4, p. 9. Note 10. Deening *v.* the Earl of Winchelsea et al. 2 Bos. and Pull. 270, in which Ld. Ch. Baron Eyre has examined the general doctrine of contribution. Cases of contribution are general in equity, vide Campbell *v.* Messier, 4 John. Chan. R. 334. Dupuy *v.* John. 1 Bibb's R. 562. Avery *v.* Patten, 7 John. C. R. 211. As to executions under the statute, 5 Geo. 2. ch. 7 in the U. States, read the learned case of Baker *v.* Webb. 1 Hayw. Rep. 42. also 1 Harr. and John. R. 471.

TWYNE'S CASE. 80. b.

This case may be considered the *polar star* on the law of *fraud*, in the disposition of *personal* property. It is constantly referred to as a standing authority or leading case on this

* Vide post, Note 28. 'On the reading of books of Reports.'

† For a similar enumeration of the most important cases in Lord Coke's Reports, on the law of Real Rights and Real Remedies, and for our observations on lord Coke's Reports, vide ante page, 177, &c.

subject, and may be regarded as a comprehensive decree or decision, in which the *principles* were fully established, leaving to future cases little else than the application of those principles.

References. *Read* Bac. Abr. title 'Fraud,' (C.) where most of the law on the subject of fraudulent conveyances to defeat creditors and purchasers within the statutes 13 Eliz. ch. v. and 27 Eliz. ch. iv. is briefly, but perspicuously stated. *Read* with attention the following cases: *Worsley v. Mattos*, 1 Burr. 467. *Edwards v. Harben*, 2 Du. and Ea. 587. *Paget et al, v. Perchard*, 1 Espi. Cases 205. *Wardell v. Smith*, 1 Campbell's Rep. 333. *Cadogan v. Kennet*, Cowper, 432. *Kidd v. Rawlinson*, 2 Bos. and Pull. 59. *Hamilton v. Russel*, 1 Cranch, 309. *Fitzhugh v. Anderson*, 2 Hen. and Mun. 289. *Barrow v. Paxton*, 5 John. 258. *Wilt v. Franklin*, 1 Binn. 502. *Osborne v. Moss*, 7 John. 161. Long on Sales of Personal Property, 66 to 80. 3 Cowen's Rep. and the Note. 5 Taunt. Rep. 216. *Wells v. Girling*, 1 Brod. and Bingh. 447.

FOURTH COKE.

ACTIONS FOR SLANDER.

[NOTE.—The observation made by us on Twyne's case, applies with great force to these cases of slander. In them the student will find nearly all the rules and the principles of law on the subject of slander. Legal writers, counsel in their arguments, and judges in their decisions, constantly resort to these cases, as the certain and abundant repository of the soundest doctrines on this subject. The substance of these cases has been collected and well digested by Mr. Espinasse in his admirable Digest of the Law of Actions and Trials at Nisi Prius, but still, not in such a manner as by any means to supersede the original reports. He who aspires to a masterly

knowledge of his profession, must not rest satisfied with summaries or abridgments. On this subject, lord Coke, in his 5th Rep. p. 25, has given the following advice: 'Take heed, reader, of *all abridgments*, for the chief use of them is as of tables, to find the book at large. But I exhort every student to read and rely only on the books at large.' Again, in his preface to the 4th Rep. p. x. he further observes, 'This I know, that abridgments in many professions have greatly profited the *authors* themselves; but, as they are used, have brought no small prejudice to *others*; for the advised and orderly reading over of the books *at large*, in such manner as I have elsewhere pointed out, I absolutely determine to be the right way to *enduring* and *perfect knowledge*, and to use abridgments as *tables*, and trust only to the books at large; for I hold him not discreet that will *sectari rivulos*, when he may *petere fontes*.'

That the science of English law in particular, has been much systematized and simplified by the numerous digests, abridgments and rudimental works, which have been presented to the legal world within the last half century, cannot be questioned; and that readers have largely participated with authors in the benefit, is equally certain. Whilst, therefore, with lord Coke, we admonish the student by no means to content himself with summaries, far be it from us to proscribe them. Some abridgments are to be preferred to their originals, and others are so full, as nearly to supersede the necessity of resorting to the work at large. In fine, we strongly recommend that the student, in the perusal of digests and abridgments, should, on all occasions of *doubt*, resort to the originals, and also refer to, and read with attention, all those cases which are admitted to be *leading*. No one was ever made a lawyer by confining himself to the Digests of Espinasse, Cruise, Selwin, and similar works; the fountains, viz: the books of reports,

must be frequently resorted to. We therefore urge upon the student, not to rest satisfied with the little summaries given of these and other cases of lord Coke by Espinasse, &c. but diligently to read the originals. The abstracts presented of all the selected cases, have been made by us with great care, from the reports and pleadings themselves, without any regard to those found elsewhere. But we admonish the student by no means to be content with our summaries.

e. LORD CROMWELL'S CASE. 12. b.

Action *de scandalis magnatum* by Ld. C. against D. vicar of N. Various matters were objected to in the declaration; and on demurrer held for the defendant. Plaintiff, in a new action amended the faults, and defendant pleaded a special justification, in which was a *colloquium* stating the cause and manner of using the words, viz: that the plaintiff had encouraged A. and B. to preach in the church of N. and they having inveighed against the Common Prayer, established by the Queen, the defendant objected, and plaintiff said to defendant, 'thou art a false varlet, and I like not of thee: to which defendant replied, 'it is no marvel that you like not of me, for you like of those who maintain sedition against the Queen's proceedings.' Plaintiff's counsel moved the court that the bar of justification was insufficient: 1st, because sedition cannot be committed by *words*, but by public and violent action: 2d, because the words ought to be justified in the sense which they import on the face of the declaration; or that the defendant should have pleaded *not guilty*, and not have *justified*.

Resolved, That the sense of the words must be taken according to the cause of speaking them; and that the special justification was proper,—for the defendant ought not to be driven to the general issue, where he confesses the words, and shows the true cause of speaking them.

This was the first cause the lord Coke (being of counsel with the defendant,) moved in the King's bench. And in actions of slander he advises,

1st. To plead special justification where the matter will bear it.

2d. Never to hazard the cause upon demurrer, but first to take advantage of the matters of fact, and leave the matters of law to the last.*

References.—Read *Dunham v. Bigg*, Camp. R. 267. 1 Wms. Saund. R. 131. Note 1. *Hewer v. Dawson*, Buller's N. P. S.

e. CUTLER AND DIXON. 14. b.

Action will not lie for exhibiting articles to justices of the peace against the plaintiff, with the intent to have him bound to good behaviour, though they contain divers great abuses, both as to him, and others: for the ordinary course of justice is pursued; and just causes of complaint would be suppressed, were such actions to lie.

References.—*Lake v. King*, 1 Wms. Saund. 131. *Ashley v. Young*, 2 Burr. 807. *Curry v. Walter*, 1 Bos. and Pull. 525. *McMillan v. Birch*, 1 Binney's R. 178. *Barbauld v. Hookman*, 5 Espi. N. P. Cases, 109.

BUCKLEY AND WOOD. 14. b.

Defendant had exhibited a bill in the star-chamber, against the plaintiff, containing some matters cognizable there, and others not. In an action of slander it was Resolved, 1. That for any matter in the bill, which was examinable by the S. C. no action would lie, though the charge was utterly false, 2. That for matters not examinable there (as in the principal case)

* The foregoing summary of this case is somewhat more ample than our limits will permit us generally to be; the case being rather confusedly reported.

the action would lie; for it cannot be in a course of justice, when the court hath no jurisdiction.

References.—In addition to the cases referred to in the above case of *Cutler v. Dixon*, read *Thorn v. Blanchard*, 5 John. Rep. 508, in which the student will find most of the learning on this subject stated with the clearness which usually distinguishes these valuable reports.

STANHOPE AND BLITH. 15. a.

Plaintiff was a justice of peace. Defendant said 'Mr. Stanhope hath but one manor, and that he hath gotten by swearing and forswearing'—held not to be actionable.

References.—Read *Holt v. Scholefield*, 6 Durn. and Ea. 691. *Ward v. Clarke*, 2 John. R. 10. *McClaghry v. Witmore*, 6 John. R. 82. *Pelton v. Ward*, 3 Caines' R. 73. *Shaffer v. Kintzer*, 1 Binney's R. 537. *Hamilton v. Dent*, 1 Haywood's R. 116.

HEXT v. YEOMAN'S. 15. b.

Plaintiff, a J. of P. charged defendant with saying, 'for my ground in Allerton, Hext seeks my life, and if I could find John Silver, I do not doubt within two days to arrest him for suspicion of felony.' Held that the last words are actionable; but the first are not.

References.—Read *Beavor v. Hides*, 2 Wils. 300. *Rex v. Kinnersley and Moore*, 1 Stra. R. 193. 3 Christian's Black. Comm. 125. Note.

BIRCHLEY'S CASE. 16. a.

The plaintiff, an attorney, charged, in his declaration, defendant with saying to him, 'you are well known to be a corrupt man, and to deal corruptly.' These words *ex causa dicendi* adjudged to be actionable.

References.—*Read* Stanton *v.* Smith, 2 Stra. 762. Fiese *v.* Linder, 3 Bos. and Pull. 372. Backus *v.* Richardson, 5 John. R. 476. Oakley *v.* Farrington, 1 John. Ca. 129.

STUCKLEY *v.* BULHEAD. 16. a.

To say of a justice of peace, ‘Mr. Stuckley covereth and hideth felonies, and is not worthy to be a justice,’ adjudged actionable.

References.—*Read* Ashton *v.* Blagrave, 1 Stra. 617. Dole *v.* Van Rensselaer, 1 John. Ca. 330.

e. WEAVER *v.* CARIDAN. 16. a.

To say ‘you were detected for perjury in the star-chamber,’ adjudged not actionable; for an honest man is *detected*, but not convicted, by having a bill of perjury exhibited against him.

References.—*Read* Hally *v.* Stanton, Croke Car. 268. Cro. Eliz. 371.

e. SNAGG *v.* GEE. 16. b.

The plaintiff’s declaration showed that the defendant’s wife was yet living, and his action was, for that defendant had said ‘Thou hast killed my wife, thou art a traitor.’ Adjudged that the first words are not actionable,—nothing said concerning the word traitor.

References.—*Read* Wilner *v.* Hold, Cro. Car. 489. Peake *v.* Oldham, Cow. R. 275.

EATON *v.* ALLEN. 16. b.

Upon great consideration adjudged that it is not actionable to say ‘He is a babbler, and a quarreller, for he gave his champion counsel to make a deed of gift of his goods to kill me, and then to fly out of the country; but God preserved me.’ For the purpose or intent of a man, without act, is not punishable by law. But the following words, cited from other cases, viz:

'My lady C. offered to give poison to one, to kill the child in her body.'—'T, and another did agree to hire one to kill A. B.'—'If I had consented to Mr. C., T. H. had not been alive.'—'My Ld. L. hath gone about to take away my life,' were all held actionable, as some *act* is charged in each of them.

References.—*Read* Lewknor v. Cruchley, Cro. Car. 140. Stevenson v. Hayden, 2 Mass. R. 406. Cro. Eliz. 684.

DAVIS v. GARDENER. 16. b.

The defendant said "I know Davis' daughter well, she dwelt in C. and there was a grocer that did get her with child. I know very well what I say, I know her father, and mother, and sister, and she is the youngest." Verdict for 200 marks. Motion in arrest of judgment, that incontinency is a mere spiritual offence, and so the remedy should be in that court; but *Resolved*, that the action will lay, for 1. Having a bastard child is punishable by sta. 18 Eliz. c. 3. 2. If it was not, the loss of marriage, &c. or any special damage, renders the words actionable.

References.—*Read* Salk. R. 694. in which this case is denied to be law. Also Graves v. Blanchet, id. 696. Matthew v. Crass, Cro. Jac. 323. Hunt v. Jones, id. 499. 3 Christian's Black. Com. 125. Note.

JAMES v. RUTLECH. 17. a.

As to the nature and use of the *innuendo*, and *colloquium*, and of *averments*, this will be found to be among the earliest cases.

References.—*Read* Van Vechtan v. Hopkins, 5 John. R. 211—a very good case. 1 Wms. Saund. 243. Note (4.) Goodrich v. Walcott. 3 Cowen 231.

e. OXFORD ET UX. v. CROSS. 18. a.

Action in London for calling the plaintiff 'whore,' (it being actionable there by custom,) was removed by habeas corpus into B. R. The whole court refused to grant a *procedendo*. For a *custom* to maintain actions for such babbling words, is against law.

References.—*Read Buys et ux. v. Gillespie*, 2 John. R. 115. *Brooker v. Coffin*, 5 John. 188. [In New York, words charging adultery, or fornication, are held not actionable, unless some special damage be alleged and proved.]

GERARD v. DICKINSON. 18. a.

Plaintiff was about demising his manor, when defendant claimed to have a lease of it, which she knew to be forged, but which put an end to the proposed contract of demise. *Resolved*, 1. That no action would lie against defendant if she had only claimed an interest, and affirmed that plaintiff had not right. 2. That the averment in the declaration that defendant knew of the communication with the proposed lessee, and knowing her lease to be forged, still affirmed it to be good, whereby plaintiff was defeated of his bargain, was sufficient to maintain the action. 3. That the *scienter* could not be traversed by the defendant, but is matter of evidence on the general issue, and for this, and other reason, the defendant's bar is ill.

References.—As to slander of *title* vide 4 Burrow 2422. *Read* also earl of Northumberland v. Byrt, Cro. Jac. 163. *Vaughan v. Ellis*, id. 213. *Smith v. Spooner*, 3 Taunt. 446. *Pitt v. Donovan*, 1 Maul and Selwin, 639.

BITTRIGE'S CASE. 19. a.

Adjective words will not sustain an action. 1. Where they do not presume an act committed. 2. When they do not scandalize one in office, trade, or function.

References.—Read *Bellamy v. Barker*, Stra. 303. *Betts v. Trevaman*, Cro. Jac. 536. *Green v. Lincoln*. Cro. Car. 318.

BARHAM'S CASE. 20. a.

'Master Barham did burn my barn,' (innuendo a barn with corn) 'with his own hands, and none but he,' held not to be actionable—for it is not felony to burn a barn unless parcel of the mansion-house, or full of corn, in such case *agitur civiliter, et non criminaliter*; and the *innuendo* cannot extend the meaning of the words.

References.—None need be read in addition to those we have stated in the case of *James v. Rutlech*.

§ End of the Actions of Slander.

SOUTHCOTE'S CASE, 83. b.

Detinue for goods delivered to the defendant to keep safe. The defendant confessed the delivery, and pleaded that they were feloniously stolen from him; and it was adjudged, notwithstanding, that he should be answerable for them. For, by his acceptance of them, he undertook to keep them safe. But if one accepts of goods, to be kept as his own, he shall not be answerable for them, if they are stolen. So if goods are pawned to one, he is in such case not responsible, because he hath a property in them, and not a custody only. But if the party, before they are stolen, tenders to the pawnee the money to redeem them, and he refuseth to receive it, he shall be answerable. If A. delivers a chest locked up, to B. and carries away the key, and the goods are stolen, B. shall not be answerable, for A. did not trust him. If a factor be robbed, he shall not be answerable; but a ferryman, innkeeper, or carrier, shall respond, though they are robbed.

References.—Read *Tyly v. Morrice*, Carthew's R. 485. 4 Burr. R. 2301. *Clay v. Willan*, 1 Hen. Black. R. 298.

Harris v. Packwood, 3 Taunt. R. 264. Jones on Bailments, 32, &c. *Coggs v. Bernard*, 2 Ld. Ray. 909, in which Ld. Coke's doctrine that bailment 'to keep,' and 'to keep safely' are identical, is repudiated; and that Southcote's case does not warrant the conclusion of the learned reporter. Pothier *Contrat de Dépôt*, No. 27, 29, 30, 31, 32. *Finucane v. Small*, 1 Esp. N. P. Rep. 315. *Thomas v. Day*, 4 Esp. N. C. R. 262. *May v. Harvey*, 13 East's R. 197. *Edson v. Weston*, 7 Cowen's R. 278. *Plate v. Hibbard*, id. 497. *Kettle v. Bromsall*, Willes R. 118. *Foster v. The Essex Bank*, 19 Mass. R. 479. 500. Story's Commentaries on Bailments, sec. 68, 69, 70, 71, 72.

SLADE'S CASE. 92. b.

[NOTE.—This very celebrated case was the first which established the use of the action on the case upon assumpsit, in the place of debt on implied contract. Much has been said as to the propriety of this decision, some strongly advocating it, others equally reprobating it. C. J. Vaughan says that it is an *illegal resolution, grounded upon reasons not fit for a declamation, much less for a decision of law*. Mr. Wooddeson on the other hand, justifies it, and expresses surprise that the case should have taken so much deliberation.] The case was in substance this. Slade brought case on assumpsit for sixteen pounds, for a growing crop of corn sold by him to the defendant. The jury found that the defendant had bought the crop *modo et forma*, but that there was no promise and assumption, but only the said bargain. It was moved that this action was not maintainable, for

1. An action of *debt* was the *ordinary* remedy, and when that does not fail, there shall be no recourse to an extraordinary one, as this action is, *et nullus debet agere actionem de dolo, ubi, alta actio subest*.

2. That the defendant, by this action, is deprived of the benefit of waging his law.

And because the justices of the C. B. held the action not maintainable, and the justices of the B. R. held the contrary, for the settlement of the point, the case was argued before *all the judges of England*, and by them *resolved*,

1st. That the action on the case was maintainable:

1. Because of the great number of precedents in which judgments in such cases had been recovered.

2. Because the judgments and books, which allow of this action, were in cases in which the party might have sued in debt.

3. Because every *executory* contract does of itself import an *assumpsit*.

2d. That in such actions on the case damages are recoverable, as well for the debt as for the special loss, and the recovery is a good bar in debt, and *vice versa*.

3d. That in many cases it would be inconvenient were it otherwise; for if A. bargain with B. to deliver to him yearly during his life twenty quarters of barley, *debt* is not maintainable till all the days have expired, but *case* may be brought on every breach; and as to wager of law, it encourages perjury, and it is therefore better to have matters tried by jury.

4th. The Register contains as well the forms of a writ of trespass on the case, as a writ of debt, and where a man by the Register can have two writs in the same case, he has his election to choose either.

References.—Read 3 Reeves' His. Eng. Law, p. 244. 394. 4 vol. p. 171. 380. 527, where the history of the action of *assumpsit* is clearly and satisfactorily traced. Vid. also 3 Wood. Lec. 169, and note (c.) a good note. Barry v. Robinson's Adm. 4 Bos. and Pull. 293, and 1 Evans' Pothier on

Oblig. 306, note (b.) and 2 vol. 398. 406, where the author traces the resemblance between our *Indebitatus Assumpsit* and the *Pactum constitutæ pecuniæ* of the civil law. And read *Childress v. Emory*, 8 Wheaton's Rep. 642, as to the point whether *Wager of Law* is known to the jurisprudence of this country; and that, even in England it never applied to debt on a promissory note, or bill of exchange.

FIFTH COKE.

SLINGSBY'S CASE. 19. a.

This is a very leading case on the doctrine, that covenants follow the nature of the interest to which they relate; and that express *several* words will not make that several which before was joint: so *e converso* if the interest be *several*, a covenant, though in joint terms, is in effect several.

References.—Read Chitty on Pleading, p. 6, 7, and note (z.) *Eccleston and wife, exs. of Castle v. Clipsham*, 1 Wms. Saund. 153 and notes, in which the law of Slingsby's case is ably treated. *Scott v. Godwin*, 1 Bos. and Pull. 66, and *Phillips v. Bonsal*, 2 Binn. Rep. 138.

LAUGHTER'S CASE. 21. b.

Resolved in this case, that if a bond consist of two parts in the disjunctive, both of which were possible at the time the bond was made, and by the act of God one of them becomes impossible, the obligor is relieved from the performance of the other; for the condition is for his benefit, and he may at election perform either; so that if deprived by the act of God of one, he is not compelled to perform the other. *Actus Dei nemini facit injuriam.*

References.—Read *Studholme v. Mandell*, 1 Ld. Ray. 279, and *Anonymous*, 1 Salk. 170, in which the ground of Laugh-

ter's case is denied to be universal; also 1 Fonb. on Equ. 221, note (q.)

E. MATHEWSON'S CASE. 22. b.

If several are bound, ex. gr. in a charter party, but they covenant separately; if the seal of one is broken off, the deed is not avoided as to the others, for the covenants are several deeds written on one piece of parchment. But if a rasure is made, the deed is avoided as to all. So where they are jointly bound, if the seal of one be broken off, the entire deed is avoided.

References.—Vid. Pigot's case, 11 Co. 26, and our references.

READ'S CASE. 34. a.

The student, in this case, will find the general rules with respect to what constitutes a man an executor *de son tort*. The case is a very *leading* one on this subject.

References.—*Read Padget v. Priest et al.* 2 Durn. and Ea. 97. *Edwards v. Harben*, id. 587. *Mountford v. Gibson*, 4 Eas. 441. *Hall v. Elliot*, Peake's N. P. Cases 86. *Curtis v. Vernon*, 3 Durn. and Ea. 587. 1 Wms. Saund. 265. No. 2, 2 vol. 137. a. No. 2.

E. GOOCH'S CASE. 60. a.

In debt on an obligation by A. against B. as heir to his father C. defendant pleaded *riens per descent*. Plaintiff maintained assets at D. and gave in evidence that C. died seized in fee of lands in D. which descended to B. This was admitted, but B. gave in evidence, that before the impetration of the writ he had aliened them in fee, which was likewise conceded; but A. proved that the conveyance was made to defraud him and other creditors, and therefore void by statute 13 Eliz. ch. v. It was insisted that this matter

should have been pleaded; but it was resolved, that upon an issue joined on the plea of *riens per descent*, the plaintiff might give in evidence, and need not plead that the land in dispute was conveyed by the defendant fraudulently to defeat creditors, and therefore void by statute 13 Eliz. ch. v. Wray, C. J. said, that although a purchaser *had notice* of the fraud in a prior conveyance, yet he could avoid such conveyance by statute 27 Eliz. ch. iv.

References.—Read 1 Fonb. on Eq. p. 270, sec. 12, 13, 14. Roberts on Fraud. Conv. 596, ch. v. sec. 5. 2 Wms. Saund. p. 7, No. 4.

SPARRY'S CASE. 61. a.

In an action of *trover* defendant pleaded the pendency of another action upon the case in the B. R. for same *trover*, and conversion of the same goods. On demurrer, adjudged a good plea, because no one shall be twice vexed for one cause. But if debt be brought in an inferior court, and the plaintiff for the same cause sues in C. B. this shall not abate by reason of the pendency of such prior suit.

References.—Read *Dudfield v. Warden Fitzgib*, 313, and the following American cases: *Embree and Collins v. Hanna*, 5 John. 101, that a foreign attachment pending in another state, before suit brought, is a good plea in abatement. *Commonwealth v. Churchill*, 5 Mass. T. Rep. 174, a good case as to the *time* to which such a plea refers. *Marston v. Lawrence*, 1 John. Ca. 397, that after plea of pendency of another action, plaintiff, without leave of court, or payment of costs, may, before replication, enter a *nilhil capiat per breve* in the first suit. *Clifford v. Cony*, 1 Mass. T. Rep. 495. (*Burnell v. Martin*, Doug. 417.)

THE CASE OF MARKET OVERT. 84. a.

[Although the doctrine of market overt, as far as we have been able to ascertain, has not been sanctioned in any of the states, it so frequently becomes the topic of discussion, that every lawyer should be familiar at least with its principles. We refer the student to a few *short select* cases, which, if read with attention, will afford him all requisite information.]

References.—Read *Horwood v. Smith*, 2 Du. and Ea. 750. *Williamson v. King et al.* 2 Camp. Rep. 335. *Miller v. Race*, that *bank notes*, though stolen, become the property of him who receives them *bona fide*, and for value; but not on the principle of *market overt*. *Wheelwright v. Depeyster*, 1 John. Rep. 471, that this doctrine is not recognized in the state of New York. *Heacock v. Walker*, 1 Tyler's Rep. 338. 3 Binn. Rep. 228, note (*); in which is concisely stated the Spanish law on this subject, ascertained by commission to New Orleans.

SEMAYNE'S CASE. 91. a.

[This is a distinguished case as to the authority of a sheriff in doing execution, and serving other process, and particularly of his right of breaking doors. No case is more frequently resorted to for law on this subject than *Semayne's*.]

References.—Read *Park v. Evans*, Hob. 62, that if sheriff raps at the door, and rushes in on its being opened, the arrest is illegal. *Howson v. Walker*, 2 Bla. Rep. 823, that if another arrest be served on one who is under such illegal custody, it is good. *Lee v. Gansel*, Cow. 1, that sheriff, in serving mesne process, may break open an inner door of a lodger's apartment, if he has gained peaceable entrance at the *outer* door. *Ratcliffe v. Burton*, 3 Bos. and Pull. 223, that sheriff cannot, under civil process, break an inner door, without a previous demand of admittance; and the following American cases: *Williams v. Spencer*, 5 John. 352, and *Fitch v. Loveland*,

Kirby's Rep. 380, as to the breaking an inner door. Nicolls v. Ingersoll, 7 John. 145, that *bail* may break open the *outer* door, in order to take the principal.

e. BAKER'S CASE. 104. b.

That if demurrer be offered to written evidence, the adverse party must join in demurrer, or waive his evidence. *Secus* in case of viva voce testimony, but in this case he *may* join if he will.

References.—Read Gibson v. Hunter, 2 Henry Black. 187, in which C. J. Eyre has ably considered the doctrine of Baker's case; and the nature of a demurrer to evidence, 3 Tucker's Black. Com. 372, Note 26. Young v. Black, 7 Cranch R. 565.

WADES'S CASE. 114. b.

Resolved, 1. That if A. to save an estate, be bound to pay twenty-five pounds *lawful money of England*, on 1st of November, a tender any time before sunset on 1st of November, is sufficient.

2. That a tender of foreign money made current by king's proclamation is good.

3. That a tender of more than is due is good.

4. That a tender of money, though in bags, is good, and payee must count it.

[The case of Vane and Studley is cited in Wade's case. It holds that if lessee, to save condition of re-entry, pays his rent to lessor, who receives it and puts it in his purse, he cannot, upon discovering it to be counterfeit, enter for condition broken.]

References.—As to the plea of tender, read 1 Wms. Saund. 33, No. 2. Spybey v. Hide, 1 Camp. Rep. 181. Douglas v. Partrick, 3 Durn. and Ea. 683. Lancaster v. Killingworth, 1 Ld. Ray. 686. Black v. Smith, Peake's N. P. Ca. 88. Grigby

v. Oakes, et al. 2 Bos. and Pull. 526. *Downman v. Downman's ex.* 1 Washington's Rep. 26. As to the point in *Vane* and *Studley's case*, read *Markle v. Hatfield*, 2 John. 455.

PINNELL'S CASE. 117. a.

Resolved, 1. That payment and acceptance of part, before the debt is due, in satisfaction of the whole, is a good plea.

2. *Secus*, if made *on the day*.

3. But the acceptance of a horse, robe, or any collateral thing on the day, is a good plea.

4. That if twenty pounds be due at A. and creditor agrees to accept ten pounds at B. in satisfaction of the whole, it is good.

5. The defendant, in pleading *accord* and *satisfaction*, must state that he paid the less sum, or performed the collateral matter in full satisfaction of the demand, and that plaintiff accepted it as such.

6. The manner of the tender and payment shall be directed by him who made the tender or payment, and not by him who accepts it.

References.—Read *Cumber v. Wane*, 1 Stra. 426. *Fitch v. Sutton*, 5 Ea. 230. *Steinman v. Magnus*, 1 Camp. Rep. 124. *Paine v. Masters*, 1 Stra. 573. *Scholey v. Mearnes*, 7 Ea. 148, and *Harrison and Close v. Wilcox*, 2 John. 448. *Johnston v. Brannan*, 5 John. 268. *Watkinson v. Inglesby and Stokes*, id. 386. On the *sixth* resolution, read *Brett v. Marsh*, 1 Vern. 468. *Manning v. Western*, 2 Vern. 606, 1 Evans's Pothier on Oblig. 368 to 376, and *Mann v. Marsh*, 2 Caine's Rep. 99. *Huger's ex. v. Bocquet*, 1 Bay. 497. *Mayor and Comonalty of Alexandria v. Patten et al.* 4 Cranch, 317.

WHELPDALE'S CASE. 119. a.

This is a very noted case on the plea of *non est factum*, and of joinder in action.

References.—Read 1 Wms. Saund. 291. b. No. 4, where the subject of nonjoinder, and the mode of taking advantage of it, is treated in a very masterly manner. On the plea of *non est factum*, read the following cases: Allwood v. Clark, Taylor's Rep. 281, (an excellent case.) Stoytes v. Pearson, 4 Espi. N. P. Cases, 255. Samuel v. Evans, 2 Du. and Ea. 569.

SIXTH COKE.

FERRER'S CASE. 8. a.

[There is no case better known in the law than Ferrer's case, as to the plea of a former judgment in bar of a subsequent action. This is a point of considerable difficulty, and must be studied with attention.]

