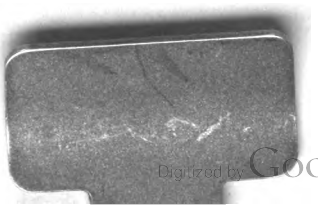
THE COMMON LAW

BY

CHARLES P. DALY, LL. D.



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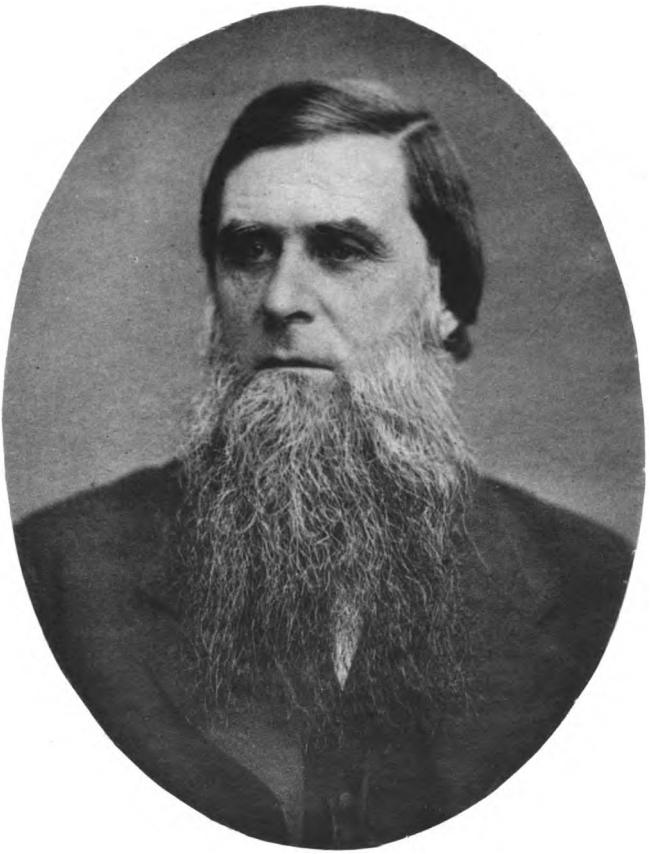

Charles P. Daly

THE COMMON LAW

ITS ORIGIN, SOURCES, NATURE, AND DEVELOPMENT, AND WHAT THE STATE OF NEW YORK HAS DONE TO IMPROVE UPON IT

BY

CHARLES P. DALY, LL.D.

EX-CHIEF JUSTICE OF THE NEW YORK COURT OF COMMON PLEAS

A DISCOURSE DELIVERED BEFORE THE SENIOR LAW CLASS OF THE UNIVERSITY OF THE CITY OF NEW YORK, APRIL, 1894

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April 25, 1894.

Hon. Charles P. Daly, —

Dear Sir: On behalf of the Senior class and of the Faculty of the New York University Law School, we respectfully ask you to allow us for publication your lecture upon "The Common Law, its Sources and Growth, and what the State of New York has done to improve upon it." All who were privileged to hear it desire to have it in permanent form, for future study.

We thank you for the exposition by which you have thrown so much light for us on this important subject; and for the added interest of the fact you mentioned, that you were a member of the first class in the University Law School.

Respectfully and sincerely yours,

O. B. Hudson, *President.*
George J. Jaeger,
Recording Secretary.
Eugene Berry,
Corresponding Secretary.
Austin Abbott,
for the Faculty.

Whereas, Hon. Charles P. Daly has been so generous as to lecture to the Class of '94 of the New York University Law School upon "The Sources of the Common Law and what the State of New York has done to improve upon it";

And whereas, he was at some pains in preparing the work specially for this class:

Be it resolved, that we express to him our hearty appreciation of his kindness in this behalf, and that we tender to him our sincere thanks for the interesting and instructive paper which it was our high privilege to have heard;

And further, be it resolved, that we, who are upon the threshold of the profession to which he has long been an honor, join with him, in that we glory in the Common Law as our goodly heritage, fitted, as it was, to the needs of a liberty-loving people and containing, as it did, within its own fabric, the means of progressively adapting itself to the social and commercial needs of an ever-advancing civilization;

And further, that we congratulate Hon. Charles P. Daly upon having, through a long experience on the bench of the historic Common Pleas, been the instrumentality whereby the Common Law was moulded to the numberless exigencies of this most active commercial centre.

Dated, New York, April 23, 1894.

O. B. HUDSON, *President.*
GEORGE J. JAEGER,
Recording Secretary.
EUGENE BERRY,
Corresponding Secretary.

ON THE COMMON LAW, ITS ORIGIN, SOURCES, NATURE AND DEVELOPMENT, AND WHAT THE STATE OF NEW YORK HAS DONE TO IMPROVE UPON IT.

BUCKLE, in his work upon civilization, while admitting the great material progress of the United States, declares that the only branch of human knowledge in which the Americans have really distinguished themselves has been in the science of jurisprudence.

Without admitting the correctness of the limited estimate of this very dogmatic writer, but accepting it as a concession, that the people of the United States, during the last three-quarters of a century, have greatly distinguished themselves in the law, the scope of my present remarks will be to show that the credit of this achievement is largely due to the State of New York, and, to do this, it will be necessary, so far as my limited time will admit, to give some account of the legal fabric we have worked on and improved upon.

This was the complicated and ill-arranged body of the English law, or more particularly, that part of it known as the common law, which the founders of the English colonies of North America applied, so far as it was suited to their condition; much more in Virginia and in the Southern colonies, than in New England, where the peculiar views of the Puritans, in respect to church

and civil government, led them to create laws, or local codes of their own, that for a considerable period sufficed for all their purposes.

It was different in the colony of New York, which was founded by the Dutch and conquered by the English in 1664. It is a recognized rule that when a country is conquered, the conqueror may impose any laws he thinks proper, and that where he makes no change, that the previous laws continue. This was the case for a short period in New York. The English doctrine of that day was that in a colony conquered by the English, the King, in the exercise of what was known as his Royal prerogative, might make whatever regulations or changes he thought proper; which was done in the form of written instructions to his governors, usually annexed to their commissions. The first governor changed the name of the principal legal tribunal in the city of New York to the Court of Common Pleas, but the proceedings in it were, for some time, continued in the Dutch language, as the great body of the people knew no other. The records were kept in Dutch, and the Dutch mode of procedure was followed. About five months after the capitulation to the English, a convention was called by the governor at Hempstead, in Long Island, by which a body of laws, known as the Duke's Laws, which was somewhat analogous to the codes then in use in New England, was adopted, which, though intended for the whole province, went into effect at first only in that part of Long Island and Westchester County where the English had settled, for the reason already stated, that in the other parts of the province the Dutch was the language in use. Amend-

ments and additions were made to this code down to 1675, and it was many years before it came into general operation.