References.—Read Kitchen v. Campbell, 3 Wils. 308. Lechmere v. Toplady, 2 Vent. 169. Lacon v. Barnard, Cro. Car. 35. Brook v. Smith, 1 Salk, 280. Seddon v. Tutop, 6 Du. and Ea. 607. Martin v. Kennedy, 2 Bos. and Pull. 69, and the following American cases: Kent v. Kent, 2 Mass. T. R. 342. Snider v. Croy, 2 John. 227. Brockway v. Kinney, id. 210. Rice v. King, 7 John. 20.

e. BELLAMY'S CASE. 38. a.

Lessee upon condition not to assign without license by deed, obtains the license, and assigns the lease to the plaintiff, who pleads the license without *profert*, and held good. *Resolved*, 1. That a deed *ex institutione legis* must be pleaded with a *profert*, though it concerns a collateral thing, and though he who pleads it claims no interest under it. 2. That a deed *ex provisione hominis*, as is the present, need not be pleaded with a *profert*.

References.—[We refer the student to Dr. Leyfield's case, 10 Co. 88, and our references; and to Hammond's Analysis of Pleading, chap. ii. sec. iii. page 28.]

SEVENTH COKE.

CALVIN'S CASE. 1.

[To induce the student to an earnest reading of this case, it cannot be necessary to dwell on its importance, as it has acquired a celebrity by no means confined within the limits of legal readers. The politician and statesman, the historian and general inquirer, resort to it as the most authentic and abundant source of information on the subject of the reciprocal duties of *allegiance* and *protection*, of *alienage* and *denization*, and generally of the relation subsisting between the state and people.

'This case of *postnati*,' says lord Coke, 'is, I confess, longer than the rest, and that for three causes; first, that it was an exchequer-chamber case, for deciding whereof, all the judges of England, as the law requireth, did argue openly and at large. Secondly, for that never any case within man's memory was argued by so many judges in the exchequer-chamber as this was; there having argued the lord chancellor and fourteen judges. Thirdly, for the variety as well of the important matter, as of the several kinds of *excellent learning* delivered in the arguments of this case.' Vid. Pref. to 7 Co. p. 11, and afterwards in the report of the case, p. 7, he adds 'This case was as elaborately, substantially, and judicially argued by the lord chancellor, and by my brethren the judges, as *I ever read or heard of any*; and so, in mine opinion, the weight and consequences of the cause, both in *præsenti et perpetuis futuris temporibus*, justly deserved; for though it was one of the *shortest* and *least* that ever was argued in this court, yet it was the *longest* and *weightiest* that ever was argued in any court; the shortest in *syllables*,* and the longest

* Alluding to the pleadings in the case.

in substance; the least for the value, and yet not tending to the right of that least, but the weightiest for the consequent, both for the present, and for all posterity.'

Notwithstanding the affectation of great method this case is but confusedly reported, and replete with the quaintness and pedantry of the age. Every student, however, emulous of accurate information of this celebrated case, must not content himself with receiving its doctrines from the various digests and abridgments of the law, the pages of the historian, or the disquisitions even of the most learned among the political pamphleteers. An infinitude has been written on the various points in this case; but as our sole object is to present to the student the choicest sources of information, and such as we feel assured he will studiously read, we limit ourselves to a very few references.]

References.—On the doctrine of the perpetuity of allegiance read Vattel, 166 to 178. Ch. xxii. of Du Ponceau's Bynkershoek. (This may be found in 3 Hall's Law Journal, p. 174 to 180.) Talbot *v.* Janson, 3 Dall. 133. 1 Wilson's Works, 311 to 317. Isaac Williams' case, 4 Hall's Law Journal, 361. Tucker's Blac. Com. vol. 1, part 2, Appendix, p. 90, 'the right of expatriation considered,' No. (k.) M'Ilvaine *v.* Cox's lessee, 2 Cranch 280, 4 Cranch 209. As to the rights of American and British *antenati*, read Lamberton's lessee *v.* Paine, 3 Cranch 97, Dawson's lessee *v.* Godfrey, 4 Cranch 321, and the very able and luminous opinion of judge Roan, in Reed *v.* Reed, 1 Munford's Rep. Appendix 1. Reeves' Discussion on the question, 'Whether Americans, born before the independence, are by the law of England, aliens. 6 Hall's Law Journal, 30.

EIGHTH COKE.

e. SIR EDWARD CROGATE'S CASE. 66. b.

To an action of trespass defendant justified as servant under the command of another, who had a right of common in the *locus in quo*. Plaintiff replied *de injuria sua propria, et absque tali causa*. Upon demurrer to this replication it was resolved,

1. That *absque tali causa* refers to the entire plea, and not merely to the command, as plaintiff supposed.

2. That when a defendant, either in his own right or as servant, claims an interest in the land, or in any common, or rent, or way, &c. in or out of the land, there *de injuria, &c.* is not a good replication.

3. If defendant derives any authority from the plaintiff himself, or if it be given him by law, here, though no interest be claimed, the plaintiff should answer it, and not reply generally *de injuria, &c.*

4. All the *parts* of this plea make but one issue; for if this replication were allowed, the plea would be multifarious and double.

References.—Read 1 Wms. Saund. 244. c. No. 7, where this replication is fully considered, and the law on this subject concisely and luminously stated; also White *v.* Stubbs, 2 Wms. Saund. 294, and notes. 1 Bos. and Pull. 76. Hyatt *v.* Wood, 4 John. 150. Lytle *v.* Lee and Ruggles, 5 John. 112. 7 John. 109, 2 Camp. 629. (On the last resolution, that a variety of facts, constituting one entire defence, does not amount to duplicity, read Robinson *v.* Bayley, 1 Burr. 316. Bolts *v.* Purvis, 2 Blac. Rep. 1022. Trevelian *v.* Seccomb, Carthew 8, and Waddams *v.* Burnham, 1 Tyler's Rep. 233. Strong *v.* Smith, 2 Caine's T. R. 28. 2 John. R. 432.

THE SIX CARPENTERS' CASE. 144.

[As to what constitutes a trespasser *ab initio*, the case of the six carpenters may be regarded as a very leading case, indeed the original fountain of the law on this subject.]

References.—*Read* Bagshaw *v.* Goward, Cro. Jac. 147. Taylor *v.* Cole, 3 Du. and Ea. 292. Winterbourne *v.* Morgan et al. 11 East. 395. Messing *v.* Kemble, 2 Camp. 115. Anscomb *v.* Shore, 1 Camp. 283.

NINTH COKE.

E. THE POULTERERS' CASE. 56. a.

This is a well known case on the *questio verata* whether, or to what extent, a conspiracy must be executed to be the subject of an indictment. [This case might with more propriety have been introduced in the seventh title of this course, being a *criminal* case; but as we have not recommended the perusal of any other of lord Coke's cases on criminal law, we have deemed it advisable that the student should read this case at the present time.]

References.—*Read* Rex *v.* Kinnersley and Moor, 1 Stra. 193. Hawkin's Pleas of the Crown, 189 to 191. 6 Mod. 99. 1 Vent. 304. 1 Levintz, 125. 1 Keble, 203. [To those who can procure the report of the trial of the journeymen cordwainers of New York, we strongly recommend its perusal, as it contains nearly all the law which has been decided on this subject. There is in it much irrelevant, and perhaps, some foolish matter; but the case is valuable, as being the first in which this doctrine was elaborately considered in this country, and one in which this law has been more fully investigated than in any other with which we are acquainted.]

TENTH COKE.

e. DOCTOR LEYFIELD'S CASE. 88. a.

On pleading with a *profert* and *giving colour*, no case is more distinguished than Dr. Leyfield's. It is at all times referred to as a leading authority on those subjects; and though the rigidity of the rule there laid down, with respect to *profert*, has been departed from in modern times, this case should be resorted to for the principles upon which the doctrine of *profert* is founded, and also for much excellent matter on the subject generally, and on the law of *giving colour*.

References.—Read 1 Chitty on Pleading, 348 to 351, pp. 400. 415. Read *v. Brookman*, 3 Du. and Ea. 151, that a deed may be pleaded as *lost by time and accident*, without a *profert*. This is a very celebrated case, in which the student will find nearly all the law on the subject of *profert*, from lord Coke's time to that of lord Mansfield. In connection with this great case, read *Smith v. Woodward*, 4 East, which held that although a deed may be pleaded as *lost* or *destroyed*, yet if pleaded with a *profert*, nothing can dispense with the production of it; the *profert* should have been omitted, and the matter of excuse pleaded. *Hendy et al. v. Stephenson et al.* 10 East 55, that a defendant in trespass cannot, by way of justification, plead that he was possessed of a right of common over the *locus in quo*, under a deed of grant by a former owner, alleged to be since lost or destroyed, and therefore not proffered in court, if the *date and names of the parties to such deed are unknown*.

ELEVENTH COKE.

e. SIR JOHN HEYDON'S CASE. 5. a.

From this case the student should commence his investigation of the law relative to the assessment of damages in the

case of joint trespassers, and of election *de melioribus damnis*. This is a subject not a little involved in contrariety of decision, and in practice has generally been attended with difficulty. 'In it is perspicuously expressed,' says Coke in his preface to 11 Co. p. 6, 'where damages shall be severally assessed by jurors; and where the first jury between the plaintiff and one of the defendants, shall assess damages for all the defendants, and where not: whereby all the books are well reconciled, for want of right understanding whereof, many judgments have been arrested, many that have been given, have been overthrown by writ of error, to the great charge, delay, and vexation of the party grieved.'

This subject has been ably discussed in a few cases in this country, and to these we shall principally refer the student.

References.—Livingston *v.* Bishop, 1 John. Rep. 290. Ammonett *v.* Harris, 1 Hen. and Munf. 488. Wilkes *v.* Jackson, 2 Hen. and Munf. 355. Hill *v.* Goodchild, 5 Burr. 2790. Brown *v.* Allen, 4 Espi. N. P. Cases, 158.

e. HENRY PIGOT'S CASE. 26. a.

In this case, among other things, it was resolved,

1. That if a lawful deed be raised, obligor may plead *non est factum*, and give the matter in evidence.

2. That if a deed be altered by the obligee or a stranger, in a material part, the deed is thereby avoided.

3. That any alteration by the obligee, though in a place not material, avoids the deed.

4. That if a deed consists of several parts, not dependant on each other, some lawful, others not, the deed is good in part, and void in part.

5. If any of these parts be erased, the whole deed is avoided; or if the seal of one be broken off, the entire deed is avoided.

6. If several bonds be written on one piece of parchment, and obligor, who is an unlettered man, seals the deed, it is good for that which was read to him, and void *ab initio* for the remainder.

References.—*Read Master v. Miller*, 4 Du. and Ea. 320. This is the most celebrated case on the subject of avoiding instruments by rasure, &c. *Henfrere v. Bromley*, 6 Ea. 309, and the following American cases: *Smith v. Crooker*, 5 Mass. T. Rep. *Woolley v. Evans*, 4 John. 54. *Steele v. Anthony*, 1 Hayw. 98. *Sanderson v. Symonds*, 1 Brod. and Bing, 426. *Waugh v. Russell*, 5 Taun. R. 707. 1 New Hamp. R. 95.

METCALF'S CASE. 38. a.

In all discussions as to the *kind* of judgment on which a writ of error lies, this case is appealed to as the *first* authority on the point. It determined that error lies only on a *final* judgment, or an award in the nature of a judgment, and therefore that it does not lie on the judgment *quod computet* in an action of account; and that the record in such case shall not be removed till the final judgment.

References.—*Read Baker v. Bulstrode*, 1 Vent. 255. *Jaques v. Nixon*, 1 Du. and Ea. 279. *Richardson v. Backus*, 1 John. 493; and the very celebrated case of *Yates v. the People*, 6 John. 337. The opinions of Yates J. p. 394, Spencer J. 398, and Kent C. J. 416, are worthy the student's particular attention. [In this valuable and interesting case, the doctrine of Metcalf's case is discussed with much ability and research. Sixteen to twelve judges held, that a writ of error will lie on a judgment of the supreme court of the state of New York on a *habeas corpus*. But though error regularly lies only on a final judgment or award, yet the writ may be sued out before the judgment is given, provided it be rendered prior to the return of the writ of error.]

c. THE CASE OF THE TAILORS OF IPSWICH. 53. a.

Resolved in this case, that a by-law prohibiting any one from working at his trade of tailor in the town of Ipswich, until he had presented himself to the company of tailors of that place, and proved that he had served seven years as an apprentice, according to the requisition of the statute, 5 Eliz. and been *admitted by them* to be a sufficient workman, was an unreasonable and void by-law, as to all that it imposed beyond the requirements of the statute.

References.—As to what restraints on trade are admitted, and what condemned as illegal, the student will find nearly all the cases luminously arranged by Ch. J. Parker, in the case of *Mitchell v. Reynolds*, 11 Wms. 181, which may also be found in 2 Comyns on Contracts, 467. *Read* also 2 Wms. Saund. 156, Note 1, and *Davis v. Mason*, 5 Du. and Ea. 119. *Dunham v. Trustees of Rochester*, 5 Cowen's New York R. 462.

c. JAMES BAGG'S CASE. 94. a.

In this noted case the student will find, 1. What are deemed sufficient causes for the amotion or disfranchisement of a corporation. 2. How, and by whom this right is exercised. 3. As to the remedy which the party grieved has in such case, either by writ of mandamus, or by action on the case. 4. As to the sufficiency of the return to the writ of mandamus.

This case presents the first instance of a judicial mandamus; and as the subject of disfranchisement, and its remedy, were more fully considered than in any preceding case, it is always referred to as a valuable decision on this doctrine. As to the point that corporations possess the power of amotion, *only* when it is given by their *charter*, or by *prescription*, it has long since been determined otherwise; and it is now held as

undoubted law, that this power is impliedly incident to every corporation, as much so as the power of making by-laws.

References.—Read *Rex v. Richardson*, 1 Burr. 517. *Rex v. Lime Regis*, Douglas' R. 149. *Rex v. Corporation of Doncaster*, 2 Burr. 740. *The Commonwealth v. St. Patrick Benevolent Society*, 2 Binney's R. 441.

☞ NOTE. There are no cases in the *twelfth* and *thirteenth* books particularly worthy the attention of the American student of law.

MISCELLANEOUS.

Under this fourth title, of personal rights and remedies, there are a number of valuable essays, opinions, &c. specially worthy the student's attention, for the reasons previously assigned in our Note 30, on Title III.

- e. 1. On the Testimony of Quakers. 1 vol. *American Jurist*, 141.
- 2. On Literary Property, *id.* 157.
- e. 3. Trial by Jury, *id.* 274.
- e. 4. Opinion on the Surrender of Fugitives from Justice, *id.* 297.
- e. 5. Opinion on the rights and Powers of Municipal Corporations, 2 vol. *American Jurist*, 203.
- 6. A Reading on Damages in Actions *ex delecto*, 3 vol. *American Jurist*, 287.
- E. 7. On the Limitations of Real Actions in Tennessee, *id.* 255.
- 8. Rules of Evidence, 4 vol. *American Jurist*, 286, 5 vol. 101, vol. 6, 18.
- E. 9. On the Law of Corporations, 4 vol. *Amer. Jurist*, 298.
- E. 10. On Double Pleading, 5 vol. *Amer. Jurist*, 269.

E. e. 11. The following numbers in the second volume of Evans' Pothier on Obligations.

IV. 'Of the rule that a person can stipulate only for himself.'

X. 'Of Alternative Obligations.'

XI. 'Of joint and several Obligations.'

XV. 'Of the Statutes of Limitations, and of the Presumptions founded on length of time.'

XVII. 'Of the distinction between Law and Fact; and of the effect of Usage upon the Law.'

XVIII. 'Of Mistakes of Law,' with the learned Dissertation of M. D'Aguesseau, and the opinions of Vinnius on the question, whether monoy paid under a mistaken idea of legal obligations be subject to repetition.

12. The following essays, opinions, &c. in the *London Law Magazine*. 'On the Effect of an Assignment by the husband, for a valuable consideration, of his wife's legal choses in action, as against her surviving,' *vol. i. page 98*.

E. 13. 'On the Sale and Warranty of Horses, *id.* 318.

E. 14. 'On the exemption of carriages, by Turnpike Acts, from payment of toll a second time on the same day, *vol. ii.* 129.

E. 15. 'On the necessity of having a Bond, as well as a Covenant, in certain cases,' *vol. iii.* 382.

16. 'Whether the rate of interest is to be governed by the *lex loci contractus*, or by that of the country wherein the subject matter exists, or to which it relates,' *vol. iv.* 49.

E. 17. 'Of Pleading Exceptions and Provisos in Statutes,' 8 *vol. American Jurist*, 233.*

* In this Essay the student will find the question examined with great ability, as to the validity of the distinction, that 'If there is an exception in the *enacting clause*, the party pleading must show that his adversary is not within the exception; but if there be an exception in a *subsequent clause*, or subsequent statute, that is matter of defence, and is to be shown by the other party.'

18. 'Of Assignments by an Insolvent Debtor, 8 vol. *American Jurist*, 284.*

19. 'Whether Law is a Science,' 9 vol. *Amer. Jurist*, 349.

e. 20. 'Whether an Act of the Legislature authorizing the sale of the real estate of a minor, be constitutional,' 10 vol. *American Jurist*, 297.

e. 21. 'Can the assignee of a foreign bond, assignable and suable in his own name, in the courts of the country where made, be thus sued on in the courts of our country?' 11 vol. *American Jurist*, 101.

22. 'Lecture on the alleged uncertainty of the Law,' 12 vol. *American Jurist*, 285.

* In this article the question is examined, whether an assignment by an insolvent debtor of all his property to trustees, in trust for the benefit of such of his creditors as should become parties to the assignment, and release their debts, and after paying such creditors, in further trust to pay over the surplus to himself, be void as against dissenting creditors, the legal operation of such an assignment being to delay and defraud creditors.

NOTES ON THE FOURTH TITLE.

(Note 1.) THE LAW OF PERSONAL RIGHTS AND PERSONAL REMEDIES.

The student having mastered the extensive and intricate doctrine of the realty, proceeds naturally to the examination of what are denominated personal rights and remedies. This branch of the law being less abstruse than that from the study of which he has just emerged; having fewer obsolete doctrines, and antiquated forms, and being withal that fund from which practitioners, and particularly the young, find most frequent occasion to draw, will be examined with more interest, as well as comprehended with more ease. We trust, however, that the extensive reading, recommended on the doctrine of the realty, will recompense the inquirer for the research expended on it; and, independently of its own intrinsic importance, will furnish innumerable lights and aids to the subject on which the student is entering, in consequence of that relation and connection manifest in all sciences, and in none more evidently than the system of jurisprudence.

(Note 2.) KENT'S COMMENTARIES.*—The transition from the extensive doctrine of the *realty*, in which our student has been so long engaged, to that of the *personalty*, into which he is now entering, might be too sudden, were he at once to be occupied in its minute learning. We believe it will prove at once agreeable and profitable, to review the *elements* of this comprehensive branch of his studies, and advise him, there-

* Vide, also Note 18, on Title ii. ante p. 166.

fore, to re-examine with care, the whole of Chancellor Kent's *second* volume. The studious and thorough reading, which we presume the student has already given the entire work, will render the reperusal of this volume, at this time, easy and highly interesting, and a very proper introduction to his deeper researches into the learning of this fourth title.

The foregoing remarks equally apply to the third volume of Blackstone's Commentaries. In the fifteenth note on the second title, we have expressed our opinion at large, on the excellence of this work; and took occasion to advert to the prejudicial habit, indulged in by many students, of having this, and other elementary productions, constantly in hand, to the exclusion of more solid and learned works. If our course be followed, we think that one careful reading of the English and American Commentaries, together with a reperusal of the chapters we have designated in each, will prove amply sufficient.

(Note 3.) BACON'S ABRIDGMENT.—No work is better known to law students generally, than what at this time, is universally called 'Bacon's Abridgment.' Both words are somewhat calculated to mislead. The work, it is true, was compiled by Matthew Bacon, and first appeared in 1736, under the name of the New Abridgment, to distinguish it from various previous works denominated abridgments, viz: *Statham's*, which probably appeared as early as 1470; *Fitzherbert's* in 1516; *Brooke's* in 1568; *Rolle's* in 1668; *Sheppard's* in 1675, and *D'Anvers'* in 1725. It is certain, however, that Matthew Bacon had the unlimited use of the manuscripts of that enlightened lawyer, lord chief baron Gilbert, and that nearly the entire work, from the title 'Abatement,' to that of 'Sheriff,' inclusive, is extracted from those manuscripts. Hence, Mr. Viner and others shortly

after its appearance, cited the work under the name of 'Gilbert's New Abridgment.' The titles which succeed that of 'Sheriff,' were supplied by Mr. Ruffhead, and Sergeant Sayer, both of them lawyers of eminence. These are facts which greatly strengthen the *authority* of this work. The word 'abridgment' is scarcely less applicable; which, however, is the case with all of the works that have taken this name. The Digest of baron Comyn seems to realize the idea of an abridgment more than the others. The preceding abridgments were generally grafted on some prior work of a similar character; but Bacon's is a series of admirable treatises, of an elementary and scientific character; and had they been prepared for the press by the learned baron of the Exchequer, there can be no doubt they would have been still more worthy of the high reputation they have enjoyed. It is, in our opinion, the only abridgment, or digest of the law which can with propriety, be recommended to students, with the exception, perhaps, of a single title in Comyn's great work; we allude to the title 'Pleader.' All of the other abridgments and digests, as we conceive, are nothing more than books of reference; and, for students, only of *occasional* reference. There have been seven English editions of this work, the first four need not be mentioned. In 1798, the fifth edition was published by Henry Gwillim, Esq. enriched by numerous valuable additions and references. The sixth by the same able editor appeared in 1807, with further improvements. In these editions the student will find, in the title 'Remainder,' a large portion of it designated by inverted commas. When engaged in preparing this edition, Mr. Hargrave presented to the editor a manuscript treatise on remainders, by chief baron Gilbert: This has been incorporated into the title on remainders, and is indicated by the inverted commas. The seventh edition by

C. E. Dodd, of the Inner Temple, appeared in 1831. The only American edition was published in 1810, by Bird Wilson, Esq. with numerous notes and references to English and American decisions. The notes are concise, and are generally correct,—but it is proper for students to be apprized that there are numerous typographical errors, the knowledge of which fact will probably relieve them from some unnecessary doubts, and fruitless researches.

(Note 4.) MARRIAGE AND DIVORCE; BARON AND FEME; BASTARDY.—The subjects of these three titles are sufficiently connected to render it advisable to read them in the order we have designated. For more extensive research into this law, we refer the reader to Mr. Poynter's Concise View on various points relating to marriage and divorce, London, 1822. Second edition, 1824; to the Reports of doctors Phillimore, Addams, Dodson and Haggard; as also to Mr. Ferguson's Reports of divorce cases in the Consistorial court of Scotland. In these reports, as also in the twentieth chapter of Mr. Poynter's Treatise, much useful matter will be found on the extra-territorial operation of laws relating to foreign marriages and divorces. The doctrine *de conflictu legum*, whether it arises out of foreign marriages and divorces, or other causes, is one of great and intrinsic difficulty. It has been a good deal discussed in England, in connection with foreign marriages and divorces, as also in numerous other cases; but it is still comparatively an unexplored region. On this much litigated subject, the continental jurists have displayed surprising ingenuity and learning, greatly excelling that of British and American lawyers. This, in a great degree, is to be accounted for by the vast number of territorial jurisdictions which obtained in Germany, the Netherlands, France, &c. which

necessarily originated a great diversity of legislation, of customs, and of judicial procedures. Hence arose frequent collisions between the judicial decisions of these petty sovereignties. A marriage, for example, valid in one, might be void in another; a divorce granted by one tribunal, might not be respected in a second; a will executed in conformity to one system of laws, might not correspond with the requisitions of another; a contract might be affected by the law of the place where it was made, or by that in which it was litigated, or that in which the subject of the contract was situate, or, finally by that of the domicile of one or both of the contracting parties; and so as to the remedies and various pleas, which might be resorted to in one tribunal, and not in another. Thus the continental jurists were perpetually engaged in discussions arising from this conflict of laws. It gave rise to a body of learning, and of refined distinctions as to the extra-territorial operation of statutes, &c. which the lawyers of this country should not be unmindful of, since our jurisprudence arises from the laws, usages and customs of twenty-five independent sovereignties, and which are not likely ever to become a very homogeneous system, and must necessarily create a series of questions very similar to those occasioned by the various systems of law existing in continental Europe. We look with great anxiety for the completion of Mr. Livermore's work, a part of which has been published, which gives us the assurance that his treatise on the subject, will be a more thorough investigation into its intricacies than can any where be found. Until then, the reader is referred to the following sources of information, which is all that the limited nature of our work will permit us to say on this much vexed title of our law.

FOREIGN AUTHORITIES.—Hertius *de collisione legum*, sec. iv. § 9. Huberus, vol. ii. lib. 1, tit. 3. Trouillier's *Droit*

Civil, tom. 10, 117. Emerigon des Ass. tom. 1. c. 4. sec. 4. Voet *De Statutis*. Rodenberg, *De jure quod oritur ex statutorum diversitate*, tit. 1, cap. 1. Savigny's Hist. of the Roman Law, during the middle ages. Chap. iii.

BRITISH AUTHORITIES.—Robinson *v.* Bland, 2 Burrow's Rep. 1077. Sill *v.* Warwick, 1 H. Black. Rep. 690. Solomon *v.* Rice, id. 131. Hunter *v.* Potts, 1 Term Rep. 182. Phillips *v.* Hunter, 2 H. Black. 402. Melan *v.* Duke of Fitzjames, 1 Bosan. and Pull. Rep. 138. Pippon *v.* Pippon, Ambler's Rep. 25. Bruce *v.* Bruce, 2 Bosan. and Pull. 229, *in notis*. Selrig *v.* Davis, 2 Dow's Rep. 230. Dalrymple *v.* Dalrymple, 2 Haggard's Rep. 54. Compton *v.* Bearcroft, id. 443. Hartford *v.* Morris, id. 428. Scrimshire *v.* Scrimshire, id. 412. Tovey *v.* Lindsay, 1 Dow's Rep. 117. Lolly's case, id. 124, and the following cases in Fergusson's Consistorial cases in Scotland. Gordon *v.* Pye, 276. Kibblewhite *v.* Rowland, 226. Utterson *v.* Tewsh, 23. Edmonstone *v.* Lockheart, 168. Duntze *v.* Levett, 68. Butler *v.* Forbes, 209. Birtwhistle *v.* Vardell, 5 Barn. and Cress. 438. Munro *v.* Ross, 5 Shaw and Dunlop, 605. Sommerville *v.* Sommerville, 5 Ves. Rep. 750. Balfour *v.* Scott, 6 Brown's P. C. 550. Drummond *v.* Drummond, id. 601. Alves *v.* Hodgson, 7 Term Rep. 241: and Mr. Robertson's Essay, mentioned at the close of this note.

AMERICAN AUTHORITIES.—Hopkins *v.* Hopkins, 3 Mass. Rep. 158. Carter *v.* Carter, 6 Mass. Rep. 263. Hanover *v.* Turner, 14 Mass. Rep. 227. Medway *v.* Needham, 16 Mass. Rep. 157. Lanfear *v.* Sumner, 17 Mass. Rep. 110. Harvey *v.* Richards, 1 Mason's Rep. 408. West-Cambridge *v.* Lexington, 1 Picker. Rep. 506. Jackson *v.* Jackson, 1 John. N. Y. Rep. 424. Borden *v.* Fitch, 15 John. Rep. 121. Bird *v.* Caritat, 2 John. 344. Holmes *v.* Remsen, 4 John. Chan. Cases, 460. 20 John. Rep. 229. Lodge *v.* Phelps, 1 John. Cases,

139. *M'Neil v. Colquhoun*, 2 Hayward's N. C. Rep. 24. *Taylor v. Gear*, Kirby's Conn. Rep. 313. *M'Candlish v. Cru-ger*, 2 Bay's S. Car. Rep. 377. *Grimshaw v. Bender*, 6 Mass. Rep. 157. *Van Reims Dyke v. Kane*, 1 Gallison's Rep. 371. *Goodwin v. Jones*, 3 Mass. Rep. 577. *Schofield v. Day*, 20 John. Rep. 102. *Harvey v. Richards*, 5 Cranch's Rep. 403. *Harrison v. Sterry*, id. 289. *Slacum v. Pomeroy*, 6 Cranch, 221. *Milne v. Moreton*, 6 Binney's Penn. Rep. 353. *Norris v. Munford*, 4 Martin's Louisiana Rep. 20. *Ranway v. Stevenson*, 5 Martin, 23. *Saul v. His Creditors*, 5 Martin, 569. *Fisk v. Chandler*, 7 Martin, 24. *Thuret v. Jenkins*, 7 Martin, 318. *Whiston v. Stodder*, 8 Martin, 952. *Vidal v. Thompson*, 11 Martin, 23.*

On the learning of 'Baron and Feme,' we refer the reader to Roper's very able treatise on the 'Law of Husband and Wife;' and to Clancy's treatise on the rights, duties and liabilities of Husband and Wife, London, 1827. New York, 1828.

In the useful volume by the late judge Reeves, of Connecticut, on 'Domestic Relations,' published at New Haven in 1816, there is an excellent treatise on the law of Baron and Feme. On the subject of 'Bastardy' we may mention Croke on Illegitimacy, London, 1800; and Robertson's Essay on the

* [Since the foregoing observations on the doctrine *de conflictu legum* were written, there has appeared a masterly treatise on the entire subject, from the accurate and learned pen of Mr. Justice Story. It is truly gratifying to the just pride of Americans, that this intricate and important branch of domestic and international law, so new to British and American jurisprudence, and so extensively, but confusedly treated, by the learned of Europe, should have been so systematically, clearly, practically and learnedly discussed, as it undoubtedly is, in this treatise. We believe that if any American law work is destined, not only to arrest the attention of the jurists of Europe, but to direct their researches, permanently, into the rich and various mines of our law, it is the '*Commentaries on the Conflict of Laws, Foreign and Domestic.*']

law of legitimation, by subsequent marriage. London, 1829.