In less than half a century the English had settled largely in the city of New York and in other parts of the province, and the result of it was that the Dutch law and mode of procedure gradually disappeared and was entirely supplanted, except in some unimportant particulars, by the English law; that is, by the common law and such English statutes as were in existence at the time when the colony was conquered, so far as they were applicable, and statutes afterwards passed if it were declared in the act that it was to apply to the colonies. This was the state of the law in New York down to the breaking out of the American Revolution, under which it was frequently difficult to determine whether some English statutes that existed before the English conquest were in force in the colony; that is, whether they were applicable or not; and down to the time of the Revolution it was warmly contested in the province whether the King, in the exercise of his prerogative, could, by his instructions to the governors, make any regulation, or establish any law, that abrogated, or was in any way inconsistent with, the laws of England as they existed when the colony was conquered; some of the governors insisting, and some of the judges deciding, that he could, and one of the lieutenant-governors, Colden, under his view of the instructions, tried to take away from the trial by jury what was most fundamental in it, — the right of the jury alone to pass upon the facts, which led to an agitation that was maintained for several years.

The English law, when the North American colonies were founded, consisted of a mass of usages, precedents, maxims, rules, principles and statutes, which, as a body of jurisprudence, was very different from that symmetrical structure, or body of law, which the Romans left as a monument of their civilization. The Roman system, when it reached its highest development under Justinian, was constructed in conformity with the peculiar views then entertained of the manner in which nations should be governed, and, founded upon that basis, its parts were faultless and its unity complete. The English system, or that portion of it which is called the common law, had its origin in the period that succeeded the convulsions that swept away the Roman civilization, and grew up an irregular mass, the congruity of which did not become apparent until much had been left off and much had been added in the slow progress of centuries. Sir Matthew Hale says that the origin of it "is as undiscoverable as the head of the Nile";[1] but we have since discovered the 'head,' or sources of the Nile, and also the source from which what is fundamental in the common law and constitutes its distinctive character, has been derived.

Law began among the semi-barbarous Scandinavian races that invaded and ultimately governed England; as it begins in all rude societies, by the recognition of the restraint imposed by usages that have had their origin in the habits, necessities or peculiar condition of the people. The duty of conforming to what has become habitual by usage, is recognized in the

[1] 1 Hale's "History of the Common Law," p. 130, London ed. of 1794.

most primitive condition of society. What is right in particular instances is determined by the usage, or, if no such guide exists, then the settlement of the thing in dispute, or the recognition of an act as an offence, and the punishment that should be inflicted is kept in memory thereafter and becomes a usage.

This rudimentary state of the law existed among the twenty-five different tribes or separate communities that existed in Great Britain south of the Clyde, prior to the Roman invasion, and, though each was independent of the other, they are commonly supposed to have been of one race, differing but little in their customs, religion or language.

The Romans, during the three centuries and more of their occupation of England, governed according to the principles of Roman polity, and, it may be assumed, introduced much of their jurisprudence from their extensive development of the agricultural and mineral resources of the country, and from what is stated by Gibbon, that under them "ninety-two considerable towns had arisen," and that "among them were thirty-two cities distinguished above the rest for their superior privileges and importance";[1] indicating such an advance in civilization, commerce and the arts, as would call for a considerable application of the Roman law; in connection with which may be stated that Papinian, the most celebrated of all the Roman jurists, presided during a portion of this period over a tribunal in York.[2]

[1] Gibbon's "Decline and Fall of the Roman Empire," Vol. IV., pp. 150, 510, 511, 512. London ed. of 1848.

[2] Ortolan, "History of the Roman Law," Sec. LXXIV., 395; Grapel's "Sources of the Roman Law," 102.

During the forty years that elapsed between the end of the Roman rule and the invasion of the Saxons, the people were governed by the clergy, the nobles and the municipal towns.[1] The long and fierce military struggle between the Britons and the Saxons that followed that invasion, extended over a century and a half before the latter obtained the supremacy, and Gibbon tells us that no conquest that "has appeared was more dreadful and destructive." "The religion and laws," he declares, "which the Romans had so carefully planted, were extirpated, the language of science, of business, and of conversation they had introduced, was lost in the general desolation, and the independent Britons appear to have relapsed into the state of original barbarism from whence they had been imperfectly reclaimed." "The island," says Palgrave, "from the British sea to the shores of the channel, became the inheritance of the Anglo-Saxons, who caused their own language and their own customs and laws to become paramount in Britain." [2]

The researches of more recent writers have somewhat modified Gibbon's account of the extermination of the Britons; the great body of them were, undoubtedly, either exterminated or driven into foreign lands, or found refuge and security in the fastnesses of Wales, but many must have been allowed to remain, who, as a subjugated class, assimilated with the conquerors and their descendants, for the reasons given by Spence that the Saxons were unpractised in agriculture, and

[1] 4 Gibbon, 151.

[2] Gibbon, Vol. IV., pp. 510 to 515; London ed. of 1848. Palgrave's "History of the Anglo-Saxons," p. 40.

not being accustomed to live in towns, were unskilled in the pursuits of trade and commerce, or in the practice of the useful arts, and must, therefore, have depended upon those they had subdued for these industries to the extent to which they were prosecuted in the intervals between the wars, and after peace was permanently established.[1]

Under such circumstances it may reasonably be assumed that some portion of the Roman law continued, and was applied in the municipal government of towns, and in transactions between individuals; but whatever may have remained was, in the towns, mixed with, and outside of them, buried beneath, an overgrowth of usages, some of which had existed among the Britons; but the greater portion of which was introduced by the Saxon, Danish and Norman races that successively invaded and governed the country.[2]

The result of the Saxon and Danish invasions was the introduction of a great variety of usages, customs and laws that took root in different localities, presenting as a whole an incongruous mass, for there were Saxon laws, Danish laws, Mercian laws and a host of local customs having the authority of law, that were tena-

[1] Spence's "Equitable Jurisdiction of the Court of Chancery," Vol. I., c. 11.

The country produced corn, cattle, gold, silver, iron ore, tin, lead and skins, and from what has come down to us from Herodotus, Polybius and other early writers, it is supposed that before the Roman invasion, the Britons carried on a large trade in these commodities, not only with Marsailles and Phœnicia, but with the Gauls, and other neighboring people. — Vine's "Cæsar in Kent," cc. 2, 3, and pp. 54, 55, 69, 70.

[2] See Appendix A.

ciously adhered to by the people of the different localities in which they prevailed. When Alfred the Great, therefore, towards the close of the ninth century, brought this divided people under one government, he made an attempt to bring order out of chaos by making a collection of these various local customs, with the view of having something like a code or general body of laws for the government of the whole kingdom.

We are told by Sir Francis Palgrave, that Ethelbert, who reigned near the close of the tenth and at the beginning of the eleventh century, reduced the traditional legal customs of the Kentish Jutes into writing, and that Saxon monarchs in other parts of England promulgated what they called their "Dooms," or judgments, which fixed definite regulations and positive rules in place of uncertain usages, and that it was from these writings or statutes that Alfred selected such articles or chapters as appeared most eligible, whilst he amended others, and some he wholly rejected, but generally abstained from making alterations, declaring that he was afraid to innovate, as he might destroy the foundation upon which all law depended, — the respect for established authority, which changes even for the better might undermine.[1] To Alfred's labors succeeded what is known as the laws of Edward the Confessor, which, though bearing his name, are said to have been compiled after his death; the laws of Ethelbirht, of Canute and others, of which early laws or codes we have only the fragments brought together, and partially translated by Mr. Thorpe, in the two volumes published by the British government in 1840, which

[1] Palgrave's "History of the Anglo-Saxons," 158, ed. of 1867.

give us, however, only an imperfect idea of what they were as a whole, or of the alterations or changes they may have undergone.

The most important of these changes was produced by the invasion of the Normans and what they did towards the complete establishment of the feudal system; the beginning of which may be traced into its Saxon period and even beyond it, into that of the Britons. The Normans were especially gifted with a genius for organization. They were as essentially a race of lawgivers as of warriors, and being crafty, subtle, dissembling, domineering and litigious, they entered upon the task of subduing England, by a course of civil polity which proved more effectual and permanent than any conquest that can be achieved by the sword. William the Conqueror, while he confirmed, to a certain extent, the laws of Edward the Confessor, engrafted upon the freer and more liberal laws of the Saxons an artificial and technical system, ingeniously contrived to make the Normans and their descendants the chief class in the State; which continued its hold for centuries and some of which still lingers, to disfigure the otherwise liberal features of the English constitution.

The interval from the ascendency of the Normans to the adoption of Magna Charta embraces about a century and a half, a period distinguished by the gradual development of new and more arbitrary principles of government, and the enactment of laws which materially abrogated those that were formerly in use. The people complained of these changes by the continuous and earnest request that they might

be governed as in the days of the good King Edward, until the popular discontent culminated at last in the movement which led to the agreement, or charter, entered into by King John, popularly known as Magna Charta. This instrument was little else than a declaration of rights, which the King and his successors would readily have infringed and broken, had not the incessant watchfulness and fear of the people secured a confirmation and enlargement of it, in a positive and practical form, by the specific enactment of the Charter adopted in the seventh year of the reign of King John's son and successor, Henry the Third, more appropriately denominated the Great Charter.

The long and turbulent reign of this King, Henry the Third, was productive of a still more important event, the establishment of a popular representative body. Under the Normans, the supreme legislative authority had been lodged in the King and in what was called the Great Council, composed of the highest nobles, the great barons and the leading dignitaries of the Church; but in the forty-eighth year of this reign, A.D. 1265, the House of Commons came into existence, and the Great Council became what has since been the House of Peers, having only a joint power with the Commons in the enactment of laws, and no original, but only a concurrent power with the other, in certain cases, such as the imposition of taxes or the granting of money. The first year of the reign of Henry's remarkable son, Edward the First, to whom Coke appropriately applied the title of the English Justinian, was distinguished by

the passage of more important statutes for the correction, enlargement, improvement and permanent establishment of the law, than has occurred in the reign of any English monarch, such as the Statute Merchant for the recovery of debts, the statute allowing the free sale of lands, the statute De Donis in respect to conditional gifts, the statute relating to the reorganization of and the proceedings in courts, the beneficial statutes of Mortmain and many others.

This eventful epoch — the latter part of the thirteenth century — might appropriately be taken as the point of time when the distinction properly began between statute law and the common law; but Sir Matthew Hale says that this distinction was made between statutes passed before the time of memory and those passed afterwards, and that this time of memory, by judicial construction, was settled to be the commencement of the reign of Richard the First, July 6th, A.D. 1189; the statutes to which he refers being the charters, constitutions or edicts granted or enacted by the King and the Great Council; so that the whole body of the English law which existed before the reign of Richard the First, with the exception of that which was administered by the clergy and whatever jurisdiction, if any, may have existed at that early period, in admiralty,[1] belongs to the common law, and from the

[1] The English jurisdiction in admiralty appears to have arisen a century later, for Lombard, in his "Archeion," says, page 41, "I think the decision of marine causes was not put out of the King's House and *committed over to the Admiral*, until the time of King Edward the Third, whereunto I am led partly by the consideration of the time of his reign, which was much occupied by affairs beyond the sea, both by reason of the wars in France and of the intercourse of trade and merchandise which

beginning of the reign of Richard the First, the English law, with the exception of that administered in the Ecclesiastical and Admiralty Courts and in equity, is divisible into the two great branches, — the common law and the statute law.

I have referred, gentlemen, to these historical facts for the purpose of getting a more exact conception of what that is which we are in the habit of calling the common law, and upon that subject I propose to bestow some further consideration.

Coke, who knew more about it as it existed up to his time than any one before him, or probably since, says: "It is nothing but reason; which," he continues, "is to be understood of an artificial perfection of reason, gotten by long study, observation, and experience, and not of every man's natural reason; for if all the reason that is dispersed into many heads were united into one, yet could he not make such a law as the laws of England; because by many successions of ages," he adds, "it hath become fined and refined, by an infinite number of grave and learned men, and by long experience grown to such perfection, that no man ought to be wiser than the law, which is the perfection of reason."[1] Coke, as Blackstone said, was a little infected by the pedantry of his age, which, it must be said, appears in this definition of the common law as an artificial perfection of reason. Another writer calls it the ineffaceable monument of the wisdom of

then flourished, and partly for that I find no mention of the Admiralty before the second year of the reign of Richard the Second," which was A.D. 1178; and see Spelman's "Glossary," 13.

[1] Coke's Litt., 97 b.

our ancestors, which conception of it as a monument built at a remote period does not harmonize with what we find in Sir Matthew Hale's history of it, who says it is impossible to say what it was originally, so many different people have successively inhabited England, — the ancient Britons, the Saxons, Danes, Mercians and Normans, — the consequence of which, he continues, "was that in the early part of the twelfth century the laws were confused and disorderly, and at that time, through the ignorance of the judges, who were the freeholders of the country, and were judges alike of the law and the facts, the business in the courts was carried on by parties and factions; so that any man that had a suit there sped according as he made parties." [1]

Runnington, the editor of the fifth edition of Hale's work, refers to the early period in still stronger language. He says: "The old kings put themselves entirely on the footing of the barbarous Eastern princes, whom no man must approach without a present. . . . Justice was obviously bought and sold; the king's court itself, though the supreme judicature of the kingdom, was open to none that brought not large presents to the king; the bribes given for the expedition, delay, suspension, and, doubtless, the perversion of justice, were entered in the public registers of the royal revenue, and remain as monuments of the perpetual infamy and tyranny of the times."