§ By the Roman civil law, the Canon law, and that of most of the countries in Europe, as also in Scotland, and in eleven out of the twenty-four states of this Union, children born before marriage are rendered legitimate (with different modifications) by the subsequent intermarriage of their parents. This is not the case in England. In Mr. Robertson's Essay, the questions discussed by him with ability and research, relate to the operation of the Scotch law to validate the claim to lands in Scotland, of one born out of wedlock, whose parents almost always resided in England, but who intermarried in Scotland, and shortly after, died in England. The general doctrine of legitimation *per subsequens matrimonium*, is examined; but the essay is particularly valuable as an inquiry into the true grounds of the doctrine *de conflictu legum*; and the true import and application of the *lex loci contractus*; *lex domicilii*, and the *lex loci rei sitæ*, as to personal rights, and as to property, real and personal. He argues very forcibly, that the *lex loci contractus* affords no principle for ascertaining legitimacy in such cases; that the *personal status* of legitimacy, impressed by the laws of one country, has no extra-territorial operation to legitimate him in another country; that the *lex domicilii* governs *personal* or moveable property only; and that it is the *lex loci rei sitæ* which is the operative principle, and that the *lex domicilii* can only be used as a *test* or medium of discovering the *situs* of the property, but when that is any how ascertained, the *lex sitæ* is the only governing principle.

(Note 5.) GUARDIAN AND WARD; INFANCY AND AGE; IDIOTS AND LUNATICS.—These three titles appear to be so naturally associated, that we prefer the student to read them

in the order stated. We are not aware of any distinct treatise on the law of 'Guardian and Ward.' In the late judge Reeve's *Treatise on Domestic Relations*, there is a chapter on this subject, to which lawyers may have occasion to refer with advantage. On the law of 'Infancy,' we refer to Mr. Bingham's treatise on *Infancy*, London, 1816; and on the subject of 'Idiots and Lunatics,' Highmore on *Lunacy*, London, 1807; to Collinson's *Treatise*, in two volumes, 8vo. London, 1812, and to Shelford's '*Practical Treatise on the Law concerning Lunatics, Idiots, and Persons of Unsound Mind*,' London, 1833, 1 vol. 8vo. republished in the second volume of '*The Law Library*,' Philadelphia, 1833.

(*Note 6.*) ALIENS, AMBASSADORS, PREROGATIVE.—In these chapters respectively, the student will find the outlines of the important law respecting the rights, duties and incapacities of aliens, and of ambassadors; and, under the head of 'Prerogative,' he will extract some of those general principles which apply, in our country, to the sovereign powers of the federal and state governments. There is no treatise, *ex professo*, on the law of aliens. But, in addition to our references in connection with Calvin's case, 7 Coke, 1,* the student will find the law of alienage pretty well collected and arranged, in Petersdorff's *Abridgment*, vol. 1, p. 462 to 488. And for American decisions, he will consult the numerous digests, under the proper heads.

The law, in extenso, respecting foreign ministers, comes under a different title of our Course,—but the present object of the student is to obtain a *coup d'œil* only of the subject, which he will find in the selected chapter of Bacon; to which he

* Vide Title iv. Syllabus, ante p. 313, for Calvin's case, and the references to the same.

may add the few pages in Petersdorff, vol. i. p. 491 to 502, and vol. vi. p. 151 to 156. For more extensive researches on the subject, the more matured student is referred to various other parts of this Course, to be ascertained by consulting the index of this volume.

On the subject of 'Prerogative,' we also direct the student to vol. xiii. of Petersdorff, 690 to 702, and generally to the Digests, under that title.

(*Note 7.*) CORPORATIONS; BY-LAWS; STATUTES.—The elementary law of these titles is correctly and clearly stated in the respective chapters in Bacon's Abridgment. But these are not sufficient to supply the requisitions of the practising lawyer. The law of corporations has become, especially in this country, an extensive and very important title, which has never been accurately and philosophically treated in England. It is divided into two great branches,—the law of public or municipal corporations; and the law of private corporations, each of which admits of various subdivisions. The former has attracted the notice of the English tribunals, and writers, much more than the latter; whereas, in our country, private corporation law has been extensively cultivated,—owing, we presume, to the fact that with us almost every enterprize which requires large capital, is effected by incorporated associations, instead of the combinations of individuals, united by no other tie than that of reciprocal agreement, so usual in England. No systematic view of the law of corporations appeared in that country until 1793. The work of Mr. Kid has enjoyed the highest reputation; but is still insufficient to meet the wants of American lawyers, as it treats mainly of municipal corporations,—is nearly out of print, there being but few copies in the country,—and chiefly because the law of this

subject has been much enlarged since Mr. Kid wrote, by an extensive series of judicial decisions in England, and a still more expansive view of the entire law, on this side of the Atlantic. The only other English work on the subject is by Willcocks, in 1827, a small and well arranged treatise on a part only of the law of municipal corporations. The imperfections, to which we have alluded, in respect to private corporations, have been fully remedied by the excellent treatise of Angell and Ames, published at Boston in 1832. In this valuable work, the authors have incorporated and judiciously arranged the substance of nearly five hundred American decisions, and perhaps of half as many English cases, decided since Mr. Kid's work appeared,—forming altogether a very satisfactory view of the American and English law of private corporations. In respect to the law of municipal corporations, a most important subject, we have still to refer to the pages of Kid and Willcocks; and to the numerous American cases decided on this law. The subject of By-laws, so intimately connected with that of corporations, is fully treated in the work of Angell and Ames—and in regard to the subject of statutes, the lawyer will consult, in addition to Bacon's chapter, the masterly work of Barrington on Statutes; and the volumes of reports generally, under the head of 'Statutes.'

(*Note 8.*)* WILLS AND TESTAMENTS, EXECUTORS AND ADMINISTRATORS, LEGACIES.—These three subjects are closely allied, and ought to be studied in the order designated. They are well treated in these three chapters in Bacon's Abridgment. These titles are eminently useful and practical, there being few subjects in the law of more frequent application, in the course of office and of court practice. Each

* Vide Note 19, on Title iii. p. 270.

has been extensively and thoroughly treated, by authors of various merit, so that what may not be very clear and satisfactory in one treatise, is apt to be found remedied in some other. In an extensive practice there is frequent occasion to examine many books on the same topic; we therefore, bring to the student's notice those of most note on these titles, respectively; premising, however, that in examining these works, it is not easy to avoid travelling over some of the grounds of the *reality*, though we may desire to restrict ourselves, as much as possible, to those of the *personalty*. The doctrines of perpetuities, of Shelly's case, and the many other subtile points of real law arising out of devises, is ill associated with the law of legacies, and other matters of personal wills. The truth is, that ambiguity in legal nomenclature sometimes occasions the erroneous classification of subjects. There is nothing sufficiently certain in the import of the words *testament*, *will*, to enable one to determine whether a treatise on either embraces real and personal estate, or either. The word *devise* is more certain, but even this, in popular use, is not free of ambiguity. There are treatises on 'Devises'—on 'Wills of personal property'—on 'Wills of real property'—on 'Mixed wills'—on 'Wills and Testaments'—on 'Wills and Codicils,' &c.—but the *short title* of the work generally leaves it uncertain, whether it relates to the disposition of real or of personal estate.

The following are the most celebrated works on the subjects of this note. '*Roberts on Wills and Codicils.*' London, 1815, 2 vols. 8vo. Amer. edition, 1823. '*Swinburne's Treatise on Testaments and last Wills.*' Seventh edition, by Powell, 3 vols. 1803. '*Toller's Law of Executors and Administrators.*' Whitmarsh's edition, 1818. '*Williams on the law of Executors and Administrators,*' 2 vols. 8vo. Troubat's American edition, 1832. '*Lowndes on Legacies,* 1824. '*Roper on Lega-*

cies, 2 vols. White's edition, 1828. *Preston on Legacies*, which is, perhaps, the most able treatise that has appeared. *Roper on Revocation of Wills and Testaments*.

(Note 9.) AGREEMENT, OBLIGATION, ASSIGNMENT, AUTHORITY, BAILMENT.—The above mentioned five titles, will afford the student a tolerable outline of one of the most extensive, and, without doubt, one of the most important divisions of the law. The student must have early perceived that the infraction of contracts, and the commission of torts, constitute the principal sources of judicial litigation. The English law of contracts, various, extensive, and important, as it confessedly is, has never been cultivated with correspondent assiduity; and, indeed, may be considered as a good deal neglected, when we regard its pervading, and great intrinsic value, and the philosophical character which essentially belongs to it. This inattention to the subject of contracts arose, in part, from the long continued hostility to the Roman and continental law, from the preference, which during centuries, was accorded to the feudal law; from the difficulties and refinements in the law of landed estates, which called so largely on the time of courts and of lawyers; and finally, from the habits and actual condition of the people so little favourable to either foreign or domestic trade and commerce, compared with what subsequently took place, and now exists in flourishing maturity. The time expended on the legal subtleties of real law, had it been dedicated to the cultivation of the doctrine of contracts, would have been most profitably applied. The one is an artificial system of wonderful ingenuity, but of no essential utility; the other is founded in nature, and arises from the infinitely varied transactions in society; the former, though the growth of centuries, could, in great part, be obliterated

from the scheme of English jurisprudence, without any vital detriment, as its place could be easily supplied by a scheme of real law infinitely less artificial; but the latter, when once called into existence, must be commensurate in duration with our habits and institutions, as it is a scheme deduced from the principles of common reason, and is the natural growth of the simple and hourly occurring negotiations of life. In the Roman code, the law of contracts is brightly prominent; but, in our science, with few exceptions, every other department has made larger advances towards a philosophical perfection than that of contracts; for though a few topics have been cultivated with scientific accuracy, and with requisite fulness, the general doctrine of contracts, as it seems to us, has never commanded that thorough examination, which its importance, and the facilities afforded by the works of the civilians, so invitingly prompted. The treatises on contracts by Powell and by Comyn; those on bailments, by Story and Jones; the various works on the law of mortgages, powers, covenants, insurances, sureties, bills, notes, guarantees, charter parties, agencies, partnerships, &c. are generally valuable, and some of them very able on the particular subjects. And were every distinct species of contract as clearly, learnedly, and philosophically discussed and explained, as is the law of bailments, the want of a general treatise on the entire subject of contracts, showing their minute divisions, connections, and dependencies, would not be regarded as a serious evil, though its presence would certainly be desirable. In the present state of the law, however, a scientific, and learned, yet elementary view of the doctrine of contracts, in all their varieties, enriched by all the wealth of the civilians, of ancient and modern times,—and so far expository as to exhibit the final result of all the adjudicated cases of British and American tribunals, and yet

so far speculative and censorial, as to point out the numerous imperfections and defects of the existing law, and all of these argued in the spirit of a matured philosophy, could not fail to be a work of great utility, as the existing separate treatises are so generally deficient in most of these respects.

WORKS ON THE LAW OF CONTRACTS.

☞ Students, desirous of examining the learning of contracts with more than ordinary research; and lawyers, when engaged in investigating many interesting questions in this extensive field, may find their labours facilitated by the following enumeration of some of the principal sources of knowledge; a meagre catalogue indeed, compared with what has been accomplished in various nations, and times,—still, (with a few brilliant exceptions,) they are not in the spirit, nor written with the research, we have above intimated as so desirable,—and, in no instance, in the way of a thorough and general treatise on the entire doctrine of contracts.

In our enumeration we, of course, have disregarded the common law distinction arising from a seal; as also the specific nature of particular contracts, which refers them to some special head; since *contracts* must be essentially the same, whether special or simple, commercial or maritime, or merely of the common law.

I. BRITISH AND AMERICAN.

1. Rutherford's Institutes. Vol. i. chapters xii. xiii. xv. Vol. ii. chap. vii.*
2. Powell on Contracts and Agreements, 2 vols.
3. Comyn on Contracts and Agreements not under seal, 2 vols.
4. Chitty on Contracts. [*Troubat's American edition.*]
5. 'Contract and Agreement.' 5 Viner's Abridgment, 504 to 551.
6. 'Authority.' 3 Viner's Abridgment, 416 to 438.

*In addition to this valuable chapter on *Interpretation*, we refer the student to a learned examination of this subject in Kirwan's *Logic*, 2 vol. page 580 to 623.

7. 'Contract.' Petersdorff's Abridg. 172 to 220.
8. Sheppard's Touchstone, chapters iv. vii. xxi. [*Preston's 7th, or Atherly's 8th edition.*]
9. Chipman on Contracts. *Middlebury, 1822.*
10. Verplanck on Contracts. *New York, 1825.*
11. Jones on Bailments. *London, 1798, of which there is a recent much improved edition.*
12. Story on Bailments. *Cambridge, Mass. 1832.*
13. Paley on Agency. *Gow's edition.*
14. Livermore on Agency, 2 vols.
15. Fell on Guaranties—*vide recent edition.*
16. Theobald on Principal and Surety. [*Vide 1 vol. Law Library.*]
17. Angell on Assignments.
18. Jeremy on Carriers.
19. Jones on Carriers.
20. Platt on Covenants. [*Vide 3 vol. Law Library.*]
21. Long on the Contract of sale of personal property.
22. Hurlstone on Bonds. [*Vide 8 vol. Law Library.*]
23. Bell's Commentaries on the Laws of Scotland, *passim.*
2 vols. 4to.
24. Chitty's Commercial Law, volumes 3d and 4th.
25. 'Construction of Statutes'*—[*vide Dwarris on Statutes, chap. xii. vide vol. ix. of Law Library.*]
26. Watson, Montague, Gow, Collier, Cary, on Partnership.
27. Weskett, Parke, Marshall, Millar, Hughes, Benecke, Phillips, Ellis, on Insurance.
28. Marius, Kyd, Bayley, Chitty, Roscoe, Glen, on Bills and Notes.

* Statutes, treatises, &c. being construed by essentially the same rules as are applicable to *contracts*, induces us to insert this, and the like sources of information, on the subject of interpretation or construction.

29. Whitaker, Montague, on Liens.
30. Lawes on Charter-parties.
31. Kyd, Watson, on Awards.
32. Montague, Babington, on Set-off.
33. Hovenden on Frauds. 2 vols.
34. Newland on Equity Contracts.
35. Powell, Sugden, on Powers.
36. Roberts on Fraudulent Conveyances, and on the Statute of Frauds.
37. Story on the Conflict of Laws.
38. Powell, Coote, Wilmot, Trollope, on Mortgages.

II. CONTINENTAL WORKS ON CONTRACTS.

1. The following works of M. Pothier. *Traité du Contrat de Vente—de Mariage—d'Assurance—de la Communauté—de Louage—de Societé—de Rente—de Change—des Hypothèque—des Contrats de Bienfaisance.*
2. *Traité des Obligations de Pothier, revu, abrégé mis en rapport avec le Code civil actuel, et le Code Guillaume, &c. par M. Molitor. Louvain, 1827, 2 vols.*
3. Pothier on Obligations. [*Evans' Translation, 2 vols.*]
4. Domats' Civil Law, part i. 'Of Engagements,' page 33 to 335.
5. Puffendorf's Law of Nature and Nations. Book v. ch. i. to chap. xii. inclusive. Book viii. chap. vii. to x. inclusive.
6. Campbell's Grotius, vol. ii. book ii. chap. xi. 'On Promises,' chap. xii. 'On Contracts,' chap. xvi. 'Interpretation of Treaties.'
7. Vattel's Law of Nations, book ii. chap. xvii. 'Of the Interpretation of Treaties.'

8. Brown's Civil Law, vol. i. book ii. chap. xi. page 343.
Of Contracts.
9. Kame's Law Tracts, tract ii. 'Of Contracts and Promises.'
10. Wood's Institutes of Civil Law. Book iii. chapters 1, 2,
3, 4, 5, 6, 9.
11. Justinian's Institutes. Cooper's edition. Notes, page 583
to 597.
12. Insti. Justin. Lib. iii. tit. xiv. ad xxx.
13. Heineccius—Antiqui. Roman. Lib. iii. tit. xiv. ad xxx.
14. Opera Minora Bynkershoekii. 'De Pactis,'—vide Opera
Omnia, 2 vol. 119.
15. Bynkershoek—Questionum Juris Privati, Lib. iv. vide
Opera Omnia, vol. ii. 517.
16. Commentarii Juris Romani Privati. Aucto-Warnkœnig.
Tom. ii. lib. iii. 'De Obligationibus,'—the whole of
the second volume.
17. Colebrooke's Digest of Hindu Laws, vol. i. part i. 'Of
Contracts,' vol. ii. part i. continued to page 317.
18. Traité des Contrats et des Obligations en général suivant
le Code civil, par M. Duranton. 4 vols. Svo. *Paris*, 1819.
19. Traité des Obligations, d'après les principes du Code civil,
dans lequel on compare ce Code aux loix Romaines, et
où l'on démontre sa superiorité sur elles dans tous les
points où il s'en est l'ecarté, par J. B. Carrier.—*Dijon*,
1819.
20. Carolus Zanchi—Tractatus de Societate. *Romæ*. 1786.
21. Sam. Strykii—De Vitiis rerum venalium. *Hala*. 1709, 4to.
22. Traité des Assurances et des Contrats à la grosse, par
E'mérigon—conféré et mis en rapport avec le nouveau
Code de commerce, &c. par Boulay-Paty. *Rennes*,
1827, 2 vols. 4to.
23. Fierli—Della Società chiamata Accomandita, 2 vols. Svo.
Firenze, 1803.

24. Du Contrat de Mariage, par M. Bellot. *Poictiers*, 1826, 4 vols.
25. De la Garantie et des vices rédhibitoires dans le commerce des animaux domestique, par M. Huzard. *Paris*, 1829.
26. Traité des dol et de la fraude en matière civilé et commerciale, par Chardon. *Avallon*, 1827, 3 vols.
27. Fagundez—Tractatus de Justitia, et Contractibus, et de Acquisitione et translatione dominii. *Lugd.* 1641.
28. Lambertengus—De Contractibus eorum quibus sine certa solemnitate contrahere permissum non est. *Mediol.* 1576.
29. Pothier. Pandectæ Justinianæ, Tom. iv. lib. xlv. tit. vii.; lib. xlv. tit. i. ii. iii.; lib. xlvi. tit. i. ii. iii. iv. v. vi. vii. viii. page 149 to 319.
30. Van Leeuwen's Commentaries on the Roman-Dutch Law. Book iv. chap. i. to xxi. page 313 to 452.
31. Crouse, De contrabandâ emptione et venditione ex jure Romano. *Lovanii*, 1824.
32. Dubuisson—Questiones Selectæ ex capite de pactis, 1816.
33. Kocchius, De Mercibus ad vendendum in commissionem datis, 1766, 4to.
34. Spiering—ad l. 5. C. de dolo malo, 1808, 8vo.
35. Scholl's Dissertatio de dolo malo, 1818, 8vo.*

[For additional works on the law of Contracts vide Title X. of this Course.]

* ~~¶~~ The student will distinctly understand that in giving in our Notes, this and any similar enumeration of books, &c. on various legal subjects, our chief object is to familiarize him with the bibliography of his science. In after life, during laborious professional researches, he may have occasion to consult, and we hope with advantage, and much saving of time, the lists we have thus given in the course of our volume. He will then examine, with care, the contents of most of the volumes, &c. the mere titles of which are all that at present claim his attention, but which may then enable him to satisfy many anxious doubts on points, perhaps of vital importance to the causes of his clients.

(*Note 10.*) **FRAUD AND DURESS.**—Fraud and duress, whether at common law, or under various statutes, whether affecting contracts respecting the realty, or personalty, by simple contract or specialty, and in whatever court it may be cognizable, is a subject so essentially connected with the doctrine of express and implied contracts, as to render it necessary to be carefully studied in close association with it. As fraud and duress vitiate the most solemn contracts, the student should carefully ascertain how far the principles of the common law will afford relief, how far the matter may rest exclusively on statutes; how far these may be in confirmation of, or suppletory to the common law principles; the courts in which relief may be had; and the formal and technical modes, whether by pleading, evidence, &c. by which the fraud, or duress may be applied, so as to annul the particular transaction. The general principles are given in the chapters we have designated; but the subject is very extensive, and will be found in nearly every department of the law.

(*Note 11.*) **ATTORNEY, SHERIFF, CORONER, CONSTABLE.**— For more special information on these subjects, we refer our student to Backus' Treatise on the laws relative to the offices and duties of sheriff, coroner, and constable, in two volumes. *New York*, 1812. Maugham's Treatise on the law of attorneys, solicitors and agents, in one volume. *London*, 1825. Merrifield on the law of attorneys, with practical directions in actions and proceedings by and against them, in one volume. *London*, 1830. Dawson's Practical Treatise on the law relative to attorneys and solicitors, and their agents, *London*, 1830. In the foregoing works, to which we may add the corresponding titles in Petersdorff's Abridgment, students and lawyers will find the entire learning of these subjects ably and clearly

digested. The duties and responsibilities of attorneys and solicitors (in itself an extensive title,) had not been separately treated until 1825, by Mr. Maugham, in his ample and well arranged work, which we apprehend, has nearly exhausted the subject. The succeeding treatises, which appeared in the same year, added but little to the researches of Maugham; that by Merrifield being occupied, in the larger part, by other subjects; and the one by Dawson having little more than one-third of the matter contained in the first named treatise. The volumes by our countryman, Mr. Backus, reflect great credit on its author, which work, with the recent treatise by Watson, on the office and duty of sheriff, have, perhaps, exhausted the law of these subjects. Mr. Watson's treatise may be found in the seventh volume of the 'Law Library.' *Philad.* 1834.

(Note 12.) EJECTMENT LAW.—This chapter on the law of ejectment, in Bacon's Abridgment, will be little more than sufficient to impress on the student's mind the *coup d'œil* of the subject, derived to him from his previous reading. From the elementary works we have recommended, in which the personal and mixed actions, (and among the rest ejectment,) are explained; as also from the treatises on the real remedies, in which there is often much that illustrates this modern remedy, the student must have obtained at least an outline of the subject. Ejectment law, in its most comprehensive range, will be acquired only in time, and by much practice. In Note 6, page 232, on the third title of this Course, we adverted to the subject of land titles in the United States, ejectment law founded on locations, and to the difficulties arising out of the practice of the land offices,—all of which are connected with the action of ejectment, as used in this country. This action in England, is seldom used to settle the question of bounda-

ries; nor do questions of intricate location, so common with us, ever there arise. The treatises on ejectment law, consequently, of that country relate to title, and to the formulæ of the action—to which the American lawyer when called on, must add much law, that until recently was wholly traditional, and which is destined, we presume, to become in the western states, a written system of intricate and refined law, to which, however, the lawyers of our country, generally, will have little occasion to refer. With the exception of the local law to which we have just alluded, the English treatises on ejectment are almost entirely applicable to our country, and have been made wholly so, by American editions, with notes and references to our law. The most meritorious treatises on the action of ejectment are Serg. Runnington's edition, of lord chief baron Gilbert's treatise—of which there is a recent edition by Ballentine. Adams on Ejectment. *London*, 1818, of which valuable work there have been two American editions, one by Ruggles, *New York*, 1821, the other by Tillinghast, *New York*, 1832.

(*Note 13.*) SLANDER.—The student having read this chapter with due care, will be fully prepared for the perusal of the select cases in lord Coke's reports, and the references to American decisions, which we have given in page 295, &c. of the Course. Still, we do not recommend his taking up those cases in connection with the present chapter; but prefer him to follow the order designated in our syllabus. The study of the intervening topics, it is hoped, will not obscure his recollections of the law of slander, gained from this chapter; but should it, in a degree, have that effect, they cannot fail to be revived, and firmly impressed, and with much additional knowledge, by a careful study of the cases in Coke. Although

we have but little liking for the action of slander, in theory, and still less for it in practice,—yet as it belongs to the profession, is a part of our science, and cannot be regarded as a very simple doctrine, we refer the student to some further sources, to be availed of, either for the removal of doubts, when reading the chapter in Bacon, and the select cases in Coke, or subsequently, when engaged in professional researches for clients, anxious to vindicate their own reputation, or to exempt themselves from the charge of having assailed another's. Whatever, therefore, on this too extensive doctrine, may not be found in the sources already indicated, will probably be supplied in the following—Petersdorff's Abridg. vol. xiv. p. 680. Comyn's Digest, vol. i. p. 245 to 282. 'Action on the Case for Defamation,' (A.) to (G.) inclusive. Dane's Abridg. vol. ii. p. 565 to 605, chap. lxiii. Starkie on Slander, 1813, 8vo.

(Note 14.) LIBEL.—The student should carefully distinguish the law of libel, from that of slander; not only as respects the criminal, but the civil remedy, in respect to the former.

In addition to the authorities stated in the preceding note, the following are the principal sources of the law of libel; generally passing by, however, the numerous volumes of reports, the treatises on Nisi Prius law, and the digests, to which the student will of course resort. With them, aided also by the following list, the most industrious lawyer, we hope, may be enabled to prosecute his researches to any desirable extent.

1. Holt on the Law of Libel, London, 1816. [*This is particularly valuable, as it contains a general history of the law of defamation, in ancient and modern times.*]

Examine carefully book i. chap. i. and the authorities therein cited.]

2. *The People v. Crosswell.* 3 Johnson's Cases, 337, [*particularly Note (a) at page 382, in which the learned reporter states the Roman law on the subject, and its sources.*]
3. Petersdorff's Abridgment, vol. xii. p. 163 to 248.
4. Mence on the Law of Libel. *London*, 1824.
5. *Théorie du Libelle.* *Paris*, 1775.
6. Jones' *De Libellis Famosis; or the Law of Libels.* *London*, 1812.
7. Loffts' *Essay on the Law of Libels.* *London*, 1785.
8. Leache's *Considerations on the Matter of Libels*, 1791.
9. Russell's *Hints for Legislators, to prevent Libels.* *London*, 1802.
10. Earl Stanhope's *Rights of Juries defended; with authorities in support of those rights; and the objections to Mr. Fox's libel bill refuted.* *London*, 1792.
11. Bartram's *Report of the trial of Nightingale v. Starkdale, in an action for a libel, in his Review of the 'Portraiture of Methodism.'* *London*, 1809.
12. Sheppard's *actions upon the case for Slander and Libel, or a methodical collection under certain heads of thousands of cases of what words are actionable, and what not*, 1662 folio, 1674, 8vo.
13. Trowers' *Observations on the Right and Duty of Juries in trials for libels, with remarks on the origin and nature of libels*, 1784, 8vo.
14. *Information against Stockdale, for a libel on the House of Commons.* *London*, 1790, 8vo.
15. Highmore's *Reflections on the distinctions usually adopted in criminal prosecutions for libel, and of the consequent verdicts.* *London*, 1791, 8vo.

16. Parliamentary debates on Statute 32 Geo. 3, chap. lx. respecting the functions of juries in libel cases, 1792, 8vo.
17. Bowle's Considerations on the relative rights of judge and jury, in trials for libel. *London*, 1791.
18. Bowle's Letters to Mr. Fox, respecting libels; suggesting the alarming consequences of his proposed bill. *London*, 1791.
19. Adair's Discussions of the Law of Libel, 1785.
20. Adams' Trial of John Peltier for a libel on Napoleon Bonaparte, 1803, 8vo.
21. Dyer on the Doctrine of Libels, and the office of jurors, 1799, 8vo.
22. Jenkins' Report of the trial of Mr. Justice Johnson, for a libel in the King's bench, 1806, 8vo.
23. Trial of Alexander Hamilton Rowan, for the distribution of a Libel, 1794, 8vo.
23. George's Treatise on the offence of libel, and on the boundaries of political discussion. *London*, 1812, 8vo.
24. Cooper's Justinian's Institutes. Note, page 629 to 636.

(Note 15.) PLEAS AND PLEADING.—Pleading, in its most extended sense, signifies the formal exposition of such facts as the plaintiff and defendant reciprocally conceive to be necessary to evince the legal sufficiency of the claim of the one, and the defence of the other. In this point of view it is obvious that the science of pleading embraces the law and the *modus operandi*, or formal mode in which the matter in litigation is stated, in order that it may be decided on, either by the jury upon an issue of fact, whether general, special or common, or by the court, on an issue or demurrer in law, in which the facts are conceded, but the law contended for, is denied by the demurrant. Hence the student will readily agree

with lord Coke, that the '*usual pleading*' must be '*the sure oracle of law,*' and that '*good pleading is the lapis lydius, or touchstone of the true sense and knowledge of the common law.*' 2 Co. 68. 3 Co. 9. 10 Co. 29. Evidence and pleading are the pillars which mainly sustain the august fabric of law; their foundations, breadth, and altitude must be familiarly known; for it may with truth be said, that he who has mastered the philosophy of evidence, and the logic of pleading is already, or certainly may soon become an accomplished lawyer; but that his knowledge of the law will prove '*stale and unprofitable,*' who is not well instructed in this '*most honourable, laudable and profitable knowledge of well-pleading in actions real and personal,*'* and that admirable system founded on reason and philosophy, which has for its object the manifestation of truth.

It is not sufficient to know the law, if we are uninformed as to the formal mode of stating our case for adjudication, and the requisite evidence to support our statement, if legally made; for although we may say, '*Turpe esse causas oranti, jus in quo versaretur ignorare,*' yet we should know, that '*Sunt jura, sunt formulæ de omnibus rebus constitutæ, ne quis aut in genere injuriæ aut ratione actionis errare possit: expressæ sunt enim ex uniuscujusque damno, dolore, incommodo, calamitate, injuria, publicæ a Prætore Formulæ, ad quas privata lis accommodatur.*'†

The science of pleading has been much ridiculed by some; but what is there, in nature or morals, good or excellent, which has not been thus assailed? It, in common with every thing which has the stamp of humanity, possesses faults, but the system, in the main, is wonderfully free from important or mischievous defects. The raillery and cavils of the witty,

* Litt. sec. 534.

† Cic. pro. Rosc. sec. 8.

though generally sciolous objectors to this learning, are little to be regarded, when such luminaries as Littleton, and Coke, and Mansfield, and Jones, have testified its worth in the strongest language of admiration. 'The substantial rules of pleading,' says lord Mansfield, 'are founded in *strong sense* and the *soudest and closest logic*; and so appear, when well understood and explained, though by being *misunderstood* and *misapplied*, they are often made use of as instruments of chicane.' So likewise sir Wm. Jones, in his preface to his translation of the speeches of Isæus, says, 'When we consider the multitude of lawsuits with which Athens abounded, it must appear strange how six or seven magistrates, even with their assessors, could have time to conduct the altercation of so many litigants, and to perform the other important duties of their office. At Westminster a similar plan would be found impracticable; nor shall I be easily induced to wish for a change of our present forms, how intricate soever they may seem to those who are ignorant of their utility. Our science of special pleading is an excellent logic; it is admirably calculated for the purposes of analyzing a cause, of extracting, like the roots of an equation, the true points in dispute, and referring them, with all imaginable simplicity, to the court or the jury; it is reducible to the strictest rules of pure dialectic; and if it were scientifically taught in our public seminaries of learning, would fix the attention, give a habit of reasoning closely, quicken the apprehension, and invigorate the understanding as effectually as the famed peripatetic system, which, how ingenious and subtle soever, is not *so honourable, so laudable, or so profitable*, as the science in which Littleton exhorts his sons to employ their courage and care. It may unquestionably be perverted to very bad purposes; but so may the noblest arts, even eloquence itself, which many virtuous men

have for that reason decried; there is no fear, however, that the contracted fist, as Zeno used to call it, or the expanded palm, can do real mischief, while their blows are directed and restrained by the superintending power of a court.⁷

In studying the doctrine of *pleading*, in common with all other sciences, we are to investigate its *constituent* parts, that is, those parts only which are adapted to attain the object of its institution. Now, the design of all pleadings is to obtain an answer, from the court or jury, on a defined point in controversy. But these constituent parts are themselves either *essential*, or *accidental*; in other words,—those are the constituent, *essential* parts of pleading which occur in the regular course of the second stage of a suit, and which are productive, not only of a final issue, but a state of readiness for trial: and those are the constituent *accidental* parts which contingently happen, but which are either auxiliary to, or do not directly tend to produce a final issue. Thus for example, the essential parts are 1, *A Declaration*, (with one or more counts.) 2, *Defence*, (of several kinds.) 3, *Plea*, (general or special.) 4, *Replication*, (general or special.) 5, *Rejoinder*. 6, *Surrejoinder*. 7, *Rebutter*. 8, *Surrebutter*. 9, *Tender of issue*. 10, *Joinder of issue*. 11, *Demurrer*, (general or special.) 12, *Joinder in demurrer*. 13, *Issue in fact*. 14, *Issue in law*. 15, *General issue*. 16, *Special issue*. 17, *Simple general issue*.^{*} 18, *Simple special issue*.[†] 19, *Compound general issue*. 20, *Compound special issue*. 21, *Continuance*.

The accidental parts of pleading are, 1, *Plea in abatement*. 2, *Plea of parol demurrer*. 3, *Imparlance*, of several kinds. 4, *Profert*, (only of deeds, or letters testamentary, and of

^{*} Consequent, for example, on the plea of *non cul*: or *nil debet*.

[†] Consequent, for example, (after the statement of *special* matter) on the pleas of *et sic non cul*: or *et sic nil debet*: or *et sic non est factum*.

administration.) 5, *Oyer*, and *Counter plea* of same. 6, *Prayer of enrolment*, and *counter plea* of same. 7, *Prayer of aid*, and *counter plea* of same. 8, *Voucher*, (single, double, &c.) and *counter plea* of same. 9, *Summons and severance*. 10, *New Assignment*. 11, *Plea puis darrein continuance*. 12, *Retraxit*. 13, *Nonsuit*. 14, *Abridgment of Pleaint*. 15, *Claim of Conusance*. A philosophical and elementary explanation of these subjects has been until very recently, *a desideratum*; but Mr. Stephen, and Mr. Hammond in their late works* have vindicated the eulogiums of lord Mansfield, who says, 'the substantial rules of pleading are founded in strong sense, and in the soundest and closest logic,'—of sir William Jones, who informs us 'that the science of pleading is founded in the most exquisite logic,'—and of Mr. Bell of Scotland, who tells his countrymen, that the English 'system of pleading is, to those who understand it, beautiful in the perfection of its rules, and in the correct and complete way in which it produces issues of fact and of law.'

We are entirely persuaded that the great complaints which are made of the expense, vexatious delay, and absurd refinements in the English, and in some of the American courts, are just,—but that the artifices of chicane, the desire of lucre, and the contracted views of *mere* special pleaders, have very much spoiled a most ingenious, beautiful and wonderful system;—a system entitled, when well comprehended, honestly practised, and reduced to its real elements, to rank with the sciences most worthy of being studied. It is against the excrescences of pleading (the gradual accretion of time, and of the want of judicious legislation in pruning them,) that we

* Vide Stephen's *Treatise on the Principles of Pleading in Civil Actions*, comprising a summary view of the whole proceeding in a suit of law. Hammond's *Treatise on the law of Nisi Prius*; and Hammond's *Analysis of the Principles of Pleading, or Idea of a Study of that science*.

should utter our invectives; and not against the science itself, which has no inherent tendency to abuse, or corruption, but just the contrary. Indeed, very many of the odious features in the system of English practice, have been either never adopted by our courts, or have been remedied by the legislature; and we are daily perfecting our scheme of pleading (based as it is on the solid foundation of the common law) by progressively getting rid of the adscitious refinements which sully its philosophy, occasion endless delay, and insupportable expense, and introducing, in their stead, such of the equitable doctrines of the Roman law as sufficiently harmonize with the primitive English pleading,—so that we may in time produce a coherent whole;—one that will possess the peculiar excellencies of each code, and be obnoxious to none of the merited censures, at present cast on this important portion of our jurisprudence.

We think, however, that most of those who have attempted to expose the defects of English and American pleading have been a little visionary, and have written as if they saw the entire scheme through a glass darkly. We surely never can agree with those who are inclined to restore *oral* pleading; we are compelled to regard most of the arguments against the fictions of the law,—as, for example, that they mislead and deceive,—that they tend to encourage mendacity, and wholly to pervert truth, &c. &c. as extremely futile, and wholly unworthy of the dignity of the subject. We also but little respect most of the arguments urged against the various counts in a declaration,—the proceedings in ejectment,—the formulæ of a *nar*: in *trover*,—the inflamed statements, so usual in declarations, &c. &c. because we think they are either entirely innocent, or, what is still better, most of them may be *legally* avoided; so that it is not the science which should be so

strongly animadverted on, but its unworthy *practitioners*. If a lawyer (being entitled to charge for every word written by him) will be so unprincipled as to insert at length, four hundred and eighty counts in one declaration, (and there have been such instances) when, perhaps, four would have answered quite as well;—and if he will *write out* eight or ten of the general counts, when it has been decided that a more *summary* form is equally good; it is the fault of the courts and their officers, and not of the science itself, if the *formulae* are prolix, tedious, and vexatiously expensive. On the whole, we entertain no doubt that a very few simple regulations in regard to pleading, would remove all the solid objections which have been raised against it. We may sufficiently illustrate our views on the subject by a very few examples.

1. We would abolish all taxation of costs—lawyers should not be permitted to *create* business, and then charge for it, though the charges be regulated by *law*. Much of the grievous expense of English judicature has proceeded from this cause, and is wholly unnecessary, as is proved in many of the states of the union.

2. The writ should cite the defendant to *appear* at a fixed time and place, in person, or by *counsel*, and to give *bail*, if then required.

3. All *rules* to compel either party to proceed should be abolished, as it ought to be the duty of each party to proceed at *stated* times, at his peril. This would avoid the endless delay and expense to which parties are often subjected under the English practice.

4. The *plaintiff* should be responsible, in the first instance, for all costs, to abide the final decision of the cause; whereas, by the English rule, no defendant is *permitted to plead* until he has paid for a copy of the plaintiff's declaration,—which,

in that country, is often very onerous, and sometimes a total denial of justice.

5. A bill of particulars should be furnished at the defendant's instance, but it should be auxiliary to, and not in avoidance of the declaration: so that whatever can be proved, may be recovered, if found in the one or the other.

6. The general counts might all be summary, that is, containing the mere substance of each, as for example, for goods bargained and sold, goods sold and delivered, money lent, money paid, money received to plaintiff's use, work performed, &c. &c. there can be no necessity to write them at length.

7. In ejectment the *first* declaration should be *adopted* by the tenant on his admission, and not be, as it always is, *copied*; or, indeed, the whole fiction, as to parties, might be abolished, though we confess we have never been able to perceive the evils complained of, except those which are consequent on a too tenacious adherence to the fiction; as, in the instance mentioned, of copying the whole of the first declaration, when there is no other variance between the two than in the name of the real defendant.

It would be no difficult task to point out many abuses of this noble science, and to suggest simple and adequate remedies; but as these abuses are attributable, much more to the faults of those who cultivate it, than to inherent defects in the science itself, the subject would seem to belong quite as much to the head of Professional department, as to that of the Philosophy of Pleading. And as our only object has been, to vindicate in a very brief manner, this excellent branch of our jurisprudence from an odium too commonly attached to it, not merely by the vulgar, but occasionally even by enlightened minds, and by those, too, of our own profession, the few observations we have made must suffice, especially as a more

ample discussion of the subject would be an evident departure from the object of our work, which, as we have several times remarked, is not designed to teach law, but mainly to designate its sources, and encourage their pursuit.

What need we more on this subject? The good sense of the student, we feel assured, will occasion him to ponder well the sentiments we have given from some of the great masters, and the encouragements we have added; and induce him to make the law of pleading one of his chief and favourite studies.

We shall close the present note by bringing to the student's attention, a list of many of the most approved sources of information on this very important department of our science,—premiering as to this, and as to all similar lists, contained in our notes, that they form no part of his regular prescribed studies; but are at present intended merely to improve him in legal bibliography,—to furnish him with the means of occasional reference,—to aid him in the gradual selection of his library; and, finally, to assist him in his deeper researches after he has been, perhaps, many years at the bar.

[The principal sources of information on Pleading may be arranged under the five following heads—*Civil, Criminal, Equity, Admiralty*, and the *Precedents* appertaining to each division.

For the bibliography of criminal, equity, and admiralty pleading, and the precedents of each, vide Titles v. vii. ix.—and the 3d division of Auxiliary Subjects, of this Course.]

I. PRINCIPAL TREATISES, &c. ON CIVIL PLEADING.

1. Comyn's Digest, title 'Pleader.'
2. Petersdorff's Abri. vol. xiii. p. 354 to 446, *et passim*.
3. Dane's Abri. vol. v. p. 636 to 720, vol. vi. p. 1 to 585.
4. Doctrina Placitandi, 4to. edition of 1771.
5. Archbold's Civil Pleading.

6. Chitty on Pleading. [*Dunlap and Ingraham's American edition, 3 vols. 1832.*]
7. Lawes' Elementary Treatise on Pleading.
8. Lawes' Practical Treatise on Pleading in Assumpsit, 1810.
9. Hammond's Analysis of Pleading, or Idea of a Study of that Science. *London, 1819.*
10. Stephen on Pleading. [*Troubat's Amer. edi. Phil. 1831.*]
11. Saunders on Pleading and Evidence, 1828. *Amer. edit. 1829, 2 vols.*
12. Evans' Essay on Pleading, with an improved system, *Baltimore, 1827.*
13. Jackson's Pleading, &c. in Real Actions. *Boston, 1828.*
14. Montague on Set-off.
15. Babington on Set-off. [*Vide 6 vol. of 'Law Library.'*]
16. Ballantine on Limitation. *Tillinghast's edition.*
17. Angell on Limitation.
18. Blanshard on Limitation. *London, 1826. [Vide 1 vol. 'Law Library.']*
19. Wilkinson on Limitation, exhibiting the recent changes. *London, 1829. [Vide 1 vol. 'Law Library.']*
20. Gould's Treatise on the Principles of Pleading. *Boston, 1832.*
21. Hammond on Parties to Actions. *London, 1817, Amer. edit. 1822.*
22. Williams' Saunders' Reports. [*Full of valuable information on Pleading. Vide recent edition by Patteson.*]
23. Lawes' Suggestions of Alterations in Pleading, &c. *London, 1827.*

II. PRECEDENTS IN CIVIL PLEADING.

1. Wentworth's Complete System of Precedents and Forms in Pleading, 10 vols. 1797, 1799.

2. Chitty's Precedents of Pleadings, &c. in Actions personal, real, and mixed. [*Supplement to his Treatise on Pleading.*]
3. Bohun, Browne, Brownlow, Lilly, Coke, Mansard, Herne, Lewintz, Thompson, Mallory, March, Rastall, Raymond, Read, Robinson, Small, Townsend, and Vidian's Precedents. [*These are the ancient works, of more or less authority, published between the years 1659 and 1791.*]
4. Impey's Modern Pleader—Precedents of Declarations, with Notes, 1813.
5. Lee's Precedents of Declarations in Assumpsit, 1812.
6. Henning's American Pleader, and Lawyer's Guide. [*1st vol. New York, 1811, 2d vol. Richmond, 1826.*]
7. Precedents of Declarations. *Boston, 1802.*
8. Story's Selection of Pleadings in Civil Actions, with Annotations. *Oliver's edition.*
9. Chitty's 3d vol. of General Practice.
10. Hennell's Forms of Declarations, &c. prepared in conformity with the New General Rules of all the courts, with Notes, &c. London, 1832. [*Vide 3 vol. 'Law Library.' Philadelphia, 1834.*]

(Note 16.) ARBITRAMENT AND AWARD. ACCORD AND SATISFACTION.—The law of arbitrament and award has been among the most refined, artificial, and vexatious doctrines known to the law. In tracing the history of this curious system, especially in times past, it would seem as if the courts of judicature, jealous of these *domestic tribunals*, had resolved on so trammelling their proceedings, by the application of subtil, and almost impracticable rules, as to render them much less resorted to; or their decisions ultimately examinable by

the courts themselves. And though much has been subsequently effected to meliorate this evil; and the jealousy, if it really existed, seems to have been wholly removed; yet the law of this subject is, we think, still unnecessarily complex: and a tendency, equally objectionable is shown, and which seems to be greatly on the increase, of encouraging these arbitrations,—but, unhappily, rather as the means of procuring an inquiry, merely preliminary to ultimate proceedings in a court of justice, and the consequent augmentation of professional emolument, than (as they ever should be) with the sole view of an honest and zealous endeavour to prevent expensive and dilatory judicial litigation. We apply our remark almost exclusively to this practice in some of our states, where it is a growing evil, dishonourable to the legislation and judicature of those states, and greatly more so to the high standing of an honourable and learned profession.

The avoidance of the gross abuse, to which we allude, and the cultivation of those elevated morals, which would render it impracticable, would be topics more proper for our head of Professional Department; where (as we trust,) the student and lawyer will find such rules for their professional guidance, as will effectually remove both the power and inclination of making the interests of clients the subject of an unprincipled contrivance, by which to extract, under the plea of an amicable and speedy inquiry before a chosen and private tribunal, thrice reduplicated fees,—and all, moreover, for what proves to be a mere preface to a volume of investigation in a court of justice.

The best sources of information on the subject of arbitration and award, are Kyd's *Treatise on the law of Awards*; Petersdorff's *Abridgment*, title '*Arbitration*,' 2 vol. page 97 to 277. Watson's *Treatise on the law of Arbitration and Awards*. London, 1825.

As to the law of Accord and Satisfaction, in addition to Pennel's case, 5 Coke's Reports, 117, which the student will find recommended in page 311 of this Course, and the English and American authorities appended thereto; we refer him to this title in Petersdorff's Abridgment, 1 vol. p. 120 to 138.

(Note 17.) EVIDENCE.—The doctrines of evidence, and of pleading are the massive pillars which mainly support the fabric of English jurisprudence. No two branches of the science are so replete with the logic and philosophy of sound sense; and none so imperatively demand of the practising lawyer an intimate and abiding acquaintance. On these subjects, more particularly than any others in the law, the student must be content to dwell with a persevering and unwearyed application, till not only their principles, but the infinitely various applications of them be so identified with his mind, that the law, and the reason of it, shall instantly present themselves, with scarcely an exertion of the memory.

In forensic disputation, evidence affords the principal weapons of attack and defence; for very often, in the combat, no time can be allowed to seek the particular sword, or to sharpen and brighten its edge; it must ever be in hand, unsheathed and polished: to drop the metaphor, in the conduct of a cause it frequently happens that a variety of questions on the law of evidence unexpectedly arise, and require an immediate discussion. In such cases the mind must not only be deeply imbued with principles, but must be familiar with *judicial authorities* to show the application of these principles to the points in litigation. This perfect acquaintance is not entirely as necessary on the subject of pleading, as the questions there generally arise out of the record, and by a little attention to the state of the pleadings, the points of probable disputation

may be anticipated, or the discussion often, in various ways, be postponed. There are certainly a good many anomalies in the law of evidence, as administered in England, and even in this country; but it is liable to fewer objections, on the score of abuse, than what obtain against pleading.

We shall not tax our students' patience, even with an enumeration of the anomalies to which we allude, but leave him to extract them, by a careful study of the late works on the subject of evidence, by Mr. Phillips, by Mr. Starkie and others. It has been a common fault with writers on English law, that too little recourse is had to the general principles of human action,—to the pervading truths which essentially appertain to a given subject,—and to that enlarged philosophy which belongs to most topics; abstractly considered, or which grows out of the vast mass of experience of other nations, and other times. Our law treatises are too English, too technical, too much based on our own experience, and legal notions. Sir William Jones and Mr. Justice Story have shown us, in their respective works on the law of bailments, what may be done by bringing to a portion of English jurisprudence, an untechnical mind, a pure and expanded intelligence, and all the riches of a deep and varied research into other codes. Mr. Stephen, in his *Treatise of Pleading*, and Mr. Hammond, in his late work on *Actions*, as also Mr. Phillips and Mr. Starkie, in their recent works on *Evidence*, have caught a slight portion of the spirit to which we refer: and we think we can perceive, in the jurists of our day, a growing sense of the necessity of appealing to general experience, and general principles, instead of restricting themselves to the narrow limits of our own common law. The philosophy of the law of English evidence has been much impaired by a too strict adherence to the analogies of the common law, and by an almost total neglect of the writ-

ings of the civilians, and of the continental jurists. The science of evidence should be founded on the closest observation of man's moral, and intellectual nature, and should suffer no control from technical, or arbitrary rules, instituted for the sake of conformity to supposed analogies, or at least those which might be safely departed from.

The doctrine of our evidence is, without doubt, the most important branch of a student's course; we would therefore recommend to him, in addition to the English treatises on Evidence and Proof (which are often drily expository,) such works as manifest the great and pervading truths of the science,—evince its general philosophy,—and teach the experience of other ages, and other nations, and more especially such works, or parts of the same, as are freely censorial, pointing out what the law of evidence, in many instances, *ought to be*, rather than what it really is.*

* Such, for example, (to meet all of these views,) as Bentham's voluminous works on Evidence. Farinacius '*De Testibus.*' Menochius '*De Præsumptionibus.*' Everhardus '*De Fide Instrumentorum.*' Domat's Civil Law. Chap. '*Of Proofs and Presumptions.*' De Moivre's '*Doctrine of Chances.*' Kirwan's Logic, vol. i. part iii. p. 169—304. Vol. ii. p. 305—350; part iv. chap. 2, 3, p. 551—622. Rees' Cyclop. '*Chance.*' '*Probability.*' Locke on the Hum. Under. Book iv. chap. 1, 2, 3, 4, 15, 16, 17. Butler's Analogy. Lord Littleton's *Conversion of St. Paul.* Gibbon's Inquiry concerning the *Man with the iron Mask.* Dr. Gregory's Pamphlet in reply to Dr. James Hamilton, Jr. Edinb. 1793. Paley's '*Horæ Paulinæ*' (a work of pure logic.) Pothier on Oblig. part iv. chap. 1, 2, 3. Van Leeuwen's Roman-Dutch Law, book v. chap. xx. xxi. xxii. Ruth. Insti. vol. ii. ch. vii.

Reid on the Hum. Mind. Essay 2, 3, 6, 7. Buffier's *First Truths.* Steuart's Phil. Hum. Mind, 2 vol. chap. 1, 2.

Quintil. Insti. Orat. Book v. Bentham's Princip. Mor. and Legis. chap. 7. Select cases in '*Causes Célèbres.*' Arguments in the case of the Representatives of *Gen. Stanwix and his Daughter*, in Fearne's Posth. Works, p. 37. The controversies relative to the *Letters of Junius*, the authenticity of *Ossian's Poems*, *Rowley's Poems*, the existence of *Troy*, &c. &c. Camp. Philo. Rhet. Book i. chap. v. Beattie's Essay on Truth, part i. chap. ii. *et*

The effect to be allowed to intrinsic evidence, or that deduced from a combination of circumstances, has been but little explored by the legal philosophers of any country. There *are* materials extant both of principle and fact, which if collected with due care, and amplified, and fashioned by a vigorous, discriminating, and embellished mind, would supply one of the most important among the legal *desiderata*. But this is a task to be *assigned* to no man; it is one of those great works which, if performed at all, will be conferred on the world, unexpectedly, by some pre-eminent genius,—a philosopher of

passim. Sir Tho. Brown's *Inquiry into Vulgar Errors*. Bacon's *Novum Organum*, lib. i. *De Aug. Sci.* lib. v. ca. 4. Paley's *Evidences of Christianity*. Soame Jenyns' *Evid. of ditto*. Warb. *Div. Leg. of Moses*. Paris and Foublanque on 'Medical Jurisprudence,' *passim*. Cooper's *Med. Jurip. passim*. Dr. Campbell's *Dissertation on Miracles*. Hume's *Essay on Hum. Under. sec. iv. v. vi.* Hume's *Essay on Miracles*; and M. Le Cat's *Essay on the Senses*. The philosophy of Evidence relates to *intrinsic* and *extrinsic* proofs; the former may result from what is called circumstantial, or presumptive evidence, and also from the judicious application of the laws of construction or interpretation. Hence the entire subject seems to embrace 1, direct testimony; 2, circumstantial testimony; 3, inferences deduced from sound interpretation. We have noted, therefore, not only such works as display the various sources of *error*, but such as show the *true* grounds of belief, from testimony, direct and circumstantial, and also from construction. We think these subjects are inseparably allied.

[The works, &c. just enumerated, are a few only of the many hundred, which manifest the principles and the facts on which the philosophy of testimony depends. *Direct testimony* is to the general science of evidence, what *osteology* is to *anatomy*: it is but the dry skeleton; whereas *circumstantial testimony*, together with the deductions from sound *Interpretation*, display the inner philosophy of the science,—and hold the same relation to it, that *physiology* does to the knowledge of the bony system. We beg leave to refer the lawyer, as well as student, to page 368, &c. for a list of English and Continental works on the law of Evidence. These, with the sources indicated in the foregoing note, will enable them to prosecute their researches into the philosophy, and the practical utilities of the subject, much beyond the narrow sphere ordinarily resorted to.]

a century, who having conceived a passion for the enterprise, devoted to it a life of toil, research and reflection.

The law of evidence has been much treated of, and is also, in many countries, the subject of almost hourly adjudication, or legislation. Still, a thorough treatise, distilled with philosophical accuracy, from ancient and modern sources; exhibiting a *comparative* view of this extensive doctrine, as found in the jurisprudence of various nations, and ages,—educing from the whole a rational, homogeneous, and practical system of civil and criminal evidence, is not only a *desideratum*, but, if ever executed, would be hailed by all nations as a blessing of untold value,—not only from its proper and direct operation, but as it would collaterally regenerate and purify nearly every other portion of the entire scheme of jurisprudence. Mr. Bentham's great work on Evidence, was certainly conceived somewhat in the spirit, and with a portion of the learning and research, to which we allude,—but his veins of eccentricity; his censorial passion; his little acquaintance with the practical concerns of courts, and indeed, of life in general; and finally, his want of minute and accurate knowledge, confined a most expansive soul, within a narrower circle than seemed natural to him, and compelled it to submit to defects and imperfections, which his vigorous, and penetrating mind would certainly have avoided, had he been either more methodically and thoroughly educated, or born a half century later. How much the world is really indebted to the labours of this conscript father of legal reforms, is even yet but little known; we cannot but think, notwithstanding his errors and defects, that the seeds which he has sown, are destined, in time, to rise free from all tares and noxious weeds, into plants of the most healthy and vigorous growth, covering all fields, penetrating every rocky crevice, and diffusing, in every direction, fertility

and health. Posterity, in examining his labours, will separate the dross from the rich and valuable ore; and, forgetting his peculiarities, will hallow his memory as the philosophical pioneer; and his works, as the first offerings of those *reforms* which, not far distant, time shall establish and consecrate. We have thus adverted to Mr. Bentham and his works, as we would guard our student from the too common error of, either siding with the philosopher's friends in a two enthusiastic and indiscriminate admiration of him,—or with his enemies, in the gross ingratitude of profiting by his labours, whilst they heap on his name and memory, nothing but the epithets of 'visionary,' 'dotard,' 'eccentric,' 'radical,' and such like terms.

We have remarked that, with the exception of Mr. Bentham's works, little disposition has been manifested in England to prosecute the inquiry much beyond the common law of evidence. This indifference, however, to the lights furnished by foreign codes and treatises, is visible in nearly every legal inquiry in that country; and is common to her statesmen as well as her legists: still, we are pleased in perceiving a manifest tendency, of late, to break down these local barriers,—which, if once done, will be followed in that country, by a depth and industry of research, worthy their Saxon origin; but with a discrimination and refinement truly exemplary, and which their remote relatives of the continent would do well to imitate.

The philosophy of evidence in general—circumstantial evidence,—presumptions—the rules of interpretation—the weight of probabilities—the doctrine of chances, and many other cognate subjects, are extremely rich in materials, diffused in all directions over the works of nearly every department of human knowledge, in all languages, and in all ages. How often are even the ephemeral productions of the day, (which

excite the admiration of the present hour, and are then hurried down the stream of eternal oblivion,) rich in valuable suggestions; replete with rare thoughts, expressed in the most choice and exact language,—full of illustrative and important facts, and the whole of their argument no less complete than beautifully told. And yet, where are the monuments of such productions, where are even their inscriptions! they may, indeed, be occasionally found in the library of some collector, in the unknown catalogue of some bibliopolist, in the forgotten pamphlets of some dusty and retired shelf—but they are lost to the world, unless so far as such contributions insensibly enlighten the general mind, and by a traditionary influence, enable others to use and improve such thoughts, and eventually to give them an enduring existence, though the long forgotten essays and pamphlets were never seen by them.* In connection with these observations we desire to mention the production of one, who, though by profession no lawyer, is by learning and genius very well qualified to give instruction on any subject that engaged his pen. We allude to Dr. Gregory's pamphlet, in reply to Dr. James Hamilton, published at Edinburgh in 1793; from which we derived so much pleasure, and such useful hints on modes of argumentation, that we warmly recommend it to lawyers as well as to students, as an admirable specimen of a very ingenious, solid, and conclusive argument, founded solely on *intrinsic* and *circumstantial* evidence. The great variety of facts which are evolved, lucidly stated, and philosophically connected; the inferences deduced from the relation of circumstances; the opinion derived from latent evidences,—combined with the beauty, ease, and simplicity of the narrative and style, form, altogether,

* Vide ante p. 286, Note 30, on Title iii. and post, Note 10, on Title xiii. in which this subject is further remarked on.

an argument no less surprising and interesting, than irresistible; and would reflect lasting honour on any lawyer who ever pleaded in Westminster hall. The object of this pamphlet is merely to prove that either Dr. Hamilton, his father, or both, were the authors of a certain obnoxious production signed 'J. Johnson, Esq.' which was conceived by Dr. Gregory to be detrimental to the University, and to merit academic censures. Having failed in supporting, by legal proof, his accusation of Dr. Hamilton before the *Senatus Academicus*, he published this pamphlet in order to justify himself to the world for this unsuccessful arraignment. No inconsiderable motive for reading this pamphlet is derived from our wonder and admiration at the creative powers of genius, which, from materials comparatively so trifling, could raise a fabric of so much beauty, order and solidity.