In the same century Henry the Second undertook to reform the state of things described in the passages that I have quoted from Hale, by instituting judges

[1] 1 Hale's "History of the Common Law," 136, 246.

itinerant, which was by dividing the kingdom into six circuits and allotting to every circuit three judges, who knew, or were experienced, in the laws. But even this was slow in accomplishing anything, for in the year 1289, when Edward the First returned, after three years' absence in France, he found the clamor against the judges so great, in consequence of their injustice, extortions, and corruptions, that he deposed nearly all of them, including the Chief Justice of the King's Bench. Although we find this to be the state of things when we come to a period where we have reliable information, and it is also stated in the "Mirror of Justices" that King Alfred caused twenty-four judges who had given false judgments to be hanged, whose names are given, as well as the names of the parties in each case, which statement, though generally doubted, Mr. Finlason, the editor and commentator upon Reeves's "History of the Common Law," thinks is true from internal evidence in the book itself. Notwithstanding, I say, all this, the common law has not unfrequently been referred to, and by writers of ability, as if it were something that had come into existence a long time ago, when people were wiser and better than they are now. There is a poetical element in our nature which leads us to seek for a perfection in the past that is not to be found in the present. It is this which led to the belief of the Egyptians, the classic writers of antiquity, and the people of Europe to a comparatively recent period, that there was in the remote past what they called the Golden Age, an age of innocence and happiness, of abundance without toil; of ideal justice, of peace and equality, during which a perpetual spring made the

earth an abode of delight.[1] The poet Moore in his imaginary biography of the Irish chieftain, Captain Rock, humorously illustrates this disposition, by making his hero say that his father's chief pleasure was to sit up late at night, by the turf fire of his cottage, and talk, while the dying embers lasted, of the good old days in Ireland, having a vague idea, he says, in which the schoolmaster tried to help him out, of the time when Ireland was an island of saints, and all the population that were not saints were kings and princes.

We now know, from ethnological and archæological researches, that there never was a Golden Age, but, on the contrary, that all mankind were originally in the rude and undeveloped state in which man is still found in certain parts of the earth; and so it has been with the common law, which, like mankind, was originally rude and undeveloped, whereas writers and eminent judges speak of its rules as supposed to have been established from time immemorial,[2] as if it was something that was in existence, as I have said, at a remote period, which was then perfect, and as if judges from that time to the present were engaged in finding out what it was, to direct them in their decisions, instead of being, as it is, but the record of the judicial progress of a people from a very rude condition to one of high cultivation, and faithfully reflecting the various stages through which that people have passed.

It is called by Bracton, and, after him, by Sir Matthew Hale and Blackstone, the unwritten law; not be-

[1] "Le Grand Dictionnaire du XIX. Siècle."

[2] Sir George Jessel, *In re Hallet*, E. L. R. Ch. Div. 710; Holland's "Elements of Jurisprudence," pp. 63, 64. 5th London ed.

cause it was unwritten, for a large part of it, from the earliest knowledge we have of it, was in writing, or it would not have come down to us; but to distinguish it from statute law. It has been called the law of usage and custom, or, as it is sometimes expressed, customary law; and though much of it originated in that way, much of it was also enacted by deliberative bodies, Saxon and Norman, and made known, in the first instance, in the form of positive edicts, by both Saxon and Norman kings. It is frequently called case law, or law originating in, and settled by, the decision of cases as they arise. Jeremy Bentham named it judge-made law; and though a very large part of it did come into existence in this way, there is a considerable portion of it with the origin of which judges have had nothing to do.

Neither Hale nor Blackstone's attempt to define or express what it is can be regarded as satisfactory. The former calls it the product of the wisdom, counsel and experience of many ages of wise and observing men,[1] which is about as general as Coke's statement respecting it. All that can be extracted from Blackstone, in the shape of a definition, is his referring to it as "that collection of maxims and customs that is now known as the common law"; a name, he says, "either given to it in contradistinction to other laws, as the statute law, the civil law, the law merchant, or the like,"[2] whilst Chief Justice Wilmot, a very eminent judge, says, "the statute law and the common law both flowed, originally, from the same fountain, the legislature,"[3] which would leave no room for laws

[1] Preface to Rolle's Abridgment. [2] 1 Com. 67.
[3] Collins *v.* Blantern, 2 Wils. 351.

established by usage or custom. But without citing other attempts, the clearest idea of it that I have found expressed by any writer is by Chancellor Kent, who says the common law includes those principles, usages and rules of action applicable to the government, and security of persons and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature. "It is the application," he continued, "of the dictates of natural justice and cultivated reason to particular cases, and a great proportion of the rules and maxims which constitute it grew into use by gradual adoption, and received, from time to time, the sanction of the courts of justice, without any legislative act or interference."[1] Accepting this as conveying a tangible idea of what it is, it may, as respects England, be said to be the whole body of the English law with the exception of that which has, since the beginning of the reign of Richard the First, been of parliamentary origin, and that which is administered in the ecclesiastical, equity and admiralty tribunals; although Blackstone and a later writer, Flintoff, embrace, under the general head of the unwritten or common law, the canon and the civil law, so far as either are admitted in English courts of ecclesiastical and admiralty jurisdiction; not, they say, because they were enacted or confirmed by imperial or papal authority, but because of their having been received and admitted by immemorial usage and custom, or the consent of Parliament.[2] Blackstone,

[1] 1 Kent's Commentaries, Lecture XXI.

[2] Blackstone's Com., Vol I., pp. 79, 80. Flintoff's "Rise and Progress of the Laws of England and Wales," pp. 2, 3.

however, removes from himself the responsibility of doing so, but does it, he says, after the example of Sir Matthew Hale. It is, of course, and has long been, a part of the law of England; but as the rules and principles applied and enforced in these peculiar jurisdictions depend so largely upon what is laid down by Roman jurists, by canonical councils, and the laws in admiralty recognized and acted upon by commercial nations generally, it might have been as well for these writers to have omitted it as a branch of the common law, as it belongs to different systems, — the canon and the civil law, — and including it tends still more to confuse what the common law is.

That a considerable portion of the common law was taken from the Roman law appears from the earliest works written upon it, such as the treatises of Glanville and Bracton; especially Bracton's work, who, while drawing copiously from the sources of the Roman law, and sometimes in the very language of the Digest, states, in his preface, that the object of his book was to give the laws and customs of England as they were then established, which may have been true. He says that he had examined the judgments of those learned in the law, and that it was to bring them into one sum or whole, that his book was composed of the facts and cases which daily arise in England, to show in what way suits and pleas are decided according to English laws and customs, and that he wrote his book because it was useful, not merely for the guidance of the practitioners, but for the protection of suitors from the ignorance and arbitrary rules of foolish and unlearned persons, who, to use

his language, "ascend the judgment seat before they have learned the laws," instances of which will still occur notwithstanding the many treatises that have since been written.

Bracton's work abounds with evidence that he had carefully studied the Roman law, the whole of it being modelled after the systematic method of the Roman lawyers; and while it is manifest that a considerable portion of it is derived from the Roman law, Mr. Crabbe in his "History of the English Law" tells us that it is evident upon an attentive perusal of Bracton's treatise, that it contains nothing but what had been previously admitted into English jurisprudence by legal authorities, which may be generally true, but it would have puzzled Mr. Crabbe to have stated who those legal authorities were; for Bracton wrote at the close of the reign of Henry the Third, in the thirteenth century, and there was but one writer before him, — Glanville, — whose performance is but a mere sketch, when compared with the more elaborate work of his successor; and there are not, I think, more than six adjudged cases of which any account exists before Bracton's time. They are to be found in the abridgment of Fitzherbert and in Jenkins, and in Keilway's reports, and are simply brief notes, obviously taken from the enrolments; for the practice of taking down what was argued and decided in a case, and which gave rise to what was afterward known as the Year Books, did not begin before the time of Stephen, in the twelfth century. Sir Matthew Hale says that we have no reports of judicial decisions in any constant series of time, before the reign of Edward the First, and it appears by the researches

of our own day, that the cases in the Year Books of the twentieth and twenty-first of that reign are the earliest that can be assigned to certain years.[1]

Mr. Long has shown, by a comparison of parallel passages, how much Bracton extracted from the Corpus Juris, and how these passages were added to or altered, to fit them into the edifice which he constructed. The learned German jurist Güterbock discovered twelve express quotations from the Digests and ten from the Code, and says that a much greater number of passages of the Roman law are incorporated into the very tissues of the Commentary without any indication of their source; and Mr. W. W. Edwards, in a very able article on "Bracton and his Relation to the Roman Civil Law," has shown this still more fully.[2] But all this does not detract from Bracton's merit, and his omission to refer to the civil law, or acknowledge that what he laid down as the law of England was derived from it, may be explained by the fact that the English people were strongly averse to the introduction of any foreign laws, or any interference with their own, which they associated with the preservation of their individual rights and liberties. Reeves's opinion is that in those places where the Roman law is stated with most confidence by Bracton, it appears rather to be alluded to for illustration and ornament than as authority for the English law;[3] but Güterbock, who was much more competent to form an opinion, says, on the contrary, that the result of his investigation is that the

[1] Year Books 20 and 21, Edward First, Preface, Lond., 1860.

[2] The "Green Bag Boston," Vol. IV., p. 196; Vol. V., p. 348.

[3] 2 Reeves, "History of the Common Law," 2d ed., 88.

external historical evidence, as well as the internal evidence of the book itself, demonstrates that no inconsiderable part of the Roman law must have been practically applied in England in Bracton's day and that Bracton generally reproduced only those Roman elements which he found were received in England as valid law, which is not only probable, but also that a considerable part of it was introduced and became English law, long before Bracton's time; for after the conversion of the Saxons to Christianity, in the seventh century, the clergy acquired great influence. Whatever literary acquirement or scientific knowledge existed at that early period was almost exclusively among them, and education is supposed to have been entirely in their hands. As early as the beginning of the eighth century the science of the law had become with them an ordinary branch of study; and although at that time the Roman law, like science and literature generally, was not cultivated, it existed in practice in many places.[1] Being men of learning, they had then and for a long period afterward, to be resorted to for the drawing up of wills, private charters, writings relating to the transfer of lands, and instruments of various kinds in the ordinary transactions of life. The foreign clergy, in the reign of William the Conqueror and that of his two sons, according to Blackstone, came over to England in shoals,[2] and down to the reign of Henry the Second, in the twelfth century, the judicial offices of the

[1] Spence's "Equitable Jurisdiction of the Court of Chancery," c. iii.; Palgrave's "Rise and Progress of the English Commonwealth," CCIV.; Ortolan's "History of the Roman Law," Sec. CXXIV.

[2] 1 Com. 17.

king's courts were conferred almost exclusively upon ecclesiastics, and that class, being especially competent, acted as advocates in legal discussions.[1] It appears also from an anonymous Norman chronicle and other evidence, that in 1149,[2] Vacarius, an Italian professor from Bologna, taught the Roman law in Oxford; that he brought with him a manuscript copy of the code and the digest from which he compiled several volumes of extracts, with brief glosses of his own, to enable his pupils to solve the doubtful points of law that were then discussed in the schools; that his lectures were attended by a great number of pupils and that his success was so great that his teaching appeared dangerous to King Stephen, who suppressed it by an edict.[3] It may therefore be inferred that during the five centuries and more that intervened from the conversion of the Saxons to the time of Bracton, that much of the Roman law was introduced by the clergy and came down thereafter as a part of the common law.

Mr. Edwards, in the article before referred to, says that "no one, at this day, can doubt but that the law, as laid down by Bracton, was the then accepted law of England, and Güterbock agrees with Biener, the German civilian, that much use was made of the Roman law, in the higher courts in the time of Glanville, the supposed author of which work lived in the twelfth century, and whose treatise, the earliest one upon English jurisprudence, is supposed to have been written about the year 1181.

[1] 1 Spence "Eq. Jur. of C.," 3. [2] Ortolan says, § 615, in 1144.

[3] Ortolan's "History of the Roman Law," § 615; "Le Grand Dictionnaire du XIX. Siècle, Vacarius."

All that this early writer, Granville, undertook to do was to give the course of procedure in the Curia Regis, or King's Court, the legal remedies enforced there, and to a certain extent in the lower courts, being, as we would regard it, simply a book upon the practice of the courts and chiefly upon that of the highest court; for so far from attempting to write a work upon the English law as it then existed, he says, in his preface, "to reduce in every instance the law and constitutions of the realm into writing would be, in our times, absolutely impossible; as well on account of the ignorance of writers, as of the confused multiplicity of the laws"; and what he then thought impossible Bracton, seventy years afterward, achieved by a book which may be regarded, in the language of Mr. Nichols, the learned translator of Britton, as one of the fullest and ablest treatises upon jurisprudence that England has produced.[1] Half a century afterward, or about A.D. 1290, it was followed by the works of Fleta and Britton, which were substantially treatises in a more compendious form of what was most important and useful in the larger work of Bracton, with subsequent additions; which works, to a certain extent, especially Britton's, superseded Bracton, whose treatise, and Fleta's also, were written in the Latin tongue, whereas Britton's was composed in French and was the first general work upon the English law written in that language, which had then, for two centuries, been the ordinary dialect of the governing classes and the language in which legal discussions were carried on in the royal courts; but at the Eyre, held in every county once in seven

[1] Nichols's Britton, Vol. I., xxiv.

years, by the itinerant justices, for the disposition of civil and criminal business, the proceedings were partly conducted in English, and which it is supposed was used to a still greater extent in the local or county courts. Britton having been composed in the language employed in the courts, came into more general use as a manual in which the law could be more readily found than in the large manuscript of Bracton, which was without paging or index, the work not having been printed until 1569, three centuries after it was written. Britton, therefore, continued to be in use and of authority for several centuries.[1] The explanation of the subsequent neglect of Bracton is the material change made during the two centuries that followed, in the law of real property, which branch of the law became in the reign of Edward the Fourth exceedingly intricate, technical, and difficult. Upon this artificial system the work of Bracton could shed but little light, and when the small treatise of Littleton upon Tenures, so profound in its learning, so simple in its style, and so felicitous and clear in its explanations, appeared towards the close of the reign of Henry the Eighth, it absorbed the attention of all legal minds, in the consideration of a subject which had then become the most important and the most intricate in the law; and when it was followed up about a century afterward by Coke's exhaustive commentary upon Littleton, with the other three books of Coke's Institutes, full of subtle distinctions, artificial rules, and abounding in the exposition of statutes, the whole fortified by an array of adjudicated cases, his

[1] Britton was printed about 1580, the imprint being without date, and Fleta was not printed until sixty-seven years after; that is, 1647.

Commentary and his Institutes became the leading books in the law, and the more comprehensive and scientific treatise of Bracton passed into obscurity.