We have only one more topic for this note, to which we claim the student's attention. It relates, indeed, principally to criminal evidence, but is not wholly out of place at this time. We allude to the difficulty of defining with accuracy, the law respecting Confessions, whether judicial, or extrajudicial, made by an accused party. Many well authenticated instances clearly show that such confessions of guilt are not inconsistent with perfect innocence; for persons have been sentenced, and executed, on their own confessions, for crimes never committed by any one. Whilst such anomalous cases ought to render courts and juries, at all times, extremely watchful of every fact attendant on confessions of guilt, the cases should never be invoked, or so urged by the accused's counsel as to invalidate indiscriminately all confessions put to the jury, thus repudiating those salutary distinctions which the court, in the judicious exercise of its duty, shall be enabled to make. Such an use of these anoma-

lies, which should be regarded as mere exceptions, and which should speak only in the voice of warning, is no less unprofessional than impolitic; and should be regarded as offensive to the intelligence both of the court and jury. The like reprobation applies to that unworthy use, so often resorted to by professional gentlemen, in the citation of remarkable cases under the head of circumstantial evidence, as if their only legitimate application was to destroy all confidence in such testimony. Counsel should never forget that circumstantial proof, when justly applied, is often entitled to even more consideration than the positive testimony of any witness; and that if it has been occasionally relied on as the only means of establishing guilt, it has been as often appealed to for the vindication of innocence,—and that it is as likely to have been misapplied in the one case as in the other. It is, therefore, manifest that confessions and circumstantial evidence are entitled to a known and fixed standing in the law; and whilst it behoves students and lawyers to examine, and carefully weigh their just force; and, as far as practicable, to define their proper limits, the advocate should never be induced by professional zeal, or a less worthy motive, to argue against their existence, be they respectively invoked, either in favour of, or against the accused.

The British, Continental, and American sources on the extensive doctrines of Evidence are very numerous. The plan of rendering this volume, in addition to its main object, in some degree, a source of bibliographical knowledge, leads us to subjoin the following list of treatises, &c. on the subject.

I. BRITISH AND AMERICAN WORKS ON EVIDENCE.

1. Lord C. B. Gilbert's Law of Evidence, enlarged by Capel Lofft. *Dublin*, 1797.
2. Morgan's Essays on Evidence, &c. 3 vols. 1789.

3. Peake's Compendium of the Law of Evidence. *London*, 1801. *Randall's Amer. edition*, 1812. *Norris' Amer. edition*, 1824.
4. Theory of Presumptive Proof; or an Enquiry into the nature of Circumstantial Evidence. *London*, 1815.
5. Phillipps' Treatise on the law of Evidence, 2 vols. *Dunlap's American edition*, 1816.
6. M'Kinnon's Philosophy of Evidence. *London*, 1812.
7. Swift's Digest of the Law of Evidence. *Hartford, Connecticut*, 1810.
8. 'Espinasse's Practical Treatise on the Settling of Evidence for Trials at Nisi Prius. *Amer. edit.* 1822.
9. Bayard's Digest of American Cases on the Law of Evidence. *Philadelphia*, 1810.
10. Saunders on Evidence, [*vide his work on Pleading and Evidence*, 2 vols. *London*, 1828. *Amer. edi.* 1829.]
11. Matthews' Treatise on the Doctrine of Presumption and Presumptive Evidence, as affecting the title to real and personal property. *London*, 1827.
12. Starkie's Practical Treatise on the Law of Evidence, 3 vols. First American, from first London edition, by Metcalf, Boston, 1826. Fifth American, from the second London edition, by Metcalf, Ingraham, and Gerhard. *Philadelphia*, 1834.
13. Van Heythuysen's Marine Evidence. *London*, 1819.
14. Garde's Practical Treatise on the General Principles and Elementary Rules of the law of Evidence. *London*, 1830.
15. Wigram's Examination of the Law of Extrinsic Evidence, in aid of the Interpretation of Wills. *London*, 1831.
16. Roscoe's Digest of the Law of Evidence on the Trial of Actions at Nisi Prius, 2d edition. *London*, 1831.

17. Harrison's Law of Evidence. *London*, 1832.
18. Lawes' Suggestions as to Evidence.
19. Bentham's Rationale of Evidence—and the Treatise on Judicial Proofs.
20. Proposed amendments and consolidation of the English law of Limitation, Presumption, and Evidence—vide Miller's Inquiry into the present state of the Civil Law of England, page 356 to 362.

II. CONTINENTAL SOURCES OF THE LAW OF EVIDENCE.

1. Essai sur la nature, les différentes especes et les divers degrés de force des Preuves, *par M. Gabriel*, 2 vols. 8vo. *Bouillon*, 1790. Nouvelle édition, revue, et mise en harmonie avec les nouveaux Codes, *par Solon, avocat Toulouse*, 1824.
 ¶ This work is usually bound two volumes in one.
2. Traité de la preuve par témoins, en matière civile, avec le commentaire de J. Boiceau sur l'art. 54 de l'ordonnance de Moulins, *par Danty*. *Paris*, 1789.
3. Disputatio de probatione per libros mercatorum, *aucto Guill Blanchard*, 1787.
4. De probatione per libros mercatorum, *aucto J. N. Schaffhausen*, 1795.
5. J. Menochii, de Præsumptionibus, conjecturis, signis, et indiciis. *Genevæ*, 1724, folio.
6. J. Mynsingeri—Commentarius in titulum De Fide Instrumentorum, 1602, 8vo.
7. Mascardi de Probationibus conclusiones, 1731, 4 vols. folio.
8. Traité sur la preuve par comparaison d'écritures, *par L. P. Vallain*. *Paris*, 1761.
9. Mémoire en réponse à l'ouvrage de M. Vallain. ¶ To these we may add the similar treatises of Raveneau, in

1666, of de Bligny, in 1699, of d'Autrepe, in 1761, and of M. de la Chalotais, in 1766.

10. J. A. Joubert, de evidentia universi et probationibus in judicio. Ludg. Batav. 1815.

(Note 18.) SELWYN'S NISI PRIUS.—That arrangement of the English courts, familiarly called the 'Nisi Prius System,' presents an admirable scheme for the administration of justice, in the first instance, and for its subsequent review and correction. The object is to have the cause tried on the spot where it arose, and to reserve legal questions of doubt, springing out of it, for the final decision of the high courts of Westminster Hall; thus speedily disposing of causes, and bringing important points to be decided, where the greatest learning and ability may pass upon them—and lastly, promoting thereby a homogeneous system of legal decisions. The nisi prius organization of courts, though not unknown in this country, is far from being general. It seems to be a conceded doctrine that cases decided merely at Nisi Prius, however long they may have passed without censure, or animadversion, are, *per se*, of less authority than judgments given in Westminster Hall; for, unless the contrary manifestly appear, such cases seem to have a presumption against them, that they may have been hurriedly decided,—and that they may have been affected by all, or any of those circumstances inherent in the tribunal, unfavourable to a grave and thorough investigation. The student, on consulting the following cases, will find this view taken by the courts at Westminster, when adverting to decisions at Nisi Prius.—Vide 2 Du. and Ea. 73. 3 Du. and Ea. 261. 5 Du. and Ea. 409. 1 Wm. Black. 263. 2 Burrow, 1081. 4 Taunton, 810. 5 Taunt. 195. 2 Bingham, 90. 3 Barnwall and Creswell, 143. 3 Barnwell and Aldesson, 341.

But a system of *Nisi Prius* law does not consist of decisions ruled merely in these courts. A treatise on that law embraces the entire scheme of rules and principles which ought to govern in the trial and decision of any cause before a judge and jury in *Nisi Prius* courts; and consequently, derives its lights not merely from what may be therein decided, but from every other authoritative source. It deals principally with the forms of actions,—the pleadings and evidence appropriate to each,—the modes of trial,—the proceedings of practice,—and finally, with every matter relating to the trial of issues of fact and of law, and the removal of points to the superior courts, for final adjudication.

Treatises on this important and extensive branch ought to be carefully studied: they are not only eminently practical, but as they embrace a very large portion of the law, they introduce the student not merely to what is peculiar to the subject, and therefore, probably new to him, but they serve, also, to refresh his memory, and to impress on his mind most of what he may have previously studied, in nearly every department of real and personal law,—and, indeed, excluding little else than what are peculiar to the courts of equity and admiralty.

The following are the treatises under this head, chronologically arranged, the subject *eo nomine*, being wholly unknown to the *bibliotheca legum*, prior to the year 1760.

1. Onslow's Institutes of the Law relative to Trials at *Nisi Prius*. London, 1760.
2. Buller's Introduction to the Law relative to Trials at *Nisi Prius*, 1 vol. 1770, 7th edition, greatly enlarged and improved by R. W. Bridgman. London, 1817.
3. Espinasse's Digest of Actions and Trials at *Nisi Prius*, 2 vols. 1789. [*There have been many English editions,*

which, with Gould's American edition, were much read, till suspended by the more recent works.]

4. Selwyn's Abridgment of the Law of Nisi Prius, 2 vols. *London*, 1806. [*A good work.*] ~~§~~ 2d American edition from the 5th London, with notes and references to American decisions, by Henry Wheaton. *Albany*, 1823, 4th American edition from the 7th London edition, by Henry Wheaton, with additional notes and references by Thomas J. Wharton. *Philad.* 1831. 8th edition, *London*, 1831, with large additions and alterations.
5. Bridgman's Synthesis of the Rules and Principles of the Law of Nisi Prius, 1 vol. *London*, 1809.
6. Hammond's Treatise on the Law of Nisi Prius, combining Theory with Practice, 1 vol. *London*, 1816. [*A philosophical work.*] American edition. *Exeter*, N. H. 1823.
7. Chitty's Practical Treatise on the Settling of Evidence for Trials at Nisi Prius. *London*, 1821. *Philad.* 1822.

(Note 19.) TIDD'S PRACTICE.—The student is often pretty well versed in abstruse learning, and well qualified to make an argument both solid and ingenious, who stumbles at some point of practice, which experience has made familiar to, perhaps, much inferior understandings. We here use the word *practice* in its most comprehensive sense, as embracing the four periods of an action, viz: *process, pleading, trial, and execution*, and all the proceedings necessary to their consummation. It is manifest, however, that this subject contains a repetition of much that, *diverso nomine et intuitu*, has been placed before the student; still the *modus operandi* is here more distinctly taught and enforced, and many subjects are treated which are peculiar to the title, and which are now, for the first time, brought distinctly to the student's notice.

Mr. Tidds' truly admirable work appeared, London, 1803: the *ninth* edition in 1830—and the first American edition in 1807.

For some further observations on practice, and a brief notice of some American works on this subject, vide post, notes 20 and 21.

(*Note 20.*) OF PRACTICE, AND PARTICULARLY OF BOOKS OF ENTRIES AND PRECEDENTS.—As there are in constant use, in the various stages of an action, certain established forms or precedents, which either in the first instance have been drawn up by able and experienced lawyers, or have attained great excellence, by the judicious corrections of time and observation, in many cases entitling them to be resorted to as authorities or evidences of the law; the books of entries and precedents, both ancient and modern, should claim a considerable portion of that student's attention, who, to the theory, or science, desires to unite a knowledge of the practice of his profession. There is often so intimate a connection between the theory and practice of a science, that its philosophy is unfolded only to those who pay especial attention to its practice. This is strikingly the case with the science of jurisprudence, which never yet disclosed its beauties and excellencies, its deformities and absurdities, to the closet student, who contemplated it merely as a speculative science. The routine of legal practice, therefore, should at all times receive a respectful attention; and not a little may be effected in this, during the entire course of the student's reading. As this branch of his duty is confessedly much less interesting than most others, we are strongly desirous of suggesting to him a plan, and earnestly recommend it to him, by which, in a very short period, and comparatively with little labour, he may obtain a large

fund of practical knowledge, anterior to his actual engagement in the career of professional duties.

As the books of entries and precedents contain the most approved forms which may be required in a very long and extensive practice, if the student should early habituate himself to the perusal of these forms and precedents, he would become intimately acquainted with most of the practical proceedings; and in the future prosecution of his professional business, would seldom or never, if informed of the *law*, be unacquainted with the *modus operandi*. It cannot be questioned, but that the *forms* constitute a great portion of that practice which it is the student's aim, by a long and tedious apprenticeship in an office, to attain. As the object of this volume is to present every mode in which he may abridge his labours, without detracting from the solidity of his acquirements, we strongly recommend a familiar acquaintance with the most approved books of precedents, as a means of nearly superseding this service in an attorney's office. On this point we state with confidence, arising both from experience and observation, that a greater fund of useful and practical knowledge may be acquired in a *few months* from these books, than most students attain by the performance of the customary duties of an office, in as *many years*. But let it not be supposed that we would place these volumes of entries and precedents in his hands to be read continuedly, and in the usual mode of reading other works: for it is without hesitation admitted, that books of forms, both as to matter and style, are exceedingly dull and uninteresting; certainly too much so to be perused in the ordinary manner. That, however, which the mind rejects in one shape, may be received with pleasure in another: like a chemical menstruum it may be saturated with one species of matter, and imbibe with avidity what is of

a different nature. In this nice art of supplying it with various food, and at suitable times; of courting or commanding it; consists the principal difficulty to be encountered by a student. He will, therefore, easily perceive the propriety of reading such books of practical forms, as we recommend, in a manner different from the usual mode of studying. Most men, however industrious or judicious in the occupation of their time, have periods of leisure which are not embraced by their *settled hours of study*. Let some of these little vacancies of time be devoted to this species of reading: let the student occasionally take up a book of forms, and read a half, or a quarter of an hour, noting with a paper his gradual progress through the volume; let him never fatigue himself with this species of reading, but frequently resort to it as a short repast, which is to occupy the fragments of time, and not to interfere with the hours of study, rest, and relaxation. By this practice much time will be usefully saved, which would otherwise be lost; the student slowly, and almost imperceptibly, gains a very useful species of knowledge; practice is thus united to theory, and if he has been otherwise studious, he appears, as it were *per saltum*, before the world, not merely the closet lawyer, but the practitioner and the man of business. We further advise the student, if the public records be accessible to him, to read occasionally the entire record of a case carried from an inferior tribunal to the supreme court: the perusal of a few records of this kind would impress on his mind a distinct view of the whole routine of an action, from the impetration of the original writ, through perhaps a hundred different forms or entries, to the return of the executory process.

We have ever deplored the great consumption of time arising from the custom of long apprenticeships in an attorney's office, commenced before even the rudiments of law have been

acquired. Many young men, on leaving college, at once place themselves in a law-office; and are frequently made mere drudges to copy long declarations, pleas, bills in chancery, deeds, letters, &c. which the proprietor of the office was either too much engaged, or too indolent to copy himself; and which neither improve the student's hand writing, nor add one mite to his legal stores. Others are suffered to grope through the Dædalean intricacies of the law without torch or clue; and destitute of all method. Left to self-direction, they essay the perusal of some black-lettered folio, as the Herculean task alone necessary to be surmounted: the difficulties of this widely diffused science are then to vanish, and this musty and ponderous folio is to be the avenue through which they are to pass, as by enchantment, into smooth and uninterrupted paths. Disappointment, however, is the certain reward of such students. Their minds are not prepared for so vast an undertaking. The first beams of legal knowledge have not been felt, when they ignorantly and temerarily fly, like Icarus, into the very face of the sun, and meet with the same inevitable and ruinous fate. Some, again, are contented with the *scraps* and *bits* of knowledge, gleaned from writing deeds and declarations; from listening to the protracted narratives of clients to their counsel; the hasty advice which the former receive from the latter; and from an occasional attendance on courts of justice; whilst the remainder of their *office hours* are dedicated to politics and pamphlets, or to the ephemeral and amusing productions of the day. In this round of *time-slaughtering*, the three or four years originally appropriated as the period of legal study, have elapsed; and the student must now embark in the practice of a profession, the very rudiments and general contour of which have never been fully presented to his mind.

This is by no means a picture of too high colouring, but a faithful sketch of the history of many students of law. We, therefore, earnestly entreat the student to devote three-fourths of the period allotted for his legal apprenticeship, to private study, and by no means to enter an office until the year previous to his entering into the practice of his profession. This year (especially if the previous time has been judiciously and industriously employed) is amply sufficient for the acquisition of all the practical knowledge requisite for a young lawyer, and indeed, besides the knowledge which may be attained during this year, but little more could be acquired by a protracted stay, as most of the nice and difficult business is usually conducted by the master of the office himself, and the young lawyer can hope to acquire this species of knowledge only as it shall occur to him in his future business; at which time, as his mind has been gradually maturing, he will encounter little or no difficulty in its acquisition.

On the subject of this note we recommend the following works, which, if travelled through in the manner prescribed, cannot fail to impart gradually and almost imperceptibly, a fund of practical knowledge, which can otherwise be acquired only by long experience, much labour, and considerable vexation.

§ ENGLISH BOOKS OF PRECEDENTS.

1. Chitty's Precedents of Pleadings.
2. Tidd's Practical Forms.
3. Bird's Selection of Precedents of Conveyancing.*
4. Montefiore's Commercial Precedents.

* Or any one of the numerous English works—the following being the most approved: Barton's Series of Original Precedents in Conveyancing. Bird's Supplement to the same. Horseman's Precedents in Conveyancing. Powell's, edited by Barton. William's Collection. Wood's Body of Conveyancing, in Theory and Practice. § The second volume of the American edition of Sheppard's Touchstone, contains numerous precedents adapted to our use.

§ AMERICAN BOOKS OF PRECEDENTS.

1. Henning's American Pleader and Lawyer's Guide.
2. Caine's Practical Forms.
3. Oliver's Precedents.

Let not the student feel the least dismay at the seeming large extent of the foregoing list, as all of them may be read, and with decided advantage too, in one half the time, which would be requisite for law treatises of the same size, and which if read in the mode we have mentioned, will induce no encroachment on their regular studies. This species of reading, also, after some acquaintance with it, becomes quite easy, and even inviting. We can, moreover, confidently assure the student, that in every instance known to us of gaining a knowledge of practice by the mode we have prescribed, the individuals, when at the bar, with pleasure referred to it as time more profitably spent, than any apportionment of the like extent, during their novitiate.

(Note 21.) CONKLING'S PRACTICE OF THE COURTS OF THE UNITED STATES.—In addition to the remarks on the subject of Practice, in the two preceding notes, it is proper now to introduce to the student's notice the American treatises on this subject. New York, Pennsylvania, Massachusetts and Virginia, appear to be the only states, in which treatises on the law of their practice respectively, have been published. We are free to acknowledge that circumstances have rendered these works to us rather books of reference, than of careful study; and consequently, that we cannot speak of them with that fulness of confidence which, perhaps, too strongly marks our observations on other works throughout our volume. Still, we feel justified in believing they are works of more than common merit, and that they deserve to be placed along side of the like works on the practice of the English courts. *Paine*

and Duer's Practice in Civil Actions and Proceedings at law, in the State courts of New York, and in the courts of the United States, is a most extensive, and we think, a thorough work. These volumes were soon followed by an elaborate treatise on New Trials, (a substantive branch of the law of practice,) by David Graham, Esq. 1 vol. New York, 1834. To these may be added Caine's Practical Forms, adapted to the Supreme Court of that state, 1 vol. New York, 1808. The practice of the courts of Pennsylvania is, perhaps, equally well set forth in the work of F. J. Troubat, and W. W. Haly, 2 vols. Philad. 1825, 1829. From Massachusetts we have the posthumous work of Judge Howe, edited by S. Fay and J. Chapman, 1 vol. 1834. And, finally, from Virginia, we have a work, which, though our acquaintance is slight with it, has made a most favourable impression on us, viz: 'Practice of the courts of Common Law and Equity in Virginia, by Conway Robinson.'

In addition to the view taken by Paine and Duer, of the practice of the national courts, this important subject has been, in part, ably treated by Judge Conkling, of the state of New York. We have had occasion to examine this work with more care than those which treat of state practice; and though several important and integral subjects are omitted, we regard it as otherwise, faithfully executed. To students the books of state practice will be regarded principally, if not entirely, as works of reference,—except to those who design to practice their profession in either of the states we have named—in which case they will not fail to read the treatise of the state to which they respectively appertain. To lawyers generally, all of these works, we presume, will gradually become familiar, as the practice of every court in the Union is so far assimilated, as to insure instruction, on many points, to all who may examine them.

(Note 22.) STEPHEN'S PRINCIPLES OF PLEADING IN CIVIL ACTIONS.—The marked design of this admirable work is to adapt the science and practice of pleading to the comprehension of students. There is no other English treatise so full, and yet so elementary. The work of Mr. Chitty is valuable for its analysis, and learning, but is deficient in the exposition of principles, and wholly so in the philosophy of the practice of pleading—and still more so in respect to his authorities, which often do not sustain his positions, and occasionally, contradict them. The only other outline of pleading, which explains the subject rudimentally, is the excellent chapter in Bacon's Abridgment, previously recommended,* but this is too concise to serve but as an introduction. We advise the student to a most careful study of Mr. Sergeant Stephen's work; and as his subsequent editions have assumed a more learned form, *in the notes*, without affecting in the least the elementary character of the text, students as well as lawyers, have the option to go more deeply into the subject, by reading the numerous authorities referred to in these notes. The second American edition by Francis J. Troubat, Esq. Philad. 1831, is, of course, to be read, if practicable, in preference to either of the English, or American editions. ¶ Vide infra, Note 23, on Gould's Treatise of Pleading.

(Note 23.) GOULD'S TREATISE ON PLEADING.—The great *desideratum*, an elementary and philosophical treatise of pleading, seems to have been accomplished in this and the parent country, nearly about the same period, in the two admirable treatises by Mr. Sergeant Stephen, and Judge Gould, the latter being a publication in 1832, of his lectures on Pleading, delivered at Litchfield, during a series of years; and the former being first published in 1824. The remark of Mr. Stephen

* Vide ante p. 290, 348.

that '*pleading, when properly understood and appreciated, appears to be an instrument so well adapted to the ends of distributive justice, so simple and striking in its fundamental principles, so ingenious and elaborate in its details, as fairly to be entitled to the character of a fine juridical invention,*' if it had not been fully proved by Mr. Stephen's own work, would have needed no confirmation, had it rested alone on the production of our countryman, whose work builds up, on the established elementary principles of the science, a consistent, rational and practical system. We should be pleased to find Judge Gould's production in the hands of every student, along side of Mr. Stephen's; and could we hope that English students would either see, or be influenced by our recommendation, we would urge upon their notice this, among several other American law works, no way doubting their favourable opinion, could they be persuaded that 'any good can come out of Nazareth.'

(Note 24.) PHILLIPPS' LAW OF EVIDENCE.—In the observations on evidence, in Note 17, of the present title, ante page 360, we alluded to the unphilosophical character, so prevalent in the English treatises on the subject, and imputed it, in no small degree, to neglect of Roman law, and especially of the works of the Continental legists.

M. Gabriel, in his *Essai sur la Nature, les différentes especes et les divers degrés de force des Preuves*, urges upon the lawyer the necessity of an enlarged acquaintance, not with the sciences and the arts only, but with general literature, and with all that can enrich the mind in the knowledge of human character, and of the infinitely combined facts of life. In speaking of his work he justly remarks *l'essai sur les Preuves, sera un exemple des secours que le jurisconsulte peut tirer de la littérature. C'est par elle que le tâche d'y remonter aux sources; ce qui est toujours utile et très-souvent nécessaire.* Without doubt,

evidence takes its sources from every variety of life, from every modification of character, from every anomalous, as well as regular operation of mind and of matter. It involves the truths of physics and of mental philosophy—the dull realities, no less than the exciting events of society—the operations of nature, infinitely displayed by all the adscititious influences of art; and, finally, the actions of communities and of empires, in common with those of families and of individuals.

A field so various and expansive, cannot be at once explored and cultivated. In truth, evidence must be a science of slow and progressive growth; and so it has presented itself in England, and elsewhere: it has, indeed, been greatly improved in that country within the last half century, but seems to have derived its modern expansion and philosophical development, in a good degree, from the reflected operation of the wonderful growth there of knowledge generally. How much greater, then, would have been the cultivation of this branch of our science, had English lawyers, statesmen, and scholars been less wedded to their peculiar jurisprudence, and more addicted to the study of that of other countries. Mr. Phillipps' work is somewhat in a better spirit than most of the English works which preceded it; but is still a purely common law production, with (as we believe) not a single reference, in either volume, to any foreign source whatever; and what is still more remarkable, with but few of those speculative and enlarged views of the theory and science of proof, to which Mr. Eden alludes, in his *Principles of Penal Law*, and which he regards as an unexplored field in the English law of his day, and which we have ventured to say, with a few exceptions, still continues so. We take pleasure, however, in referring to a small essay appended to the first volume of Mr. Phillipps' treatise; also particularly to the Scotch work of Mr Glassford,

on the same subject; and to that of Mr. Matthews on the doctrine of presumption, and presumptive evidence. We also desire to call the reader's special attention to several able essays in the *American Jurist*, dictated in the liberal and inquiring spirit to which we have so often alluded, and which we should be pleased to see pass into the regular treatises daily to be expected from the prolific presses of this and our mother country. We allude to the following essays in the

AMERICAN JURIST.

1. 'Testimony of Quakers,' vol. i. p. 141.
2. 'Testimony of persons interested in a suit,' vol. iii. p. 20.
3. 'Incompetency of Witness on account of religious opinions, vol. iv. p. 286.
4. 'Incompetency of Witness from infamy of character,' vol. v. p. 101.
5. 'Incompetency of Witness from interest,' vol. vi. p. 19.
6. 'Incompetency of Parties as Witnesses at common law,' vol. 8, p. 1.
7. 'Evidence in Courts of Equity and Law,' vol. x. p. 1.
8. 'Competency after pardon of the crimen falsi,' vol. xi. p. 356.
9. 'Admission of Parties in Criminal Procedure,' vol. xiii. p. 50.

(*Note 25.*) COMYN ON CONTRACTS NOT UNDER SEAL.—In Note 9 of the present title, page 336, we have briefly expressed our opinion of the character generally of the English treatises on the subject of contracts. In this country we have had but two treatises, or rather essays, under this title, both of which, however, differ from the English works, in regard to their inquisitive, censorial, and philosophical character. We allude to the works of Chipman and of Verplanck, which, though

conceived in the proper spirit, are not as thoroughly discussed, either on principle or authority, as we could have wished, nor are they embodied in as neat and polished style as even essays should be. The morals, philosophy, and literature of contracts can scarce be said to have been treated in the English works, bearing the comprehensive name of treatises on contracts. Powell, Chitty and Comyn are nearly all that can be enumerated under this head; and they have all been favourably received, by the profession and by students, but mainly, as we think, on account of the importance and popularity of the subject, the want of other English productions, and the almost total neglect of foreign sources. There is, in contracts, so much of pure reason, so much that emanates from the essential nature of man, so much that lies at the very foundation of all laws, that students need not hesitate to resort with assurance to the Pandects of Justinian, the pleadings of the Attic orators, the Dwépas and Ratnas of the Hindu code, the numerous texts and commentaries of European lawyers; and the volumes of our own municipal law. These all may be made to greatly illustrate each other; for though different nations may vary the forms and evidences of contracts, their substance in all places, and at all times will be found reposing on essentially the same philosophy, and are created, expounded and enforced by nearly the same elementary principles. The works of Powell, of Chitty, and Comyn, especially the last, should be carefully studied by every student of English law. Comyn is justly a great favourite; and, as a purely common law work, is entitled to much praise—but we admonish our student not to rest satisfied with even all that has been written in our law; but to select, in the course of his riper and professional studies, from the list of foreign works we have given,* such as may suit

* Vide ante page 340.

his views of a more enlarged study of the important doctrine of contracts. We beg leave further to refer the student to the *American Jurist* for some able essays, on this subject. 'Agreements, void in part,' vol. x. p. 241. 'Nature of the contract of sale,' vol. xi. p. 271, vol. xiii. p. 249. 'Doctrine of Caveat Emptor,' vol. xii. p. 94. 'Implied Warranty on sale of personal chattels,' vol. xii. p. 311. 'Contracts made on Sunday,' vol. xiii. p. 378.

(Note 26.) SERGEANT'S LAW OF ATTACHMENTS.—The proceeding by attachment against the property of the debtor, where he is not an inhabitant of the state, or being an inhabitant, has withdrawn from its jurisdiction, is known to the jurisprudence of perhaps every state in the union. Each state has legislated on this subject, but they have all derived the leading principles and general forms of proceeding from the same original source, the custom of London. A treatise, therefore, which displays the general learning on this topic, with the various additions and modifications introduced by the local law of any state, will be found eminently useful in all: Mr. Sergeant's treatise, therefore, may be studied with a certainty of finding information almost equally beneficial to the student of any state; and to this source he will the more readily apply, when he learns that this is the only ample and systematical treatise on the subject. Until very recently the law of this subject was only to be found in a chapter of Bohun's *Privileges of London*, (an old and rare work,) and in the meager chapters of *Viners' Abridgment*, and of *Comyn's Digest*. In this country the subject is highly important, as it does not repose, (as in England,) on the custom of a few towns, but is common to the jurisprudence of, perhaps, every state in the Union. Since Mr. Sergeant's work appeared, (*Phil.* 1811,) two English works of limited extent, have been published, viz:

Woolsey's and Ashley's treatises on the Practice of Attachment in the Mayor's court.

§ Much useful information on the attachment laws of the various states of the Union may be gained from the late Mr. Griffith's Law Register, *passim*, and from the volumes of the Jurist, under the head of 'Legislation.' We also refer the student to Petersdorff's Abridgment, vol. 9, p. 709, title 'Foreign Attachment.' For the *Trustee Process* peculiar to Massachusetts, &c. which is a species of domestic attachment, partaking also sometimes of the nature of foreign attachments, the student will consult Mr. Cushing's valuable work on this subject.