Among the treatises upon the common law belonging to this early period, "The Mirror of Justices" should be mentioned, in respect to the antiquity of which there has been difference of opinion; some regarding it as older than the Norman conquest, and others ascribing it to the reign of Edward the Second; but the better opinion appears to be that it was written after Fleta and Britton, but in part from memorials extending as far back as the time of Alfred, with which the author is presumed to have been acquainted. It is a general treatise upon the civil and criminal law, in which the author enumerates abuses of the common law, which he undertakes to correct. Reeves regarded it as a book to be read with caution; but Coke thought highly of it as a work of authority. St. Germain's "Doctor and Student" should also be mentioned, written in the reign of Henry the Eighth, in the form of a dialogue, upon the laws of England, which, as a clear, concise and popular exposition of the common law, upon many points, has always been highly esteemed. Another work of value which was first printed in this reign, but written in the reign of Henry the Sixth, is Fortescue's "De Laudibus Legum Angliæ," generally in the nature of a dialogue upon the law of England, and, to a certain extent, contrasting the common law with the civil law; a work that Chancellor Kent justly commends as containing, "in such an uncultivated period of society, so many invaluable provisions in favor of life, liberty, and property." To

follow the subsequent treatises on the common law would involve too much detail, but I may mention especially the little book known as "Finch's Law," written by Sir Henry Finch in the beginning of the seventeenth century, as showing how much law a clever man can compress in a small space, and impart by language as clear as it was concise; which, with Wood's Institutes, published in 1754, were the two books in use, especially among students, to acquire a general knowledge of the English law, until they were superseded by the more attractive work of Blackstone.

The common law appears to have derived its name from the fact that it became the general law of the realm, as contradistinguished from local laws, that were different, but recognized as continuing in force, in certain localities. While as a body of law, it was greatly inferior to the Roman system in method, conciseness, and scientific arrangement; it had certain great features that were fundamentally different from the other, and which, in my judgment, constitute its especial excellence. Among the Scandinavian races, from whose usages and customs so large a part of it was derived, no king could rule over the people without the consent of the Thing, which was a popular assembly composed of all the freemen that owned land, and at that early period, as appears by citations in Du Chaillu's learned work, "The Viking Age,"[1] the great principle was recognized, that all law and government is founded upon the consent of the governed. The Roman system admits this, but assumes that the people made over to the

[1] 1 Du Chaillu, pp. 501, 533 to 543.

sovereign their whole authority, by which he became clothed with absolute power. The Institutes of Justinian, after pointing out that every community is governed by the law which natural reason points out as common to all mankind and by that which a community or state makes for its own government, has these words: "That which seems good to the Emperor has also the force of law; for the people by the *lex regia*, which is passed to confer on him his power, make over to him their whole power and authority. Therefore, whatever the Emperor ordains by rescript, or decides in adjudging a cause, or lays down by edict, is unquestionably law," and this is substantially repeated in the Digests from a fragment of Ulpian. The *lex regia*, or royal law, which is here referred to as conferring this power upon the sovereign, is not described by Roman jurists or historians, but it is now generally understood as meaning the old *lex comitia*, which in the early time of the Roman kings was enacted by the *comitia curiola* to invest a king with his power. This formal procedure was continued afterwards during the Roman republic to invest the magistrate with what was called the *imperium*, and afterwards, as each emperor was either named by his predecessor or elected by the army, this formality was gone through with by a *senatus consultum*, or decree of the senate, recognizing his right to succeed, or approving the choice of the troops; after which he was assumed to be invested with the imperial power. If the law was what to the emperor seemed good, he might abrogate any law or make anything the law he

thought proper. But under the common law, the sovereign had no such power. From an early period, any change in the law, or any new one, had among the Britons to be submitted to their Gorseed, and among the Saxons to their Witenagemot, or popular assembly, which was the beginning or embryonic form in England of representative legislative bodies, and if the proposed change, or new law, received the approval of this great assembly, which was expressed by acclamation, it was established thereafter as the law of the land.[1]

Spence, in his work on the "Equitable Jurisdiction of the Court of Chancery,"[2] claims that after the Saxons were established in England their kings did not always secure the popular sanction for the establishment of a law; that Ethelbirht, the king of Kent, in the sixth century, as his own act, decreed the establishment of his code, on the advice of his Witan.[3] Sir Francis Palgrave, however, in his history of the Anglo-Saxons, who may be supposed to have been better informed upon such a subject, says, "From the whole tenor of Anglo-Saxon history it may be affirmed that every affair and matter which concerned the empire received the sanction of these virtual representatives of the community."[4]

Another great feature akin to the foregoing, in which the common law differed from the Roman system, was that the king was subordinate to the law and bound equally with the people to obey it. The Saxon kings

[1] Flintoff, 52; Palgrave, "Anglo-Saxons," XXX.
[2] Vol. I., pp. 10, 11.
[3] Council or advisers.
[4] Palgrave, XXX.

down to the time of the conquest, after their election by the Witenagemot, took a solemn oath to preserve and maintain it; and William the Conqueror, after the conquest was achieved, took this oath, and a case, the particulars of which are given in Sir John Davies's reports, shows how strictly he observed it.[1] How deeply this principle that the sovereign is subordinate to the law was imbedded appears further by the strong language of Bracton in the thirteenth century, who, in his eighth chapter, has this remarkable passage, "The king is subject to the law, for the law makes the king. There is no king where the will and not the law has dominion"; and in another part of his work says, "If the king is without bridle, a bridle should be put upon him."[2]

Although William the Conqueror recognized his subjection to the law, his Norman successors did not; and from the time that Magna Charta was wrung by the barons from the reluctant John to the declaration of James the Second that he had the right, as king, to dispense with any law, if it was necessary, and that he alone was the judge of the necessity, English history abounds with instances, especially during the reigns of the Tudors and the Stuarts, of English monarchs assuming more or less of absolute power, under what they claimed to be their royal right or prerogative, producing in some reigns, as in that of Henry the Eighth, abject submission by Parliament and people, and in others resistance, and at last such popular uprisings as brought Charles the First to the block, and drove James the Second out of England.

[1] The case of Tanistry, Davies's Reports, p. 112.

[2] Bracton, Book I., c. viii.

Dr. Lieber, in his "Political Ethics," says that "the principle that monarchs are for the benefit of the people, and may be deposed if their acts are against the interests of the people, was first proclaimed and acted upon, in modern times, when the Netherlands declared themselves independent of Spain." But the recognition of this is much older than the revolt of the Netherlands; for among the Scandinavian races, with whom the common law may be said to have originated, if a king would not carry out, but attempted to subvert, the laws, he might not only be deposed, but even put to death.[1]

This royal prerogative or power, exercised exclusively by the king, was, throughout a considerable period of English history, a very uncertain factor, the struggle being, on the part of the monarch, to augment, and of the people to limit it. Mr. Allen, in his learned inquiry as to its rise and growth, deduces it from the Roman law; and the efforts of the English monarchs in stretching it was, as far as they could, to do what was done in Rome, where, in the language of Lord Mackenzie, "by gradual usurpation, the power of the emperor became absolute, and the forms of the ancient liberty disappeared."[2] The English kings went even farther. The Roman law, as I have already said, recognized that the absolute power of the sovereign was derived from the people, and had been vested in him by their consent; but English kings, especially the Stuarts, went farther than this, and claimed, as other European sovereigns have done, that the power and authority

[1] Du Chaillu's "Viking Age," p. 543.

[2] "Studies in the Roman Law," p. 12, 2d ed.

they exercised as monarchs descended to them as a divine right; that it came from God, and not from the people. The title of a book that I have seen which Charles the First ordered to be printed in Oxford in 1643, a year before his defeat at the battle of Marston Moor, is in these words: "The Lord's Annointed, wherein is proved that the Right or Monarchical Powers of our Sovereign Lord King Charles is not Human, but of Divine Right, and that God is the Sole Efficient Cause, and not the People"; and his father, James the First, declared that, "As it was atheism and blasphemy in the creature to dispute what the Deity may do, so is it presumption and sedition in the subject to dispute what a king may do."[1] And in the preceding reign of Elizabeth, it was asserted in the House of Commons by courtiers and country gentlemen that the royal prerogative did not admit of any limitation, as absolute monarchs, like those of England, were a species of divinity.[2]

When all this is called to your attention, gentlemen, you will appreciate the importance and value of the common law, and the courage, intelligence and manliness displayed by the English race in their struggles to maintain the great principle of the subjection of the king to the law as laid down by Bracton. It explains why they clung so tenaciously, through so many centuries, to the common law, to preserve their rights and liberties, and justifies what Sir Matthew Hale said of it, that it was adapted to the disposition of the English people and incorporated in their very temperament.

[1] King James, Works, pp. 531, 557.

[2] Hume's "History of England," c. xliv.

Another distinguishing feature of the common law was its high regard for truth. For although, during the Middle Ages, perjury was the prevailing vice,[1] at an earlier period, among the people of Northern Europe, to whom we trace the origin of the common law, it was otherwise. "No literature," says Du Chaillu, "points out so clearly and so often the sacredness of an oath, and the loathing in which oath-breakers were held. No one could absolve a man for breaking his oath, no matter how great might have been the splendour of his achievements,"[2] and this respect for truth appears even in those cruel ordeals as tests of guilt or innocence, — plunging the arm in boiling water, lifting a red-hot iron with the naked hand, walking over burning ploughshares, and the wager of battle, — which had their foundation in a child-like faith that God would miraculously interpose in behalf of truth, or to give the victory to him who had the right; and also in the usage of determining controversies, or proving innocence through compurgators, which, as far as we know, may have been the origin in England of a trial by a jury, of twelve men, although this is disputed.[3] By this usage, if a man accused could get twelve men of the vicinage, called the compurgators, who would declare under oath that they believed him innocent, he was acquitted. This usage or law existed among the Scandinavian races, who had what was called the purifying oath, *dulareid*, taken by the defendant alone, or by him and a certain number of co-swearers, the number varying according to the

[1] Hallam's "Middle Ages," c. ix., p. 11; Supplementary notes, p. 260.

[2] "The Viking Age," Vol. I., p. 553.

[3] See Lewis's "Ancient Laws of Wales," c. V., pp. 394, 395.

nature of the offence charged, the most solemn and important being the *tylftaried*, the oath by twelve men. This purifying oath did not come into use among these northern nations until after the introduction among them of Christianity, and it appears by the "Hervarar Saga," c. xiv., that twelve of the wisest men were selected to decide important cases, which selection of twelve may have been from its association originally with the twelve gods worshipped by the Scandinavians, or possibly afterwards from the number of the twelve apostles.[1]

The trial by jury was another great feature of the common law.[2] The Roman, like the common, law separated the decision of the law from the finding of the facts. The expounding of the law was left to the magistrate or prætor who conducted the preliminary proceedings, until an issue was formed, when he sent the case, for the determination of the facts, to the *judex* or *judices;* for this tribunal might consist of more than one, in which case its verdict, or the *judicium*, as it was called, might be given by a majority. The distinguishing feature of the common law, however, was

[1] 1 Du Chaillu's "Viking Age," pp. 47, 523, 524, 557. "The law," says Coke, "delighteth herself in the number twelve; for there must not only be twelve jurors for the tryal of matters of fact, but twelve judges, of ancient time, for tryals of matters of law in the Exchequer chamber; also in matters of state there were, in ancient time, 12 Counsellors of State. He that wageth his law, must have eleven others with him, which [who] think he says true, and that number of twelve is much respected in Holy Writ, as twelve apostles, twelve stones, twelve tribes," etc. Co. Litt., 155 b. c., and see, as to the fixing of the number of twelves for a jury, "Guide to English Juries, by a Person of Quality," 1682, attributed to Lord Somers.

[2] See note B, Appendix.

the importance it attached to the facts, in which it differs from any other system, in requiring that they should be determined by twelve men, who, in respect to them, should all be of one mind; that is, whose verdict should be unanimous, which requiring of unanimity, Hallam, the historian, pronounces "a preposterous relic of barbarism";[1] but Sir Henry Maine expresses his concurrence in the ordinary professional opinion, that "its [the jury's] view of facts and its mode of ascertaining them are the glory of English law."[2]

Fortescue, the author, in the fifteenth century, of the treatise before referred to, in praise of the law of England, who, during his banishment to the continent, had an opportunity for studying the working of the civil law, devotes a part of his celebrated work to showing the superiority of the English mode of trial by jury for determining questions of fact to that of the civil law. Coke, referring to these passages in Fortescue, calls it "a mode of trial that excels all others" (Co. Litt., 232 c.), and the experience of the centuries that have intervened in England and in this country has confirmed that opinion.[3]

While both systems had their origin in usage, the mode in which the common law was chiefly built up differed in some of its features from that by which the Roman system was formed. From the foundation of the state the Romans enacted laws framed by those to whom the legislative power was entrusted, of which the

[1] Hallam's "Middle Ages," Vol. II., p. 404, 10th London ed.

[2] Maine's "Early History of Institutions," p. 48, N.Y., Holt, 1876.

[3] See note C, Appendix.

code of laws engraved upon the ten tables of brass, and publicly put up for the information of the citizen, was an early example. With them also, as with the English, the judicial power was constantly engaged in creating law. The prætor, or judge, wrote down the rules by which he would be governed in administering justice during the year that he was in office, and put these rules, which were called edicts, in a conspicuous place; and if, in the course of the year, the decision of any case suggested to him the necessity or propriety of a new rule or edict, he made one. Each prætor generally adopted the edicts of his predecessor, adding, during the year he was in office, whatever his experience suggested, and in this way, in the course of time, these edicts swelled to a large bulk and became known by the title of the Prætorian Law. There was also another method. There was among the Romans a body known as *Juris Consults*, who, upon the application of their clients, gave their opinions upon questions of law. Of course they had no other weight than was derived from the concurrence of many in the same opinion; but in the course of time they became the source of much of the law afterwards embodied in the Pandects, and where the *Juris Consults* were unanimous upon any question, the prætor decided according to their opinion, which then had the force of law. An example of the same kind occurs in the English law, which I find reported in the first volume, now, of the printed Year Books, in which the court were disposed to sustain an action, but changed their opinion because all the sergeants agreed that the law was, or should be, otherwise.