(Note 27.) RAM ON THE SCIENCE OF LEGAL JUDGMENT.— This is a work of considerable utility and novelty, in which the author seems to have been at a great feast of wise saws, and stolen the best of them.* It is a book much to our mind, in which there is a vein of philosophy blended with the most practical utilities,—both of which agreeably disappoint the reader, as from the short title, he might expect a didactic treatise on the law of judgments in all of their varieties, but finds an abundant repast of maxims, opinions, sources of argument, sources of authority, rules of interpretation, duties of judges, &c. &c. all tending to unfold the elements and *matériel* which compose legal judgments, and with all of which it behooves every scholar in the law to be familiar. We were gratified to find in Mr. Ram's work an enlarged and satisfactory exemplification of our views as to most of the eight species of Note books recommended and exemplified in the first edition of this volume, and which we retain unaltered;† the coincidence of the two schemes being reciprocally confirmatory of the justness of the views taken of the subject by each, espe-

* Vide 'Love's Labour Lost.'

† Vide post 'Note Books.'

cially as Mr. Ram never saw the edition alluded to, and which we trust is not now adverted to in an unbecoming manner.

(*Note 28.*) ON THE READING OF REPORTS, AND PARTICULARLY OF LEADING CASES.—The source of the purest and most accurate legal information lies in the various books of reports of cases argued and determined in the different courts of judicature. To these reports the authors of abridgments and digests of the law are almost solely indebted; but as these digests purport to contain the substance of an infinitude of reported cases, we can expect from them neither fulness nor accuracy of information. These digests and elementary works, therefore, are to be considered merely in the light of well arranged note books; and are to be read rather for the clearness of their definitions, and the methodical and luminous exposition of principles, than for plenitude, certainty, and precision of knowledge. Those who are in the practice of frequently referring to reports, have occasion to remark how often the authorities advanced by legal writers are extended or contracted by them, either from negligence, misapprehension, or in support of their particular doctrines. They find other cases irrelative to the propositions, in aid of which they are cited, and not unfrequently, precisely the reverse: hence the necessity of sometimes unlearning what has been acquired in these digests and rudimental works, by a critical and minute scrutiny into the books of reports. Students thus employed in precisely defining their knowledge and correcting their mistaken views, derived from the errors of law-writers, their generality of expression, or the vague manner in which cases are often stated by them, finally arrive at the useful conclusion, that abridgments are to be regarded with a suspicion of their accuracy; and that the writer who abridges least is most to be relied on: hence Viner, as the repository of certain and ample

information, is, perhaps, of all others, except the books of reports, the safest for reference.* As the book of reports contain the law nearly in the precise phraseology in which it was administered by the judges, they necessarily furnish the most satisfactory and accurate information on expository jurisprudence; and as the arguments of counsel, and frequently of the court, present all the motives or reasons why a point should, or should not, be established as law, these books likewise contain a rich and abundant fund of censorial jurisprudence. The decisions of courts are seldom mere naked judgments or opinions on points drawn from the arguments of counsel; but are more frequently lucid, ample, and learned investigations of the previous authorities on the subject; with a chronological and minute examination of each, and a clear exposition of the very reasons upon which the judgment is based. But, in the digests and abridgments, the student cannot expect to find the arguments for or against, or that close chain of reason and authority, by which the rules of law, or the principles stated in them, were originally decided.

These are, with us, sufficiently weighty reasons for strongly urging the student frequently to refer to the reports. But as indiscriminate reference would lead to boundless research, and absurd waste of time, we submit for his guidance the following rules.

1. Where the point in the digest, &c. is important, and has been or continues to be a *questio vexata*, read with attention the case in which it was *first* agitated or decided, and also the case in which it was, if it has been, *finally* settled; and note, in both cases, the arguments of counsel, and the reasons stated

* We are aware that this opinion as to Viner has been questioned by one whom we regard as the highest authority in this country, and perhaps, it ought to have been suppressed in the present edition. Vide North Amer. Rev. vol. 6, p. 74.

by the court. It is not often that the intervening cases need be particularly examined.

2. If a point be indistinctly stated, so that a doubt rests on the mind as to the meaning, or if it be intelligibly stated, but appears to be at variance with the common notions of right, or with the analogy of the law; read the cases referred to, until the doubt be removed. The proper time to dissolve such doubts is when they are excited. The student, in these researches, will find that there is a *legal reason* in contradistinction to *natural reason*; that many points which appear at variance with the latter, are in strict conformity with the former; and that points which *prima facie* seem not to be justified by analogy and principle, are upon examination ascertained to be fully correspondent to both.

3. The *ancient* reports should be read principally by way of reference, for, with the exception of lord Coke's reports, there are none which are worthy a continuous perusal. The ancient reports, likewise, should be more frequently referred to than the modern, as it is a principle that the science should be studied chronologically. From this mode of investigation, uniting the aid of juridical, and even general history, the student will find much advantage. This mode is also preferable for other reasons: generally, the ancient reports are less methodical, in style more rugged and dry, and altogether less interesting in their matter and manner, than the modern. If the student then (at a time when he is zealously devoted to the study of ancient doctrines, and when his mind is deeply imbued with their principles,) should neglect to search into these repositories of the ancient law, he certainly will not resort to them after he has indulged in the more lucid, harmonious, and pleasing pages of such reporters as sir James Burrow, Mr. Douglas, Mr. Cowper, and Messrs. Durnford and

East, of England; and, with but few exceptions, we may add those of our country. We would remark besides, that the ancient reports generally contain the cases in which points of law were first either established or agitated; and the modern cases are, very often, little else than different illustrations of these ancient points or principles, by applications of them to different statements of facts. They are frequently repetitions of precisely the same law, or with some little modification; or are, (upon full consideration of all the ancient cases on the particular points,) full denials of them. In these ancient cases, therefore, as they first agitated or settled the various doctrines, we may expect to find the *reasons* or *motives* which induced these decisions. The modern reports, moreover, are in such constant and daily use, that a knowledge of their contents is necessarily, and almost imperceptibly acquired; and if the ancient cases have been duly attended to, many of the modern cannot but be familiar to the student, whilst they present to him a constant opportunity of exercising his mind in a similar way with the judge who has decided them, viz: by examining the bearings and analogies of cases, applying principles to facts, and modifying or reversing these decisions, as the change in times and circumstances sometimes imperiously requires. This self-investment of the office of a judge, in this particular, will be found a highly profitable exercise, which every student will insensibly glide into, if he has been in the practice of tracing legal points from their infancy, to their full establishment or final decay.

4. In order that the student may not consume too much time, or be so frequently interrupted by his references as to lose sight of the object and method of the subject under perusal, we suggest three modes. *First*, to read the case referred to immediately, in all cases where the present doubt or diffi-

culty interferes with the due comprehension of the subsequent matter. *Secondly*, to note down the names, book, and pages of such cases as are deemed important and necessary to be read, but which are nevertheless improper to be referred to immediately, either because they are on isolated points, not interfering with the full comprehension of the main subject, or because, upon looking into the report, they are found to be too long for present perusal. Such cases, thus noted down, should be read as soon as the student has finished the volume or chapter in which he was engaged. *Thirdly*, to read such cases only as are intended to remove existing doubts, or such as are known to be what are denominated *leading cases*. An indiscriminate reference would require too much time, and, in numerous instances, prove an absolute waste of it, because upon examination of these cases, they will be frequently found to contain the precise words of the work by which they are cited. In order, then, to profit by reference, we know of no better mode than to limit this reference, as stated, to such cases as are examined to satisfy *doubts and difficulties*, and secondly to those which, on account of their peculiar learning, or other cause, are denominated *leading cases*. We shall close this note with a few observations on the great utility of according an especial attention to leading cases.

Those cases are considered leading, in which a point of law was *first* in an especial manner judicially noticed, or an important and pervading principle, after a series of contrariant decisions, *finally settled*; or in which a long received doctrine was reversed; or a dubious one established or modified, after an elaborate and thorough examination of the point in all its plenitude of analogies and bearings. Such cases are unquestionably entitled to more than ordinary attention from the student, who, by treasuring them in his mind, lays the foun-

dation of an extended and durable superstructure of legal knowledge.

Chronology and geography have, with great propriety, been denominated the eyes of history. They enable the historian to take a comprehensive view of a long and infinitely varied series of events, which, like the differently formed links of an extended chain, are obviously *distinguished* from each other, yet *connected* by ties equally manifest. They likewise impart a fixity and locality to our ideas, which impress them indelibly on the mind; so that disconnected events are, by the aid of chronology, united and fixed in the memory; whilst geography is no less instrumental, by giving to such events all those interests and sympathies which belong to place.

So in the science of law, leading decisions establish *resting places* for the mind; they form so many *epochas* in juridical history; and, if attended to, render a service to the legal inquirer, similar to that which is afforded to the historian by chronology and geography.

The undivided infinity of time, in common with the boundless and trackless regions of space, bewilders and wearies the mind; and for steady and useful contemplation it is essential, that there should be fixed periods and determined places whence to compute time and measure space: so in the interminable regions of jurisprudence, the mind would soon be confused and exhausted, were it not for those great and learned cases on which it occasionally is allowed to repose, and from which the various relations and dependencies of this august science may be contemplated.

It is scarcely necessary to attempt an illustration of the practical utility of a knowledge of these leading cases, by whom best reported, and even the pages where they are to be found, which is a matter of much less difficulty than may at

first be imagined. The memory is a very improvable and docile faculty, and after principles are impressed, such minutiae as the names of cases, their reporters, and even the pages, should not be neglected, as they afford much facility in the course of an extensive practice. A knowledge of one or more leading cases on most of the great doctrines of this science, is of infinite utility, as by reference to them, the inquirer is at once furnished by the marginal or other citations with a comprehensive view of the law on the particular subject. As for example: On the various species of bailments, and the respective duties of bailees, the great case of *Coggs v. Bernard*, 2 Ld. Raymond 909, may be referred to. If the point of inquiry be the conclusiveness of a sentence in a foreign court of admiralty, the case of *Hughes v. Cornelius*, 2 Show. 232. As to the authority of domestic judgments, *Moses v. M'Farlane*, 2 Burr. 1005. On the necessity of pleading with a *profert*, *Reed v. Brookman*, 3 Du. and Ea. 151. The distinction between case and trespass *vi et armis*, *Scott v. Shepherd*, 2 Black. 892. As to the right of a *feme covert* to sue or be sued, *Marshall v. Rutton*, 8 Du. and Ea. 545. The legality of agreements in restraint of trade, *Mitchell v. Reynolds*, 1 Peer. Wms. 181. On the effect of a demurrer to evidence, *Gibson v. Hunter*, 2 Hen. Black. 187. Whether money paid under a mistake be subject to repetition, *Bilbie v. Lumley*, 2 East, 469. As to legacies *in terrorem*, *Scott v. Tyler*, 2 Dick. Rep. 712. The dependence and independence of covenants, *Kingston v. Preston*, Doug. 684; or *Pordage v. Cole*, 1 Wms. Saund. 320. The validity or nullity of the deeds of infants, *Zouch v. Parsons*, 3 Burr. 1794. As to fraud in the sale of personal property, *Twyne's case*, 3 Co. 80. The personal responsibility of agents to the persons contracted with, *Macleath v. Haldiman*, 1 Du. and Ea. 172, or *Hodgson v. Dexter*, 1 Cranch. 345.

As to variance between the *allegata* and *probata*, *Bristow v. Wright*, Doug. 664. As to the validity of a deed by feme on the eve of marriage, defeating the marital rights of her future husband, *Carleton v. Earl of Dorset*, 2 Vernon 17; *King v. Cotton*, 2 P. Wms. 674; or *Countess of Strathmore v. Bowes*, 2 Brow. Ch. Rep. 345. As to the extent of the consideration of marriage to validate deeds against the claims of subsequent purchasers, under statute 27 Eliz.; *White v. Stringer*, 2 Lev. 105; *Jenkins v. Keymis*, 1 Lev. 150. That an agent must perform the authorized act in the *name of his principal*, *Combe's case*, 9 Co. 76; *Wilks v. Back*, 2 East, 142; *Appleton v. Binks*, 5 East, 148. *Fowler v. Shearer*, 7 Mass. T. Rep. 14. The great patent cases of *Hornblower v. Bolton*, 8 Du. and Ea. 95. *Bolton v. Bull*, 2 Hen. Black. 463. As to responsibility for damages resulting, either from *suggestio falsi*, or *suppressio veri* respecting another's *credit*, even though defendant was no way interested in, or benefitted by plaintiff's loss; *Pasley v. Freeman*, 3 Du. and Ea. 59.—*Hutchinson v. Bell*, 1 Taunt. Rep. 558.

In this way should the student treasure in his mind a *governing* case on every interesting doctrine of the law. As his mind matures, he will find no difficulty in retaining the names of most of the important cases which will lead him directly into the channel in which the law of a subject may be found at large. The subject of *note books* we have treated much in detail. Vid. post. It may, however, be well in this place, to advise the student to preserve, in a book for the purpose, a *list* of all such cases as in the course of his reading he may ascertain to be distinguished and leading; which should be placed under the heads to which they belong. The titles should be alphabetically arranged, and the cases only of great learning or importance should be inserted, without a comment,

except where best reported. This kind of note book will consume but little of the student's time, will prove of great utility in the prosecution of his future inquiries, and will be found eminently serviceable, when the pressing and multifarious duties of a counsellor will so occupy his time, as to render highly important every means, which is calculated to abridge his labours.

PARTICULAR SYLLABUS.

TITLE V.

‘Habeant curiæ prætoris potestatem tam subveniendi contra rigorem legis, quam supplendi defectum legis. Si enim porrigi debet remedium ei quem lex præterit, multo magis ei quem vulneravit.’—*Bacon De Aug. Scient. Lib. viii. cap. iii.*

THE LAW OF EQUITY.

- e. 1. For a succinct account of the origin of Equity Jurisdiction, read Reeves’s History of English Law, vol. i. p. 59; vol. ii. p. 250; vol. iii. p. 188, 273, 379; vol. iv. p. 368; vol. v. p. 158; and the first twelve chapters of Parke’s History of the Court of Chancery. *London, 1828.*
(*Note 1.*)
2. ‘Of the Practical Proceedings of Courts of Equity.’ [*Revise Wooddeson’s Lectures, vol. iii. part 3d. Lecture 55.*]
- e. 3. ‘Of the Court of Chancery.’ [*Revise the chapter in 2 Bacon’s Abridgment, p. 134, &c.*]
4. Story’s ‘Commentaries on Equity Jurisprudence, as administered in England and America.’ *Cambridge, 1835, 1 vol. 8vo. (Note 2.)*
- E. e. 5. Jeremy’s Treatise on the Equity Jurisdiction of the High Court of Chancery. *London, 1828.*

- e. 6. Fonblanque's Treatise of Equity. [*Laussat's edition. Philadelphia, 1831.*] (*Note 3.*)
- e. 7. Newland's Treatise on Contracts within the jurisdiction of Courts of Equity. (*Note 4.*)
- E. e. 8. Hovenden's General Treatise on the Principles and Practice by which courts of Equity are guided as to the prevention or remedial correction of Fraud. *London, 1825, 2 vols.*
- E. e. 9. Sugden's Practical Treatise of the Law of Vendors and Purchasers of Estates. *London, 1806. Philadelphia, 1807.*
- E. e. 10. Leigh and Dalzell's Treatise on the Equitable Doctrine of the Conversion of Property. *London, 1825. (Note 5.)*
11. Barton's Historical Treatise of a suit in Equity, 1796. (*Note 6.*)
12. Cooper's Treatise of Pleading on the Equitable side of the High Court of Chancery. (*Note 7.*)
13. Laussat's Essay on Equity in the State of Pennsylvania. (*Note 8.*)

E. e. MISCELLANEOUS.*

1. 'On Chancery Jurisdiction.' [*American Jurist, vol. ii. p. 314.*]
2. Parke's Lecture on the question, What are Courts of Equity? *London, 1832. [Read also 10 vol. American Jurist, p. 226 to 237.]*

* Vide ante pp. 212, 286, Note 30, and p. 321.

3. 'Can the donor revoke an actual gift before acceptance by the donee?' *Vide vol. xii. Amer. Jurist*, 118 to 124.
4. 'Whether payment of purchase money on a parol agreement for sale of land takes it out of the Statute of Frauds. *London Law Magazine*, vol. i. page 111.
5. Of the execution of Powers of Sale by the survivor of several donees. *5 Law Magaz.* p. 141.
6. Johnson's Chancery Reports. [~~§~~ These volumes contain the decisions of Chancellor Kent. We know of no such a body of Equity law, at once so learned and elementary; and, therefore, strongly recommend frequent reference to these cases in the course of our student's researches under the present head.]

NOTES ON THE FIFTH TITLE.

(Note 1.) CHANCERY JURISDICTION.—The history of the gradual establishment of chancery jurisdiction is essential to the acquisition of a definite idea of the nature and extent of chancery powers; a subject of some difficulty, and for a long time of much disputation. The limits or criteria which distinguish equity from common law, are not very certain, as may be seen by consulting the pages of lord Kaimes and justice Blackstone. It is manifest that the history of equity jurisdiction must be of great service in ascertaining the principle which distinguishes the duties of a chancellor from those of a common law judge; for in this history, the full extent of the powers of the latter is unfolded; and as their inadequacy was progressively discovered, we perceive the

origin and growth of the former. It is, perhaps, not very practicable to give a rule which shall fully distinguish equity from law. Judge Swift, in his Treatise on the Law of Connecticut, expresses himself on this subject much to our mind. 'A court of equity,' says he, 'acting according to the dictates of conscience, and aiming at the attainment of abstract right and perfect justice, has power to abate the rigour, correct the injustice, and supply the deficiency of positive law, where such rigour, injustice, or deficiency, result as an indirect and collateral consequence and operation of law; and where it is apparent that such effect was not the design and intent of the law. But where the matter complained of, flows as a direct and necessary consequence from the principle of law, adopted upon a calculation to promote the general good, a court of equity has no power to interfere. This limitation is a proper restraint upon the boundless discretion given to that court by the general terms used by lord Kaimes, and at the same time gives it an equitable power which is denied by justice Blackstone.'

§ The foregoing is the view we took of this subject at the date of the publication of the first edition of this volume. We are much pleased in saying that since that period much has been done to philosophically explain and define the nature of equity jurisdiction.

(Note 2.) STORY'S COMMENTARIES ON EQUITY JURISDICTION.—§ Cujus fama longiori anotatione non eget.

(Note 3.) FONBLANQUE ON EQUITY.—The original of this celebrated work was published anonymously, in the year 1737. It was then very small, being nothing more than an essay. It was entitled, 'A Treatise of Equity,' and was much and deservedly admired. In the year 1794, it was ushered

into the world, in a new and highly enlarged and improved form, by John Fonblanque, Esq. Few works have attained such universal approbation, or been more generally read. The notes are copious, perspicuous, and learned, and the authorities are full and pertinent.

In reading this treatise the student will of course frequently refer to the reports of Peere Williams, which have ever been esteemed among the most valuable and authentic sources of chancery law. It would be scarcely possible to speak too favourably of Mr. Cox's excellent edition of this work; but it has already received the warmest praises of the profession; and the learned, both of the bench and the bar, have strongly testified their unqualified admiration of his editorial labours.

Those who have any knowledge of the just anticipations of a professional eminence of the highest order, which were terminated by the early and lamented death of Mr. Laussat, need not be reminded of his excellent edition of Fonblanque; and to those who have not, we cannot refrain from expressing our humble opinion, that he was one of the most learned lawyers, for his age, that this country has known. [*Vide post, Note 8, of the present title.*]

(*Note 4.*) NEWLAND ON EQUITY CONTRACTS.—The principal authors who have treated of contracts, &c. cognizable in equity, are Powell, in the second volume of his *Essay on Contracts and Agreements*; Fonblanque, in his *Treatise of Equity*; Sugden, in his *Practical Treatise on the Law of Vendors and Purchasers of Estates*; Roberts, on *Voluntary and Fraudulent Conveyances*; and the present excellent treatise by Mr. Newland. This is a work which will be particularly acceptable to the student, as the decisions at common law are often contrasted with those of equity, and the subject of every species

of contract cognizable in that court, is treated with singular ability and perspicuity.

(Note 5.) LEIGH AND DALZELL ON THE CONVERSION OF PROPERTY.—The title of this work is not very expressive of the subject treated. This, perhaps, could not have been easily avoided without a departure from the fashion of the day which, in the selection of the *nom de livre*, is so apt to disregard expressiveness for the sake of brevity.

The important doctrine of equity which, for many purposes, regards things *agreed* to be done, as *actually performed*, and which, consequently, deals with *real* estate as if it were *personal*, whenever there has been a sufficient indication of intention by Agreement or Will, to impress the realty with personal uses, or *e converso*, is the subject of the volume now brought to the student's notice. Money agreed to be laid out in land, or directed so to be, by Will; or, the avails of land under an agreement or direction to convert land into money, is always respected as equitable assets; and are transmissible, or descendible as such respectively; and are also considered in this and other respects, as actually land or money from the period which the circumstances of the case point out as that in which the equitable conversion takes place. The law of this important subject had never before been collected and systematically arranged. The work consists of eight chapters, the first of which treats of the origin and definition of the conversion of property, and of the general design of the treatise. In the second chapter are set forth the means by which this conversion may be effected,—which is followed by a historical deduction of the method by which land came to be convertible into equitable assets—how the intention to produce the conversion must be manifested—and concludes with an explanation of *contingent* conversions. The third chapter considers the period

from which the conversion of personalty into realty is considered to commence. The topics of the fourth chapter are the various consequences of a conversion of personalty into realty—the operation of the statute of Mortmain on money directed to be laid out in land,—and the substitution of land for money covenanted to be invested. In the fifth are considered the consequences of a conversion of realty into personalty, and the effect of the statute of Frauds on the avails of real estate directed to be converted into money. The sixth chapter pursues the subject of the consequences of an absolute conversion; the operation of the statute of Mortmain, and of the stamp act,—and of the disposition to be made of the surplus money, or land, after the objects of the conversion are accomplished. The succeeding chapter treats of conversions by persons entitled *in autre droit*, as guardians, assignees and committees of estates of bankrupts and of lunatics; and in the concluding chapter are treated the doctrine of the reconversion of property—how the intention to reconvert by persons *absolutely* entitled is to be evidenced—the means of reconversion by those having only a *qualified* interest—and finally, of the statutes enacted to facilitate those means. The subject is becoming as important and practical in this country, as in England; and has been clearly, succinctly and ably treated.

(Note 6.) BARTON'S SUIT IN EQUITY.—This is a remarkably perspicuous and satisfactory outline of the practice; in which are explained, analytically and scientifically, the various forms of bills, answers, demurrers, pleas, and other proceedings, from the institution to the completion of a suit in chancery. It is preceded by an historical essay on the jurisdiction and objects of chancery; the whole of which is a clear and beautiful *coup d'œil*, admirably adapted as an introduction to the

study of the practice and pleadings in this court. It appeared in 1796, and continues to maintain its high rank amidst the numerous works of later date.

(*Note 7.*) COOPER'S EQUITY PLEADING.—The matters cognizable in a court of equity are not more distinct from those of a court of law, than are the modes of proceeding: the practice, therefore, and the system of pleading adopted by this court, are no less important to the student than the subjects embraced by its jurisdiction. After an acquaintance with the principles and extent of this jurisdiction, whether exclusive of, concurrent with, or auxiliary to the powers of the courts of common law, our student will hasten to inform himself of the pleading and practice of this court: on this subject, after an attentive reading of that beautiful little outline by Mr. Barton, we would place in his hands Cooper's *Treatise of Equity Pleading*, as the most comprehensive, methodical, and learned which has appeared on the subject. Prior to the year 1782, there was no regular or express treatise on the subject of Pleadings in Chancery, the example being set at that time by sir John Mitford, afterwards lord Redesdale, from which to the present time, the subject has been treated by Beames, Lubé, Montague, Willis, Cooper, and a few others. Lord Eldon, in the case of *Lloyd v. Johnes*, 9 Ves. jun. 54, remarked that Mitford's treatise on Pleadings in Chancery by English Bill, was a wonderful effort to collect what is to be deduced from authorities speaking so little what is clear, and that the surprize is not from the difficulty of understanding all he has said, but that so much can be understood.

The second edition of lord Redesdale's excellent work, appeared in 1787, and consequently contains none of the cases reported in Vesey, jun. Brown, Ambler, Anstruther, Scholes and Lefroy, part of Dickins, &c. We mention, therefore, the

third edition of 1814—and the still more recent one by Mr. Jeremy, either of which will, perhaps, be found as valuable as Mr. Cooper's treatise, which was published in 1809, but of which there have also been several subsequent editions. In the study of works on pleading and practice in chancery, we urgently recommend great attention to be paid to the *precedents* of each, for the reasons stated, ante Note 20, p. 374, &c.

(Note 8.) LAUSSAT'S ESSAY ON EQUITY IN PENNSYLVANIA.—In reviewing Mr. Parke's work on Equity Jurisdiction, &c. the London Law Magazine dwells on the subject of Law Reform in the United States, and mentions this Essay in the following laudatory and merited terms. 'We have now a publication before us, alone sufficient to create an interest in the subject-matter, did it not possess the highest claims to our attention in itself. We allude to *An Essay on Equity in Pennsylvania*, by Antony Laussat, jr. student of the Law Academy of Philadelphia; which though written merely as an academical exercise, is an admirable book for any man, a wonderful book for a student to write.* Mr. Johnes, also, in his *Suggestions for a Reform in the Court of Chancery*, London, 1834, makes a similar honourable mention of the 'Essay.' 'The reader may easily conceive the intense interest and delight, which the first perusal of such a work—and under such circumstances—was calculated to inspire. It will be observed, that while the object of these pages is to show the expediency of putting an end to an existing separation of these jurisdictions, the purpose of Mr. Laussat's work is to show the inexpediency of introducing such separation into a country where it does not exist.' Mr. Johnes being zealous in the cause of reform, and friendly to the union in one tribunal of both jurisdictions, was naturally much pleased to find in Mr. Laussat so able an

* Vol. v. p. 142.

advocate. But the student will, of course, bear in mind that our countryman was deprecating a separation of that, the union of which is nearly peculiar to Pennsylvania; and consequently that Mr. Johnes has drawn from this solitary example, a more extended inference than seems to be warranted. We have adverted with much satisfaction, to Mr. Johnes' work, as it, like that of our late countryman, may be regarded as the *first fruits* of the well directed industry of a youthful author of talents and learning. The praises bestowed on this early production of the late Antony Laussat, may, with equal justice, be applied to Mr. Johnes, but whose career of usefulness, we trust, is destined to be of much longer duration, and whose warm admiration of Mr. Laussat's work is complimentary both to his heart and head. May these bright examples of early law learning, and of successful authorship, be faithfully imitated and realized by the students of both countries.

WORKS OF OCCASIONAL REFERENCE ON THE LAW OF EQUITY.*

I. BRITISH.

1. Atherley's Law of Marriage and other Family Settlements. *London*, 1813.
2. Beames' General Orders of the Court of Chancery. *London*, 1815.

* Equity has been much more extensively treated than is indicated by our Syllabus and Notes on this head. Throughout our volume we have endeavoured, in some degree, to present the bibliography of each subject, which necessarily goes much beyond the just limits of the syllabus and notes. Our views on this subject, which vary according to circumstances, are fully explained in several of our previous notes—but whatever may be the special object of these various lists of books, there is one common to all of them, viz: to unfold gradually something of the bibliography of a most extensive science. ☞ Vide ante p. 136, 158, 212, 227, 235, 236, 266, 267, 286, 321, 338 to 342, 346, and particularly to p. 356 and 362, 368, and post, Note 1, Title viii.

3. Beame's Elements of Pleas in Equity. *London*, 1818.
Halsted's Amer. edit. New York, 1824.
4. Beames' View of the Writ of Ne exeat Regno. *London*, 1812.
5. Beames' Doctrine of Costs in Courts of Equity. *London*, 1822.
6. Bennett's Practice of the Master's Office in Chancery.
7. Cooper's Parliamentary Proceedings as to the Court of Chancery, &c. *London*, 1828.
8. Cooper's Lettres sur la Cour de la Chancellerie et quelque points de la Jurisprudence Anglois. *Londres*, 1828.
9. Collinson's Law concerning Idiots, Lunatics, &c. *London*, 1812.
10. Durham's Practice in Chancery. *London*, 1830.
11. Eden's Law of Injunctions. [*Amer. edit. Albany*, 1822.]
12. Fowler's Practice of Exchequer, in Equity, 2 vols. *London*, 1817.
13. Lord Chief Baron Gilbert's Treatise of Equity, 1758, 1796.
14. Grant's Practice in Chancery. *London*, 1826, 2 vols.
15. Harrison's Accomplished Practiser in the High Court of Chancery. *London*, 1759. *Newland's edition, with references, &c. to modern cases*, 1809, 2 vols.
16. Halkerston's Maxims and Rules in Law and Equity.
17. Hampson's Treatise on the Liabilities of Trustees.
18. Highmore's Law of Idiocy and Lunacy. *London*, 1809.
19. Howard's Duties of Solicitors on Sales. *London*, 1830.
20. Johnes' Suggestions for a Reform of the Court of Chancery, by a union of the Jurisdictions of Equity and Law, with a Plan of a new Tribunal for cases of Lunacy. *London*, 1834.
21. Keating on Family Settlements. *London*, 1810.
22. Kames' Principles of Equity. *Edinburgh*, 1778.

23. Legal Judicature in Chancery, with Remarks on the Judicial Authority of the Master of the Rolls. *London*, 1727. [*Supposed to be the production of lord King.*]
24. Lubé's Analysis of Equity Pleading. *London*, 1823.
25. Lothian's Practice of Consistorial Actions.
26. Maddock's Principles and Practice of Chancery, 2 vols. *London*, 1814, 2d Amer. edit. 1822.
27. Mitford's (lord Redesdale,) Pleadings in Chancery. [*Jeremy's edition.*]
28. Montague's Equity Pleading.
29. Newland's Practice in Chancery, 2 vols. *London*, 1813. *New York*, 1826.
30. Parke's History of the Court of Chancery. *London*, 1828.
31. Parke's Equity Jurisdiction of North America.
32. Powell's Essay on the Creation and Execution of Powers. *London*, 1799.
33. Roberts on Voluntary and Fraudulent Conveyances. *London*, 1800.
34. Seton's Forms of Decrees in Equity.
35. Sugden's Practical Treatise of Powers. *Ingraham's American edition from 3d London edit. Philad.* 1823.
36. Shelford's Practical Treatise on Lunatics, Idiots and Persons of Unsound mind. *London*, 1833. *Law Library*, vol. ii. *Philad.* 1833.
37. Turner's Epitome of the Practice in Chancery.
38. Turner's Practice and Costs in Chancery, 2 vols. *Venable's edition. London*, 1817.
39. Vanheythuysen's Equity Draftsman. *London*, 1816.
40. Wellesley's View of the Court of Chancery. *Lon.* 1830.
41. Willis' Pleading in Equity, &c.
42. Willis' Digest of the Practice as to Interrogatories. *London*, 1816.
43. Willis' Duties and Responsibilities of Trustees.

II. AMERICAN WORKS.

1. Swift's Law of Connecticut, vol. ii. book vi. *Windham, Connecticut*, 1795.
2. Blake's Historical Treatise on the Practice of the Court of Chancery of the State of New York, 1818.
3. Dane's Abridgment, vol. xiii. Index, '*Chancery*,' '*Equity*.'
4. Hoffman's Treatise on the Powers and Duties of Masters in Chancery. *New York*, 1824.
5. Hoffman's Treatise upon the Practice of the Court of Chancery, 2 vols. *New York*, 1834.

PARTICULAR SYLLABUS.

TITLE VI.

'The *Law of Merchants* not being founded in the particular institutions, or local customs of any particular country, but consisting of certain principles which general convenience has established to regulate the dealings of merchants with each other in all countries, may be considered as a branch of public law.'—*Marshall*.

'Non erit alia lex Romæ, alia Athenis, alia nunc, alia posthac; sed et omnes, gentes, et omni tempore una eademque lex obtinebat.'—*CICERO*.

THE LEX MERCATORIA.

(*Note 1.*)

1. The title 'Merchant and Merchandize,'
4th vol. of Bacon's Abri. p. 595, Wilson's edit.
- * 2. Abbot's Treatise on the Law of Merchant
Ships and Seamen. *Story's 2d American edit.*
- * e. 3. Ingersoll's Translation of Roccus.
4. Chitty's Treatise on Bills of Exchange and
Promissory Notes. *Smith's Amer. edit. 1834.*
- * e. 5. The following select titles in the second
volume of Evans' View of the Decisions
of Lord Mansfield, in Civil Cases.

1. Insurance Marine.
2. Insurance on Lives.
3. Insurance from Fire.
4. Botomry.
5. Bills and Notes.
6. Lien.

6. Livermore on the Law of Principal and Agent.

- * E. e. 7. Fell on Mercantile Guaranties.
- * e. 8. Phillips on Insurance.
- * E. e. 9. Phillips on Average and Adjustment.
- 10. Collyer on the Law of Partnership.
- e. 11. Ellis on the Law of Debtor and Creditor.
- e. 12. Smith's Compendium of Mercantile Law.
London, 1834. (Note 2.)
- e. 13. Theobald on the Law of Principal and Surety. *(Note 3.)*
- 14. Story's Commentaries on the Law of Bailments. *(Note 4.)*
- * e. 15. *The following select cases in Douglas' Reports. (Note 5.)*

§ VOLUME I.

- Bean *v.* Stupart, p. 11.
- Wooldridge *v.* Boydell, p. 17.
- Milford *v.* Mayor, p. 55.
- Lilly *v.* Ever, p. 72.
- Mills *v.* Fletcher, p. 231.
- Dingwall *v.* Dunster, p. 247.
- Planché *v.* Fletcher, p. 251.
- Johnston *v.* Sutton, p. 254.
- Macdowall *v.* Fraser, p. 260.
- Layabre *v.* Wilson, p. 284.
- Mason *v.* Hunt, p. 297.
- Barber *v.* Fletcher, p. 305.
- Thellusson *v.* Fletcher, p. 305.
- Earle *v.* Harris, p. 357.
- Hoare *v.* Dawes, p. 371.

§ VOLUME II.

Noble *v.* Kennoway, p. 510.
 Russel *v.* Langstaffe, p. 514.
 Loraine *v.* Thomlinson, p. 585.
 Peacocke *v.* Rhodes, p. 633.
 Archer *v.* Bank of England, p. 638.
 Rhuston *v.* Aspinall, p. 679.
 Eden *v.* Parkison, p. 733.
 Bermon *v.* Woodbridge, p. 781.

- * e. 16. *The following select cases in Sir James Burrow's Reports.* (Note 6.)

§ VOLUME I.

Pelly *v.* Royal Exchange Assurance Comp. p. 341.
 Miller *v.* Race, p. 452.
 Godin *v.* London Assurance Comp. p. 489.

§ VOLUME II.

Heylyn *v.* Adamson, p. 669.
 Goss *v.* Withers, p. 683.
 Luke *v.* Lyde, p. 882.
 Gardiner *v.* Croasdale, p. 904.
 Hamilton *v.* Mendes, p. 1198.
 Edie *v.* East India Company, p. 1216.

§ VOLUME III.

Price *v.* Neal, p. 1394.
 Grant *v.* Vaughan, p. 1517.
 Pillans *v.* Van Meirop, p. 1663.
 Carter *v.* Bœhm, p. 1905.

- * e. 17. *The following select cases in the Supreme Court of the United States, reported by Cranch, Wheaton and Peters.* (Note 7.)

§ CRANCH'S REPORTS.

- Vol. 1. Clark *v.* Young, p. 181. Wilson and Lenox *v.* Maitland, p. 194.
Mandeville and Jameson *v.* Riddle & Co. and Note A. in the Appendix.
§ *There is no case in the second volume, on the Lex Mercatoria, particularly worthy of the student's attention.*
- Vol. 3. Marine Insur. Comp. of Alexandria *v.* Tucker, p. 357. Lawrason *v.* Mason, p. 492.
- Vol. 4. Rhinelander *v.* Penn. Insur. Comp. 29.
United States *v.* Willing and Francis, p. 48.
Alexander *v.* Baltimore Insur. Comp. p. 370.
- Vol. 5. Mandeville and Jameson *v.* Wilson, p. 15.
Hodgson *v.* Marine Insur. Comp. of Alexandria, p. 100.
- Vol. 6. Livingston and Gilchrist *v.* Maryland Insur. Comp. p. 274.
- Vol. 7. Russell *v.* Clark's Executors, p. 69.
Livingston and Gilchrist *v.* Maryland Insur. Comp. p. 506.
- Vol. 8. Marcardier *v.* The Chesapeake Insur. Comp. 39.
Gracie *v.* Marine Insur. Comp. p. 75.
- Vol. 9. The Ship Soci  t  , p. 209.

§ WHEATON'S REPORTS.

- Vol. 1. Morgan *v.* United States Insur. Comp. p. 219.
- Vol. 2. Coolidge *v.* Payson, p. 66. Raborg *v.* Peyton, p. 385.
- Vol. 3. Lenox *v.* Prout, p. 520. Lanusse *v.* Barker, p. 101.
Swan *v.* Union Insur. Comp. p. 168.
- Vol. 4. [*There is no case on the Lex Mercatoria in this volume which claims insertion.*]
- Vol. 5. Mandeville *v.* Welch, p. 277.
- Vol. 6. Smith *v.* Universal Insur. Comp. p. 176.
- Vol. 7. Dorr *v.* Pacific Insur. Comp. 581.
- Vol. 8. Fleckner *v.* U. S. Bank, p. 338. Spring *v.* S. Car. Insur. Co. p. 268.

- Gracie *v.* Palmer, p. 605.
- Vol. 9. Renner *v.* Bank of Columbia, p. 581. McGruder *v.* Bank of W. p. 598.
- Vol. 10. U. S. Bank *v.* Bank of Georgia, p. 333.
Jenney *v.* Columbia Insur. Comp. p. 411.
- Vol. 11. Brooks *v.* Marbury, p. 78. United States *v.* Tappan, p. 419.
- Vol. 12. Drummond *v.* Prestman, p. 515. General Insurance Company *v.* Ruggles, p. 408.

§ PETERS' REPORTS.

- Vol. 1. Bank of Washington *v.* Triplett and Neale, p. 25.
Buck and Hedrick *v.* Chesapeake Insur. Comp. p. 151. McLanahan *v.* Universal I. Co. p. 170. Schimmelpenich *v.* Bayard, p. 264. Conrad *v.* Atlantic Insur. Comp. p. 386. Bank of Columbia *v.* Lawrence, p. 578.
- Vol. 2. Townsley *v.* Sumrall, p. 170. Leroy et al *v.* Johnson, p. 186. Buckner *v.* Finlay and Van Lear, p. 586.
- Vol. 3. Patapsco Insur. Comp. *v.* Coulter, p. 222. McDonald *v.* Magruder, p. 470.
- Vol. 4. Boyce and Henry *v.* Edwards, p. 112.
- Vol. 5. Patapsco Insur. Comp. *v.* Southgate, p. 604. Edmondson *v.* Drake and Mitchell, p. 624. Windship et al *v.* Bank of the U. States, p. 529.
- Vol. 6. [*There is no case on the Lex Mercatoria, in this volume.*]
- Vol. 7. Douglas *v.* Reynolds, p. 113. Scholefield *v.* Eichelberger, p. 586.
- Vol. 8. Hazard's Administrator *v.* New England Marine Insur. Comp. p. 557.
- Vol. 9. Bank of Alexandria *v.* Swan, p. 33.

MISCELLANEOUS.*

1. 'Opinions of lord Mansfield on Commercial Law.'
[*Vide vol. vi. of Amer. Jurist, p. 65 to 86.*]

* *Vide ante* p. 212, 286, Note 30, and p. 321.

2. 'Mercantile Law.' [*Vide London Law Magazine, vol. i. p. 45 to 54; p. 242 to 265; p. 527 to 546. Vol. ii. p. 237 to 256; p. 522 to 544. Vol. iii. p. 180 to 199. Vol. iv. p. 135 to 154; p. 347 to 372. Vol. v. p. 149 to 174. Vol. vi. p. 114 to 127.*]
3. 'Whether the rate of Interest is to be governed by the *lex loci contractus*, or by the *lex loci rei sitæ*.' 4 vol. *London Law Magazine*, p. 49 to 61.
4. 'Of the Transfer of Debts.' [5 vol. *London Law Magazine*, 103.]

[§ In this last article the student has explained to him a very important doctrine growing out of the common law rule which prohibits the assignment of a chose in action. We allude to the mode of substituting one creditor for another, and the remedy for its enforcement. The subject is sufficiently extensive on authority for a distinct chapter in a *Nisi Prius* treatise, but has hitherto almost wholly escaped notice. In the few pages now recommended the student will find the outline, at least, of the doctrine to which we allude.]

NOTES ON THE SIXTH TITLE.

(Note 1.) OF THE LEX MERCATORIA.—The student, no doubt, will find some difficulty in ascertaining the origin, and defining the limits of this system. As a body of law he will, perhaps, be unable to comprehend why it should be considered as a branch of the law of nations.* So likewise he may not agree with the learned commentator, who classes it under that part of the English *Lex non scripta*, denominated '*Particular Customs*.'† By some he will find it defined as the *general usages or customs of merchants in mercantile negotiations*; whilst others would have that to be the law of merchants in any place, which is the usage of that place. It is not for us, in such a work as the present professes to be, to enter much

* 4 Black. Com. 67. † 1 Black. Com. 75.

into legal discussions, or to solve for the student his numerous legal doubts. How far the *lex mercatoria* may be derived from the general usages of merchants of all nations, and thus far claim a place in the law of nations, as being *quasi publici juris*; how far *general usage* among the merchants of England constitutes the *lex mercatoria* of that country; or how far *local usage* may become law, or the entire system be ranked with particular customs, the inquiring student will no doubt duly inform himself. We would, however, remark that this general mode of expression, relative to the origin or limits of this system of law, is calculated to mislead the student. The *lex mercatoria* of any particular country, as for example England, may perhaps be defined, a system of principles or rules peculiarly regulating mercantile transactions, derived principally from the customs of merchants in different nations, from the usages, either general or local, of the merchants of England, which customs or usages of foreign or English merchants have been judicially sanctioned; and lastly from express legislative provision. Hence this system, whether we regard its extent, or the sources of its origin, cannot with propriety be classed with '*Particular Customs*;' for a particular custom affects only the inhabitants of a *particular district*; whereas, the *lex mercatoria* is not restricted within any defined limits, but extends over the whole realm, and operates every where, over *certain transactions*. So likewise, this law need not be specially pleaded, as particular customs must generally be, nor is this law to be tried by a jury as customs are. The student may consult the distinction taken in 2 Burr. 1226, 1228, *Eddie v. East India Com.* 2 Doug. 654, end of the note. 1 Ld. Raymond, 175. *Pinkney v. Hall.* 4 Du. and Ea. 208, 210. 6 East, 202, *Par v. Anderson.* 2 John. 327, *Frith v. Baker.* 1 Caines 43, *Smith and Stanley v. Wright.* Story's *Abbott on Shipping*, 417.

(Note 2.) SMITH'S COMPENDIUM OF MERCANTILE LAW.— This small work is a distillation, and of which we may rather say *ament meminisse periti*, than *indocti discant*. We have, therefore, assigned it a place towards the close of the works recommended in the Syllabus, as it is not sufficiently elementary to be sooner read, and will serve as a very instructive analytical outline, and remembrancer of most of what the student has previously read.

(Note 3.) THEOBALD ON THE LAW OF PRINCIPAL AND SURETY.— We have great satisfaction in recommending this little treatise, as it is certainly written with judgment and fidelity, and evinces some scholarship beyond the bounds of the common law. It is the substance of a private course of lectures delivered by Mr. Theobald at the London University, with the then professor's permission; the favourable reception of which by the class, and other circumstances, induced its publication. The work is elementary, the author's design being 'to divest every case, as much as possible, of technicalities and statements of procedure; so that, whether the reader has studied equity or common law, or not even either, he may still have no difficulty in learning the law upon the subject.' Mr. Theobald alludes, in his preface, to the dryly expository character of English law treatises in general; and states that, without neglecting to give the law as it exists, he has also 'endeavoured to combine with it original criticisms;' but adds some excuse, (as if any were necessary,) for the expression of these 'private opinions.' We have more than once taken occasion to express regret that law treatises are so generally deficient in censorial views, in historical researches, in references to foreign sources, and in philosophical analysis. We see no reason why every legal subject should not be investigated so as to display distinctly its history—its authoritative law; its defects and imper-

fections, with suggestions for their amendment; its literature, foreign and domestic, ancient and modern,—all of which could be done in perhaps, a shorter compass than is usually appropriated by the existing treatises. We should, therefore, have been better pleased (as the subject is peculiarly fitted for it,) had Mr. Theobald drawn much more extensively on foreign sources, and entered still more fully into the science of his subject.

(*Note 4.*) **STORY'S COMMENTARIES ON THE LAW OF BAILMENTS.**—In our Introductory Lecture on the Roman or Civil Law,* which we presume is in the hands of a very few, as we gave it only a partial, and gratuitous circulation, we had occasion to advert to this admirable work of Mr. Justice Story, an author always learned, perspicuous, elementary, and thorough; quem appellasse, laudasse est. We hope to be pardoned for here repeating, from that lecture, our brief remarks on this work.

'In matters of pure reason, and the eternal principles of justice, as they have been educed by wise heads and sound hearts, we may often rely on the Roman law, and its commentators, with almost unerring confidence. No one can read without admiration, their expositions of the law of contracts, in all its numerous divisions. This is strongly exemplified in the recent very learned Treatise on the doctrine of Bailments, by Mr. Justice Story. We there perceive the riches of a highly cultivated and embellished mind, gratefully returning to the abundant fountain of Roman law, a portion of its borrowed wisdom, and paying the most willing homage to the exalted merits of Justinian, of Pothier, Domat, Vinnius, Heineccius, Ayliff, Wood, Brown, and others. Whilst his learning on the law of bailments, ranges from the year-books, down through

* Vide Introductory Lecture on the Civil Law, p. 10, Baltimore, 1832.

all successive ages of the common law, he illustrates and happily enforces his doctrines by constant references to Roman law, as set forth in the distinguished sources to which I have just alluded. How much more valuable and authoritative he has thereby rendered his work, will be allowed by all, except by those (and there are such) who deem it idle, unprofessional, and even pedantic, to transcend the narrow limits of the common law, or to pursue our researches into regions, which, to them, are *terre incognite*, they would apply the carping objection, that the Roman law, if not authoritative, need not be referred to at all, as it would only tend to add to our already unwieldy *bibliotheca legum*, a mass of works accessible only to a few.'

We confidently recommend also to the careful study, no less of the British, than of the American legists, the 'Commentaries on the Conflict of Laws'—and the 'Commentaries on Equity Jurisdiction'—by the same author. As to his very able Commentaries on the American Constitution they of course, will be studied on this side of the Atlantic; but we doubt not the bright day of unprejudiced, untrammelled philosophical research, will soon prevail much beyond these limits; and that the scholars at least, of that noble country to which we are so closely allied, by various ties, will also unite with us in admiration, praise, and study of this work.

(Note 5.) SELECT CASES IN DOUGLAS' REPORTS.—Mr. Douglas, afterwards lord Glenbervie, reported the decisions of the Court of King's Bench for four years, commencing with 1778. His reports are of the highest authority; and his manner is preferred by many to that of sir James Burrow. We advise the student by all means to read with attention the preface to this work, and the selected cases (if practicable) in the American edition, *Philadelphia*, 1807.

(Note 6.) SELECT CASES IN BURROW'S REPORTS.—Sir James Burrow has recorded with a faithful and able pen the decisions of that living voice and oracle of English jurisprudence, the Earl of Mansfield. The substance and style of these reports have attached to them a reputation of which scarce any other repository of legal decisions can boast. The material facts of the cases are luminously detailed; the arguments of counsel circumstantially, but not tediously reported; and the opinions of the court accurately and satisfactorily stated. On the principles of the *lex mercatoria* these volumes may be considered a copious and original fountain. In fine, Burrow is to be regarded as, of all other reporters, the most elementary and methodical, and therefore, best suited to impart instruction to the student. The great pleasure we derived from these volumes is forcibly brought to our recollection by the beautiful and graphic remarks of our distinguished countryman, Chancellor Kent, who, in speaking of the modern reports, says, 'they are worthy of being studied even by scholars of taste and general literature, as being authentic memorials of the business and manners of the age in which they were composed. Law reports are dramatic in their plan and structure. They abound in pathetic incident, and displays of deep feeling. They are faithful records of those 'little competitions, factions, and debates of mankind,' that fill up the principal drama of human life; and which are engendered by the love of power, the appetite for wealth, the allurements of pleasure, the delusions of self-interest, the melancholy perversion of talent, and the machinations of fraud. They give us the skilful debates at the bar, and the elaborate opinions on the bench, delivered with the authority of oracular wisdom. They become deeply interesting, because they contain true portraits of the talents and learning of the sages of the law.*'

* 1 Kent's Comm. 496, 2d edition.

(Note 7.) SELECT CASES IN THE REPORTS OF CRANCH, WHEATON, AND PETERS, OF DECISIONS IN THE SUPREME COURT OF THE UNITED STATES.—Cases argued and adjudged in the Supreme Court of the United States, if faithfully reported, command our confidence, and are appealed to as authoritative and decisive of the law. To a repository of such cases the student resorts with pleasure and the utmost reliance, as they are almost necessarily supposed to be cases, no less important in principle, than sound in decision, because few else than cases of legal importance reach this tribunal, and they generally receive, both in the inferior and supreme tribunal, an elaborate discussion by counsel, and a serious judicial consideration.

Judge Cranch's Reports, in nine volumes, embrace cases from the year 1801 to 1815. Our selection from these volumes, on *mercantile* and *constitutional* law, will be found to include most of the important cases on those subjects. The latter will be found under the Ninth Title of this Course. The few decisions of the supreme court, of any interest, prior to 1801, will be found in the third volume of the Pennsylvania Reports by A. J. Dallas. The period taken in by judge Cranch, is, perhaps, the most momentous and lustrous in our judicial history. The principles of our admiralty and maritime jurisprudence were in a great measure defined; those of our neutral and belligerent rights and duties pointed out and vindicated; the laws of commerce were examined with research and applied with discrimination. Constitutional questions of vast importance were settled, and many of our statutes interpreted, and the powers of the various branches of our government, in various particulars, ascertained.

Mr. Wheaton commenced his duties of Reporter in 1816, and terminated them in 1827. Mr. Wheaton's Reports are

accompanied with many valuable notes and appendixes, evincive of learning, discrimination and scholarship. His classical and richly embellished mind; his truth, accuracy, and judgment, are all manifest in these annotations; and the cases are reported with the skill of a lawyer, and the faithfulness of one conscientiously alive to the high trust reposed in him. To the twelve volumes by Mr. Wheaton, have been added nine by his successor, Mr. Peters. During these twenty-one years a noble superstructure of constitutional law has been raised. Every other department, also, of our jurisprudence has been greatly expanded, strengthened and embellished. The application of the Constitution of the United States to the various elements of our great confederacy, so as to educe a national system productive of general good, and as little particular and local evil as possible, demanded judicial talents of the highest order. Twenty-four sovereign states, and fourteen million of people, had reposed a trust of the most exalted character in this august tribunal: questions of the deepest interest and the utmost intricacy; questions of the first impression, for which it were vain to seek analogies in other systems, were often to be solved, and applied, not only to individuals but to states,—and all was happily accomplished with almost universal submission and satisfaction. ‘I cannot conceive,’ says Chancellor Kent, ‘of any thing more grand and imposing in the whole administration of human justice, than the spectacle of the Supreme Court, sitting in solemn judgment upon the conflicting claims of the national and state sovereignties, and tranquillizing all jealous and angry passions, and binding together this great confederacy of states in peace and harmony, by the ability, the moderation, and the equity of its decisions.*’

The existing volumes by Mr. Peters contain many cases of great, and some of intense interest.

* 1 Kent's Comm. 444, 2d edition.

PARTICULAR SYLLABUS.

TITLE VII.

'It was necessity which forced men to give up a part of their liberty. It is certain then, that every individual would choose to put into the public stock the smallest portion possible; as much only as was sufficient to engage others to defend it. The aggregate of these, the smallest portions possible, forms the right of punishing; all that extends beyond this is abuse, not justice.—*Marquis Beccaria*.

THE LAW OF CRIMES AND PUNISHMENTS.

1. The Marquis Beccaria's Essay on Crimes and Punishments. (*Note 1.*)
- e. 2. Bentham's Introduction to the Principles of Morals and Legislation. [*The following Chapters only:*]
 - Chap. xii. 'Of the consequences of a mischievous act.'
 - Chap. xiii. 'Cases unmeet for punishment.'
 - Chap. xiv. 'Of the proportion between punishment and offences.'
 - Chap. xv. 'Of the properties to be given to a lot of punishments.'
 - Chap. xvi. 'Division of offences.'
 - Chap. xvii. 'Of the limits of the penal branch of Jurisprudence.'
- E. e. 3. Bentham's Theorie des Peines et des Re-compenses. (*Note 2.*)
4. Eden's Principles of the Penal Law. (*Note 3.*)

5. Bicheno's Philosophy of Criminal Jurisprudence.
 6. Russell's Treatise on Crimes and Misdemeanors.
(*Note 4.*)
 7. Carrington's Supplement to all the modern treatises on the criminal law. (*Note 5.*)
 8. McNally's Rules of Evidence on the Pleas of the Crown.
 9. Archbold's Summary of the Law of Pleading and Evidence in criminal cases, with precedents.
10.  STATE TRIALS.

[We are somewhat apprehensive that the very *name* of this voluminous and extensive work may excite some alarm. We should not, however, feel justified in pretermittting it: for though it must be admitted that it contains many dull unnecessarily prolix, and perhaps unimportant cases, yet it is certainly entitled to be considered the most authentic and satisfactory record of the pleas of the crown which has yet appeared.

Most of the important doctrines of the crown-law were either advanced, illustrated, or fully established in the cases there reported; so that, independent of the useful knowledge as to the mode of conducting criminal proceedings, during the times, and in the respective courts in which they occurred, furnished to us by the rigid minuteness with which the cases are reported; and likewise the information which may be gained as to the genius of the times, and the character of the distinguished personages who in many cases were the subjects of them, evidenced either by the *fact* of their prosecution, or the manner of conducting their trials; the student is to regard

this work as the depository of much useful law, and consequently entitled to a portion of his attention.

As this publication is quite too extensive to be generally perused, and yet quite too valuable not to be read at all, we have endeavoured to *select some of the most important cases*, many of which should be studiously read, and the remainder at least cursorily perused; as to this, the student will exercise his own judgment on the cases which we have pointed out.

The first eight volumes of this work have been well abridged by Mr. Salmon, who has added copious and satisfactory notes. His work is entitled, 'A new Abridgment and Critical Review of the State Trials, and Impeachments for High Treason.' Mr. Salmon had previously favoured the public with a new edition of the State Trials at large.

Emlin's edition of the State Trials, in six volumes, published in 1742, and Hargrave's in eleven volumes, which appeared in 1776, have been highly approved. In 1826, J. M. Phillips, Esq. published a work entitled, 'State Trials; or a collection of the most interesting trials prior to the revolution of 1688, reviewed and illustrated.' It is embraced in two volumes, and has been very favourably received by the profession. The trials comprehended in this selection, are among the most valuable to be found in the previous voluminous editions, the most celebrated of which is that of T. B. Howell, Esq. in twenty-one volumes, royal octavo, 1809, 1816. Mr. Phillips, moreover, has considerably curtailed the original cases of much of their superfluous matter. If these volumes be not accessible to the student, we recommend him to read the cases we have marked thus *, in Salmon's Abridgment. The remainder should be read in the work at large. *It is proper further to observe that Criminal Jurisprudence is with some a favourite subject of study, and of practice, and our volume*

aims at meeting the views of every class of students and practitioners.]

SELECT CASES IN THE STATE TRIALS.

Year.

1534. Sir Thomas More, for high treason. *Beheaded.*
1 vol. State Trials, 59. Salmon's Abr. 10.
1605. Robert Winter and others, for high treason. *Executed.*
1 vol. State Trials, 232. Salmon's Abr. 57.
- 1615.* Richard Weston, Ann Turner, sir Jervis Elvis, James Franklin, Frances countess of Somerset, Robert Carr earl of Somerset; for the murder of sir Thomas Overbury.
1 vol. State Trials, 324. Salmon's Abr. 61.
- 1620.* Francis Ld. Bacon. Proceedings against him in parliament for bribery and corruption. *Fined 40,000*l.**
1 vol. State Trials, 375. Salmon's Abr. 75.
1631. Mervin Ld. Audley, for a rape and sodomy. *Beheaded.*
1 vol. State Trials, 388. Salmon's Abr. 122.
1634. John Ld. Balmerino, for a treasonable libel. *Pardoned.*
1 vol. State Trials, 429. Salmon's Abr. 129.
1640. Thomas, earl of Strafford, for high treason. *Beheaded.*
1 vol. State Trials, 723. Salmon's Abr. 164.
- 1643.* William Laud, archbishop of Canterbury, for high treason. *Beheaded.*
1 vol. State Trials, 824. Salmon's Abr. 198.
- 1648.* Charles I. king of England, for high treason. *Beheaded.*
1 vol. State Trials, 986. Salmon's Abr. 218.
1656. James Naylor, for blasphemy. *Pilloried, &c.*
2 vol. State Trials, 265. Salmon's Abr. 254.
- 1657.* Tasborough, for subornation of perjury. *Fined.*
2 vol. State Trials, 1017. Salmon's Abr. 376.

1662. Sir Henry Vane, for high treason. *Beheaded.*
2 vol. State Trials, 435. Salmon's Abr. 286.
- 1663.* Col. James Turner and others, for burglary. *Executed.*
2 vol. State Trials, 502. Salmon's Abr. 294.
- 1680.* William viscount Stafford, for high treason. *Beheaded.*
3 vol. State Trials, 101. Salmon's Abr. 396.
- 1681.* Borosky and others, for murder. *Executed.*
3 vol. State Trials, 466. Salmon's Abr. 443.
1683. John Hampden, Esq. for high misdemeanor. *Fined*
40,000*l.*
3 vol. State Trials, 824. Salmon's Abr. 500.
1683. William Ld. Russel, for high treason. *Beheaded.*
3 vol. State Trials, 706. Salmon's Abr. 462.
- 1684.* Titus Oates. Proceedings against him on the statute
De Scand. Mag'. *Damages* 100,000*l.*
3 vol. State Trials, 985. Salmon's Abr. 519.
1685. Titus Oates, for perjury. *Fined, pilloried, &c.*
4 vol. State Trials, 1. Salmon's Abr. 530.
1685. Alice Lisle, for high treason. *Beheaded.*
4 vol. State Trials, 105. Salmon's Abr. 544.
1687. Philip Stansfield, for high treason and parricide. *Executed.*
4 vol. State Trials, 283. Salmon's Abr. 608.
1688. The seven bishops, for a libel. *Acquitted.*
4 vol. State Trials, 305. Salmon's Abr. 582.
1690. Viscount Preston, for high treason. *Pardoned.*
4 vol. State Trials, 410. Salmon's Abr. 614.
1695. Sir John Friend, for high treason. *Executed.*
4 vol. State Trials, 599. Salmon's Abr. 656.
1696. Cap. Thomas Vaughan, for high treason.
5 vol. State Trials, 17. Salmon's Abr. 713.

1701. Cap. William Kidd, for murder and piracy. *Executed.*
5 vol. State Trials, 287. Salmon's Abr. 738.
1702. Haagen Sevensden, for forcible marriage. *Executed.*
5 vol. State Trials, 449. Salmon's Abr. 757.
1704. Cap. Thomas Green and his crew, for piracy in Scotland.
5 vol. State Trials, 573. Salmon's Abr. 809.
1709. Henry Sacheverell, D. D. for high crimes and misdemeanors. *Silenced for three years.*
5 vol. State Trials, 641. Salmon's Abr. 816.
1716. Francis Francia, for high treason. *Acquitted.*
6 vol. State Trials, 58. Salmon's Abr. 864.
1718. Bonnet and thirty-three of his crew, for piracy in South Carolina. *Executed.*
6 vol. State Trials, 156. Salmon's Abr. 872.
1722. Christopher Layer, for high treason. *Executed.*
6 vol. State Trials, 229. Salmon's Abr. 878.
1666. Thomas Ld. Morley, for murder.
7 vol. State Trials, 421. Salmon's Abr. 299.
1710. George Purchase, for high treason. *Pardoned.*
8 vol. State Trials, 285. Salmon's Abr. 855.
- Mawgridge, for murder, 9 vol. State Trials, 64.
Gregg, for high treason, 10 vol. State Trials, 77. Appen.
Stevenson, for murder, 10 vol. State Trials, 462.

§ BRITISH AND AMERICAN WORKS, &C. ON CRIMINAL JURISPRUDENCE, FOR OCCASIONAL REFERENCE.

1. Cottu on the Criminal Justice of England. [*From the French, London, 1822.*]
2. Chitty's Practical Treatise on the Criminal Law. *London, 1816, 4 vols.*
3. Coke's 2d, 3d, 4th Institutes.

4. Colquhoun's Police of the Metropolis. *Lon.* 1806, 8th ed.
5. Christian's Precedents and Principles, relative to Impeachments. 1791.
6. Collyer's Criminal Statutes.
7. Chase's Trial on Impeachment before the United States Senate, by C. Evans. *Baltimore*, 1806.
8. Cordwainers' Trial for Conspiracy, by W. Sampson. *New York*, 1810.
9. Conspiracy Cases relating to the Frauds on the Office of Discount and Deposit. *Baltimore*, 1823.
10. Carson's Report of the Conspiracy case of Eberle et. al. relating to St. Michael's and Zion Churches. *Philadelphia*, 1817.
11. Boscawen's Convictions on Penal Statutes, with Precedents. *London*, 1817.
12. Beccaria Anglicus, or Letters on Capital Punishments.
13. Dagge's Considerations on Criminal Law. *London*, 1774, 3 vols.
14. Deacon's Digest of Criminal Law. 2 vols.
15. Disney's Penal Code on the Basis of the Law of England.
16. East's Pleas of the Crown. 2 vols. *London*, 1803.
17. Emlyn's Preface to the 3d edit. of the State Trials.
18. Firth's Remarks on the State Trials. *London*, 1817.
19. Foster's Reports of Crown Cases. *Dodson's edit.* *London*, 1792.
20. Gude's Crown Practice, 2 vols.
21. Hale's Pleas of the Crown. *Dogherty's edit.* 2 vols. *London*, 1800.
22. Hawkins' Pleas of the Crown. *Leach's edit.* 4 vols. *London*, 1795. [*Curwood's more recent edition.*]
23. Hammond's Criminal Code on Forgery. *London*, 1828.
24. Hume's Criminal Law of Scotland.

25. Hargrave's Preface to the 4th edition of the State Trials.
26. Hargrave's Collection of Juridical Arguments, p. 1. 'Opinion on the Commitment of the Hon. Simon Butler, and Mr. Oliver Bond, by the Irish House of Lords, in 1793, for Contempt.'
27. Harg. Jur. Arg. p. 403. 'Opinion concerning Writs of Error in Criminal Cases, other than Treason.'
28. Jardine's Index to the State Trials.
29. Jones, Sir William. 'Inquiry into the legal mode of Suppressing Riots, with a constitutional plan of future defence.' *Vide 8 vols. of his Works*, p. 460.
30. Livingston's Introductory Report to the Code of Prison Discipline, prepared for the State of Louisiana. *Philadelphia*, 1827.
31. Livingston's System of Penal Law for the United States of America, 1 vol. *folio*. *Washington*, 1828.
32. Livingston's Penal Code of Louisiana. *New Orleans*, 1822. (*Note 6.*)
33. Leach's Cases in Crown Law, 2 vols.
34. Montague's Selection of Opinions as to the Punishment of Death, 3 vols. *London*, 1812.
35. Montague's Thoughts on the Punishment of Death for Forgery. *London*, 1830. (*Note 7.*)
36. Motts' Ancient Statutes, which award Death without benefit of Clergy, from Edward 3d to Queen Ann, with copious notes. *London*, 1817.
37. Maclean's Treatise on the Quarantine Laws.
38. Paley on Summary Convictions on Penal Statutes. *London*, 1814.
39. Penal Code of the French Empire. (*Note 8.*)
40. Pennsylvania State Trials, 2 vols. *Philadelphia*, 1794. (*Note 9.*)

41. Penruddock's Analysis of the Criminal Law.
42. Phillips' Essay on Juries and Criminal Law.
43. Reeves' Chart of Penal Law. *London*, 1779.
44. Romilly's Observations on the Criminal Law of England, in regard to capital punishments. *London*, 1811.
45. Roscoe's Observations on Penal Jurisprudence. (*Note 10.*)
46. Roscoe's Additional Observations, &c.
47. Russell and Ryan's Crown Cases, decided by the Twelve Judges.
48. Starkie's Treatise on Criminal Pleadings, &c. *London*, 1814.
49. Shaler's Report of the Trial of the Cordwainers of Pittsburgh for a Conspiracy. *Pittsburgh*, 1816.
50. Trials for High Treason in Scotland, 3 vols. 1820.
51. Trial of Aaron Burr for High Treason, 3 vols.
52. Wheeler's Reports of Criminal Law Cases, decided at the City Hall, New York, with notes, 3 vols. *New York*, 1823, &c.
53. Yorke's Considerations on the Law of Forfeiture for High Treason. *London*, 1795.

CONTINENTAL SOURCES, FOR OCCASIONAL REFERENCE,
IN CRIMINAL JURISPRUDENCE.

1. *Traité du droit pénal*, par M. Rossi. *Paris*, 1829, 3 vols. 8vo.
2. *Manuel de la Science du droit pénal*, par M. Tittman (en allemand.) *Halle*, 1824, 3 vols. 8vo.
3. *Dictionnaire de la Pénalité dans toutes les parties du monde connu*, &c. par M. St. Edme. *Paris*, 1828, 6 vols. 8vo.
4. *De mezzi di preveniere piu frequenti delitti contro la vita e le proprieta, dell' avvocato P. Mantegazza*. *Milano*, 1804, 1 vol. 8vo.

5. Du Système pénal et du système répressif en général, et de la peine de mort en particulier, par Ch. Lucas. *Paris, 1827, 1 vol. 8vo.*
6. Mémoire lu à la Société libre d'emulation de Rouen, sur l'abolition de la peine de mort infligée aux faux mon-
ayeurs en matière d'or et d'argent, par M. Tougard.
Paris, 1828.
7. De la peine de mort en matière politique, par M. Guizot.
Paris, 1822.
8. Précis de la science du droit criminel et pénal, contenant,
l'histoire abrégé des peines et de la procédure crimi-
nelle chez les peuples anciens et modernes, la théorie
de la pénalité et de l'instruction criminelle, &c. par
Malpoyre. *Paris, 1830.*
9. Développement de la théorie des lois criminelles, par la
comparaison de plusieurs législations anciennes et
modernes, notamment de Rome de l'Angleterre et de la
France; suivie de l'application de cette théorie dans un
projet de Code criminel, correctionnel et de police, par
S. Bexon. *Paris, 1802, 2 vols.*
10. Proyecto de un Cadigo Penal, par M. L. Vidaurre. *Bos-
ton, 1828.*

NOTES ON THE SEVENTH TITLE.

(Note 1.) BECCARIA ON CRIMES AND PUNISHMENTS.—This Essay is from the pen of Cæsar Bonesana, Marquis of Beccaria. His fine talents and enlarged philanthropy, as usual, created him enemies, who accused him of venality in the discharge of official duties, and compared him in corruption, as well as talents, to lord Bacon; we would fain hope with equal malevolence, and that if the illustrious author of *Novum*

Organon has found triumphant vindicators, in Montague and others; the amiable and eloquent champion of the rights of humanity—the author *Dei Delitti e Delle Pene*—will find many, equally as zealous and successful. It would seem that novel views in morals no less than in physics, must have opponents; for if the friends of humanity are zealous, its enemies are equally alive; if there be patrons, tyrants are sure to appear; if many shudder at the inhumanity of punishments, there are others to exult in them. It is true, Beccaria found friends among the good and the learned; but he needed protection, as his Essay warred against kings, and princes, and men in high places—it contended with history, and habits, and selfish prejudices—still it is prevailing, and has done much to settle the true philosophy of penal jurisprudence.

This work was first published, we believe at Naples, in 1764, and passed through six Italian editions in the course of eighteen months. Translated into various languages, it excited much curiosity, much sincere praise, and no little vituperation. It soon appeared in a French garb, from the classic pen of the Abbé Morellet; who, however, took great liberty with its arrangement. M. De Voltaire in 1766 composed a Commentary on it, which is appended to the English translation, republished in Philadelphia, 1809.

When we reflect on the genius of the government and religion under which the Marquis lived, and of those which surrounded him, we cannot but additionally value the enterprize and boldness of the man who ventured to disseminate such wholesome truths. Happily for our country we need no advocate for humanity—liberty—exemption from torture; they are indigenous growths of our soil, which need but little culture, and which, under any circumstances, can never, we hope, be entirely eradicated. Still we have not gone the whole length

of Beccaria; and have needed the exertions of the benevolent and powerful legislator for the state of Louisiana, against this relic of pagan barbarity,—the ultimum supplicium. Mr. Livingston's argument demonstrates the cruelty, impolicy, and evils consequent upon the infliction of death, unless where the public and private peace imperiously require it.

Bonesana was born at Milan in 1720, (some say 1735,) and died in 1794.

(*Note 2.*) BENTHAM'S THÉORIE DES PEINES ET DES RÉCOMPENSES.—It is a matter of no less surprise than regret, that a work of such extraordinary merit as the late Mr. Bentham's 'Theory of Punishments and Rewards,' should thus long have continued unknown, not only to the students, but to the learned of our country. Twenty-four years have elapsed since the publication of this book, yet it is to be found in scarce any public or private library with which we are acquainted; and most of the booksellers, and many of the literati, have never heard of it. This remark proceeds from regret that nearly every ephemeral production which issues from the British press, finds an easy admittance, and a flattering reception among our countrymen; while works of singular excellence, and sound philosophy, are totally disregarded, or perhaps permitted gradually to elaborate their way to a partial notice.

The eulogy, perhaps, is not unwarranted or too strong, that no where, among ancient or modern productions, is the philosophy of criminal legislation more ably and happily illustrated, than in the work under observation. Mr. Bentham's predecessors in this channel have, without exception, failed in exhibiting a complete theory of the sanction of criminal laws; one resting on the basis of sound philosophy, and which might serve as a lasting and universal guide.

In the works of Grotius, Puffendorf, Montesquieu, Beccaria, &c. we do not find delineated even a rude contour of this very interesting subject, which, under the skilful management of Mr. Bentham, has assumed in all its parts the form and attitude of science.

The learned editor of this work, M. Dupont, who gives additional lustre to Mr. Bentham's pages, considers it decidedly superior to any preceding production. He informs us that he undertook to examine the most renowned works on the subject, as well as those of less note, and arose from their perusal without hesitating to offer Bentham's production to the public. 'I was induced,' says M. Dupont, 'to collect together all that is scattered in the *'Spirit of Laws'* on the subject of punishments and rewards, and I found that this collection would have occupied not more than ten or a dozen pages.' 'We hence see the folly of D'Alembert's assertion, so often repeated in France, that *'Montesquieu said every thing, and abridged every thing, because he saw every thing.'* 'Amid numerous thoughts either vague or loose,' continues M. Dupont, 'and some that are erroneous, we meet with many which are certainly judicious and profound, as in all that we possess of this illustrious writer; but how far do they come short of a theory of punishment!' 'Beccaria did more;' but still this and all subsequent writers, according to M. Dupont, have shed but little light on this very important topic.

The law student cannot fail in being much delighted with this work; it is a book replete with original and philosophical thoughts, and sound practical observations, conveyed in a manner of peculiar force, and often in language of great novelty and appropriateness; in fine, in a style not entirely Mr. Bentham's, but in his best manner, with the exception of his *Essay on Usury*, and his *Fragments on Government*.

The whole skiagram, or analysis of his subject, we conceive to be as original as it is admirable; and the filling up every way suited to the excellence of the contour. The accuracy and clearness of his definitions, the fitness of his new words and terms, the zeal and learning displayed in the discussion and illustration of many novel and highly important topics, and the light and conviction brought to the understanding on many hitherto involved and difficult questions, render this work not only eminently instructive, but uncommonly interesting.

Mr. Bentham displays much closeness and discrimination of thought in his observations on the attributes or qualities of punishments: these he holds to be *certainty, equality, divisibility, analogy, commensurability, economy, exemplariness, remissibility, tendency to reform, deprivation of the power of injuring, convertibility into profit, simplicity of denomination, and popularity.*

He likewise displays much ingenuity and philosophy in his remarks on what he denominates 'Expense of Punishments,' and his division of them into *economical* and *costly*; and likewise in his division of punishment into *privative* and *corporeal*, which latter he subdivides into *simple afflictive, complex afflictive, and restrictive.* So also, his observations on the *end* and *measure* of punishments, the infliction of death, the incapacity of testifying, indiscriminate imprisonment, solitary confinement, different species of prisons, &c. are fraught with lessons of the soundest wisdom, and greatest practical importance. We have said thus much on this work, from a conviction that its author has left his predecessors at an immeasurable distance, in every thing which relates to the philosophy of criminal jurisprudence. It is much to be regretted that this work still remains in the French language: it was published by its

learned editor, M. Dumont, in that language at London in 1811, in two volumes, and has not, we believe, been translated. As it is a work which should be very generally read, we have no doubt that it will yet assume an English garb.*

(*Note 3.*) EDEN'S PRINCIPLES OF PENAL LAW.—This justly admired work was published in 1771, by William Eden, afterwards lord Auckland; and from its philosophical character, and enlightened humanity, ranks him with Montesquieu, Beccaria and the other advocates of a mild and improved system of legislation. The philosophy of criminal jurisprudence is the first to enlist the interest and affections of a people emerging from the inveteracy of ancient customs and laws, or from the oppression of their rulers. To effect these salutary changes much has to be written; the subject is to be put in every possible light; numerous suggestions must be made to suit the taste and judgment of those who are to pass on them, so that a wise selection may be made from varied and abundant materials. In the old world this is altogether essential; change there is slow and progressive only; whereas, in this country, 'the world is all before us where to choose,' the elements of our laws and legislation; we have had much to build up, and always but little to pull down. Works, therefore, on the melioration of laws, and the science of legislation, are to us of less importance; but still sufficiently so to be made the subject of some attention; for we have yet some improvements to make; and legislation to be just and salutary, should ever keep pace with the alterations of our condition. We have been led into these brief remarks, as the works of Roscoe, Cottu, Beccaria, and many others mentioned under the present title, belong to the class of productions designed to awaken nations to a clear

* For further remarks on the writings of this extraordinary man, vide 1 vol. Hoffman's Legal Outlines, p. 464, &c.

sense of the cruelty, ignorance, and prejudice involved in the tenacious adherence to ancient laws and customs, when the actual condition (intellectual, moral, and physical,) of the people has undergone such important changes. We have studiously avoided, in the course of our work, the introduction, either for the student or scholar in the law, of works merely of a political character, and especially those which are incendiary in their tendency. There are morals in politics, as well as in religion, from which individuals no less than nations should never depart; and we are satisfied that changes, whether in constitutions, customs, laws, or practices, should not be lightly and irreverently made; but, to be salutary, they should be the gradual and well digested result of the deliberations of wise heads and sound hearts.

(*Note 4.*) **RUSSELL ON CRIMES AND MISDEMEANORS.**—The criminal jurisprudence of England is no where treated in so inviting a manner as in this work, which first appeared in 1819, and subsequently in 1827, somewhat improved. The first American edition by Mr. Davis, solicitor general of Massachusetts, adapted it to our use; and a few years after it was again very ably edited by Theron Metcalf, Esq. on the basis of solicitor Davis', and the second London edition. There is now, however, a new edition in the press by George Sharwood, Esq. of Philadelphia, who, to nearly all of the matter of the preceding editions, has added further notes and references; so that the student may now refer to this work with the certainty of finding the subject treated in its most enlarged and improved form.

(*Note 5.*) **CARRINGTON'S SUPPLEMENT, &c.**—This little volume is a very useful supplement to Mr. Russell's treatise, and contains the substance of all the important statutory and

other alterations in the criminal law of England, particularly those effected by the statute 7 Geo. 4, c. 64. The preceding editions of the works of Chitty, Starkie, Curwood, Archbold and others, did not contain them. These changes in the penal jurisprudence of England are not unimportant to us; for many of them are, and have long been the law in this country, so that Mr. Carrington's work may in some degree, be regarded as an American Commentary on the first English edition. It is a small and well arranged volume, which contains, moreover, all of the important crown decisions between 1819, and 1826; the former being the date of the appearance of Mr. Russell's work; and the latter that of Mr. Carrington's.

(Note 6.) LIVINGSTON'S PENAL CODE.—The legislature of Louisiana, in February, 1820, provided for the appointment of a person to submit a *projet* of a code of penal law adapted to the wants of that state; and Mr. Livingston, having had conferred on him this important trust, made his very able Report, published at New Orleans, in 1822, in one volume, 8vo, and which is the work which gives rise to the present note.

From the time of his appointment, Mr. Livingston dedicated himself with zeal, and wonderful industry to the arduous and honourable task assigned him. In its execution he has shown himself a philosophical legislator, possessed of all the desirable capabilities of the late Jeremy Bentham, (the great pioneer in the enterprise of private legislation,) but without any of his objectionable peculiarities; together with all the wisdom of Montesquieu, and the animating and ennobling philanthropy of Beccaria.

A few years after this publication, Mr. Livingston submitted to the legislature of his State his Introductory Report to the Code of Prison Discipline, it being a part of his system of penal law. This report is contained in a small volume, pub-

lished at Philadelphia in 1827. Eminently successful in these undertakings, which had placed him at the head of the school of modern reformers, and of philosophical digesters or codefiers, he prepared, voluntarily as we presume, a very elaborate and admirable system of penal law for the United States of America, which was presented to the National Legislature, and by order of that body, printed and published at Washington in 1828, in one volume folio. It consists of three codes, or books, viz: of Crimes and Punishments—of Procedure in Criminal Cases—and of Prison Discipline: to which is added a book of Definitions of all the technical words used by him in the foregoing codes.

No one, we presume, can read this digest of criminal jurisprudence without great admiration of its accurate learning,—precision of thought,—exemption from speculation, and especially its humane, and yet highly practical character. Although this code has not gone into authoritative operation, it well deserves the studious attention of legislators, of statesmen, and of practising lawyers.

(*Note 7.*) MONTAGUE'S THOUGHTS ON DEATH FOR FORGERY.—Basil Montague, Esq. is advantageously known by several useful works, among which, under the present title, are his Selection of Opinions of different authors on the punishment of death, in 3 vols. London, 1812, and his Thoughts on Death for Forgery, in one vol. London, 1830. The last is a very creditable work, written with fine literary taste, and with great accuracy of thought and language.

(*Note 8.*) PENAL CODE OF THE FRENCH EMPIRE.—The criminal as well as civil code of France, imperatively claim the attention of him, who aspires to the character of an enlightened statesman and lawyer. It is impossible to read the

French codes, without profound respect for the learning and philosophy of their distinguished authors. The Penal Code has been translated and published in the appendix to the second volume of the American Review, and will be read with no less pleasure than advantage. The Commercial Code, however, is to us the most valuable and interesting. It has been ably translated and annotated on by Mr. Du Ponceau, of Philadelphia, a civilian of talents and learning: this is likewise to be found in the same work. The translation of the Commercial Code, by John Rodman, Esq. of New York, about the same time, published in an octavo volume of three hundred and sixty pages, is on the whole better entitled to the student's attention, as it is accompanied with a translation of the 'Motives, or discourses of the counsellors of state, containing a luminous and interesting discussion of the various principles and provisions of the Code;' and also the original text, on the opposite page of the book, for those who may be inclined to compare it with the translation. Mr. R. has added appropriate and sensible notes, which make us regret they are so few in number. The studious perusal of both these Codes would require but a few days, and would richly compensate the student. So strong is our desire to furnish every temptation which may invite the student to a punctual adherence to the works designated in this Course, that we shall deem no apology necessary for the following extracts from Mr. Rodman's very sensible preface to his work.

'The Code Napoleon now constitutes the civil law of France. All former laws, customs, and usages, both written and unwritten, of the different provinces in that country, were entirely abolished on the introduction of this new system of jurisprudence. It is, unquestionably, a work of the highest merit, whether we consider the pure morality, the sound legal prin-

ciples, and enlightened reason, which pervade every part of it; or the lucid order, precision, and method, with which the matter is arranged and exhibited. Whatever, therefore, some persons may think of the nature of the present government of France, of its stability or duration; whatever may be the ultimate consequence of the powerful coalition now arrayed against her; and though the star of her glory now shines with diminished lustre; yet, as long as society and civilization exists, as long as reason, truth, and justice are prized among men, the Codes of the French empire, those splendid monuments of jurisprudence, erected by the learning and wisdom of the nation, will endure, and reflect the brightest honour on their founders. The notion entertained by many people in this country, that this system of laws is wholly founded upon arbitrary power, and consequently affords no security to the rights of persons, or the enjoyment of property, is equally erroneous and absurd. However arbitrary a government may be, it can never be its interest or policy to make laws, by which the bonds of society may be slackened, and the relative rights of individuals left at the mercy of accident or force. In cases unconnected with *public policy*, where the object is solely to determine the question of *meum* and *tuum*, the laws of even a despotic state are quite as likely to be framed so as to afford protection and security to private rights, as under the government of the freest republic. The excellence of laws, as they respect the mutual relations and multifarious commerce of men in society, depends much more upon the enlightened views, and the wisdom of the lawgiver, than upon the nature of the government, or the freedom of the people. In proportion to the advancement of civilization and of learning in a country, whatever may be the form of its government, the laws will be found just and pure; I mean those laws which relate to *per-*

sonal rights, and the security of property, for I am not now considering *political* rights. In the reign of *Justinian*, as despotic a prince as any that swayed the Roman sceptre, that magnificent system of jurisprudence which forms the body of the Civil law, was raised and perfected: a system, whatever may have been the early prejudices of the English nation against it, which contains all the elements of justice and equity between man and man, and the principles and provisions of which, at this day, strengthen and adorn the gothic fabric of the common law of England.'

'If we reflect,' continues Mr. Rodman, 'upon the manner in which the different codes established by the present government of France were enacted, we cannot but entertain a very favourable opinion of their excellence. They were the productions of care, labour and time; and the fruit of the united wisdom, genius, and researches of the best and most enlightened men of that country. Many of the most distinguished members of the old parliaments were called to assist in the formation of this new system of jurisprudence, and contributed their learning and experience to render it as perfect as possible. The discussions which took place in the council of state, on the framing of the Code Napoleon alone, make two large quarto volumes, in which every article and clause of that Code are examined, and critically compared with the former existing laws on the subject, and with those of other countries. Still greater solicitude was manifested, and equal care taken, to give perfection to the Commercial Code. After the plan of it had been formed, and discussed in the council of state, a copy of it was sent to every court of justice, and to every chamber of commerce, throughout the empire; and their separate observations required on every article which appeared susceptible of amendment. These observations forming an

immense mass of opinions, of suggestions, and of arguments, were laid before the council of state, and the Code again taken into consideration, and such alterations made in it as were judged proper; after which it was submitted to the legislative body for final adoption. *Human ingenuity could not have devised, nor human happiness desired, a mode better calculated to ensure perfection to a work of this nature.* Not only the most distinguished judges and statesmen, but every merchant of character and respectability in France, was thus called upon to contribute his information and experience in the formation of this system of laws.

'The *Code Napoleon* contains all the *general* principles of civil and municipal law. Its provisions embrace all the various relations of men in society, their rights, duties, and obligations, both in respect to the public authority and to each other. It secures the enjoyment, and regulates the descent and transfer of property; recognises the principles of equity in the construction of contracts and engagements, and provides for their faithful performance.

'The *Commercial Code* provides for the application of the general principles recognised in the Code Napoleon, to the numerous and diversified cases arising out of the operations and transactions of trade. It is therefore, in many respects, conformable to the spirit of the commercial laws of other civilized nations, though it differs from them in some important points, and contains many new and highly valuable provisions. Such a body of mercantile law, condensed in so small a compass, its various parts arranged and exhibited in so able a manner, is not to be found in the jurisprudence of any other nation. The commercial law of England exists not in any definite and distinct form. It must be sought in the voluminous pages of the statute book, and still more in the count-

less volumes of elementary treatises and reports of adjudged cases, which encumber the library, and distract the mind of the judge and the lawyer. Founded originally upon usage, it has, from time to time, received particular additions and alterations from acts of parliament, and derives its force and authority much less from positive regulation, than from the numerous and sometimes contradictory decisions of the courts. The *lex mercatoria* of England, though equally the law of the land, forms no part of what is called the common law. The former has borrowed most of its principles, and many of its rules, from the commercial regulations of the continental nations, and from none more than from those of France, whose celebrated ordinances, and enlightened authors, have contributed more to improve and enrich the commercial jurisprudence of England, than all the statutes of her parliaments, or the writings of her jurists. The treatises of *Pothier*, of *Jousse*, of *Domat*, of *Emerigon*, and of *Valin*, are deservedly held in the highest estimation in Great Britain, and neither national antipathy nor inveterate prejudice has been able to resist the influence of these luminous and masterly productions. Even the ordinances of Louis XIV. have extorted the highest encomiums from the bench and the bar of England; and are cited as authority in almost every commercial question of importance, before the courts of that country.

‘In an age of science and of letters, whatever the wisdom and the genius of any nation has produced, which may contribute to private happiness or public order, is entitled to credit and consideration. Whether it be the code of George or Napoleon, of Frederick or Alexander, which is offered to our notice, why should we not equally examine its principles and provisions.’*

* For further remarks on the French codes, and the character of the Emperor Napoleon as a lawgiver, vide Hoffman’s *Legal Outlines*, vol. i. page 469.

(Note 9.) PENNSYLVANIA STATE TRIALS.—These volumes contain the reports of the impeachment of Francis Hopkinson, judge of the Admiralty Court, in 1780, and of John Nicholson, comptroller general of Pennsylvania, in 1792, both of whom were acquitted. They are merely referred to as depositories of useful information, and as a source to be looked at in case of a recurrence of similar charges.

(Note 10.) ROSCOE'S OBSERVATIONS ON PENAL JURISPRUDENCE.—The *right*, the *means*, and the *ends* of punishment have at all times proved a subject of extreme difficulty among jurists. In regard to these, or some of them, various systems have been zealously maintained, as to all of which we may probably say, what may indeed be said of most theories, that the truth lies exclusively in none of them, and more probably in a fair compromise among all. These systems, eight in number, refer this right, &c. to *vengeance*, *example*, *compact*, *atonement*, *prevention*, *psychological restraints*, *improvement of the offender*, and *retaliation*. These divisions of the subject, are useful, as they give it a didactic form, and enable authors and readers to analyse their views, and to see the entire theory of punishment through a clear medium; but the result would be still more useful if the legislature were to act on no one of these systems, but on these and all other grounds arising out of the nature of man, and the constitution of civil society.

Mr. Roscoe's Observations on penal jurisprudence, and the reformation of criminals, published in 1819, and his 'Additional Observations,' are founded on the system of moral correction of the offender, and are marked by all of those humane recommendations, to which good hearts are so prone, when human depravity has not been much and variously presented to their personal observation. Such works as those of Beccaria, Eden, Bicheno, Montague, Bentham, Roscoe, and many

others, especially some of the continental works we have enumerated, ante p. 431, belong to the study of the statesman, and legislator, as well as of the practical jurist. They are on topics of vital interest to every individual, and are especially worthy the attention of all who are disposed to come in aid of the cause of a mild but efficient scheme of penal laws, by their advice, their pecuniary assistance, and their personal exertions.

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