This prætorian law had this excellent quality, that it could be progressively rectified and improved, — for the prætor might always reject what was old and obsolete, — and it had also, what in England was lodged in the Court of Chancery, the power of correcting the effect of the strict law, by doing in a case what was equitable.

The English mode of procedure, as I have said, was different. At an early period the value of having permanent evidence of the settlement of any controversy, especially where it related to land, was sensibly felt. This could be done only by putting it in writing; and as that accomplishment was then possessed by few, except the clergy, the practice arose of coming before them; and as the settlement might have greater solemnity and more binding effect, they were in the habit of inscribing the conclusion that was arrived at, or what in fact had the character of a judgment, upon the blank leaves of the mass books. In course of time the oral proceedings in court — if the matter were of sufficient importance — began to take something of the same form. The conclusion of the court was briefly written down in each case as it was disposed of, by the clerk, upon a roll of parchment kept for the purpose, known as the enrolment or judgment.

This enrolment of the conclusions of the court did not show the ground upon which the judgment was founded, or the rule or principle, if any, that had been acted upon and applied, which was desirable, especially in new, important or intricate cases; and to supply this want, the entry was afterwards augmented in particular and important cases; the clerks at the time

when this practice arose being tolerably well instructed in the law generally, so as to be able to give in an abridged form what was most essential, though entries were not unfrequently made giving the nature of the pleading, and the legal points raised on either side, but without the reasons or grounds given by the court for the decision.

These entries were so valuable as expositions of the law that the clerks prepared *annually* a record of them for the use, I suppose, alike of the court and of the practitioners, to which the name was given of the Year Books; the earliest of which, as I have already said, that can be assigned to any certain years are those in the twentieth and twenty-first years of Edward the First, which now constitutes the first of the five volumes of the Year Books extending as far as the thirty-fifth year of the reign of Edward the First, which have been edited and translated by Mr. Alfred J. Horwood and published by the English government between the years 1866 and 1879. The Year Books of subsequent reigns that have been previously published are the nine folio volumes in Norman-French, or more properly law-French, printed between the years 1596 and 1620, to which Sergeant Maynard, in 1698, added another volume.

After regular judicial tribunals were established of the high character of the royal courts, such as the King's Bench and the Court of Common Pleas, and when the practice arose of taking down in writing a brief statement of what the controversy was about, what was argued on the one side and on the other, and the judgment which the court rendered, a body of precedents

gradually arose to guide the court thereafter in like or analogous cases; for it came to be recognized that where a case had been argued and solemnly adjudged, that the rule, principle, or reason which it suggested, and which was applied in the decision of it, should thereafter be followed, unless the case was substantially overruled, which was rarely done, and then only after the greatest deliberation and the fullest convictions that it was not only erroneous, but that its continuance would work injustice. This controlling influence of precedents was not recognized in the Roman law, nor is it in any country of Europe where the civil law prevails. It is objected to by civilians as preventing the improvement of jurisprudence and keeping it stationary as a science; but to the practical English mind it appeared more important that the law should be well known, fixed and stable than that it should be abstractly correct. And there was another reason: it was one of the securities for preserving the laws of a free people, and operated as a check upon arbitrary and corrupt judges; for if the precedent was in point, and they overruled it without giving any reason, or gave one that was obviously untenable, it was more fully disclosing that their intention was not to administer the law, but to subvert and disregard it.

If an adjudged case that settles some new point, or the facts of which evolve some new rule or principle, is to have the permanent effect of being adhered to thereafter, then adjudged cases create or establish law; and if not overruled, or disturbed by legislation, what they settle enters into and becomes a part of the common law. Sir Matthew Hale, how-

ever, does not admit that this is creating law. After stating, in one part of his work, that the common law cannot be changed authoritatively except by act of Parliament, he afterward says: "The decisions of courts of justice bind as law, between the parties thereto, in the particular case, till reversed for error or attaint; yet they [the decisions] do not make a law, properly so-called, for that only the king and Parliament may do." "Yet," he says, "they have great weight and authority in expounding, declaring and publishing what the law of the kingdom is, especially when such decisions hold a consonancy and congruity with resolutions and decisions of former times."

Even in the face of so great an authority this appears to me what is called a distinction without a difference. When a reason is given by a court for the judgment it renders upon a certain state of facts, that is sound and obvious, it is a rule that determines what is right in such a state of facts, and if it must be adhered to thereafter by the same court and by tribunals subordinate to it, if the like point or question should thereafter arise, — it has all the force and authority of law while it remains undisturbed. It may be abrogated or overruled by the authority that established it, as an act of Parliament may be repealed by the power that created it; but while it remains, it is the law, as it governs thereafter in like cases, and a very large amount of what we call the common law has been made in this way to which Austin has given the title of *judiciary law.*

Hale's statement that the common law cannot be changed or altered except by act of Parliament is true as respects what is fundamental; but a great deal has been lopped off and a great deal added to it by judicial decisions, in the course of centuries. The Roman Pandects say that an ancient custom is rightly observed as a law established by usage, and may therefore be abrogated by non-usage, through the tacit consent of all.[1] In this manner, much of what was once common law passed away from the altered condition, interests, or habits of the people, and much through the action of judicial tribunals, by what Sir Henry Maine calls *legal fiction;*[2] that is, by assuming that the law is not changed, but merely interpreted or expounded, when in fact it is altered, or modified in its operation, or, as Austin pithily puts it, "establishing new law under guise of expounding the old."[3] This took place in the development of the Roman, as well as of the common, law, but in the former it was done by the lawyers, and in the latter by the judges. Jeremy Bentham denounced and ridiculed it,[4] but it may be doubted if extensive changes and improvements in the law, especially at an early period, could have been made in any other way, and, as they were made progressively, when the necessity for them was suggested, in any better way.

In a system like the common law, where a point once adjudged became a precedent to be followed thereafter, it was important where a question of law arose in a case, to know if it had arisen before and

[1] D. 1, 3, 32, 1. [2] "Ancient Law," c. ii.
[3] Austin's "Jurisprudence."
[4] 4 Bentham's Works, pp. 459, 460; 5 id., p. 546.

been adjudicated. This could not be ascertained by consulting the treatises of Bracton, Fleta, and Britton; for although these writers cite numerous cases as authority for their statement of the law, all the adjudged cases were not to be found in these works, and to search over the long period of the Year Books to find if there were any case in point was an enormous undertaking. To meet this want, therefore, works were prepared as early as the fifteenth century, to which the name was given of Abridgments, in which the cases previously decided were arranged under their appropriate legal heads or branches of the law, with an abridged statement of the case, the point determined in it, and where it could be found.

The earliest of these is Statham's Abridgment, which is said to have been printed at Rouen, in Normandy, in 1470. It is without a title-page, — at least the copies that I have seen, — beginning simply with an index of the different heads of the law under which the matter is arranged, and for what is stated in the text, which was generally very brief, and sometimes not very clear; there is a reference, on the margin of the page, to the year of the king's reign and the term of the court, by which the record of the case could be found. Compared with subsequent productions of the kind, it was but a meagre performance, but it was a beginning, and was then not only a material help, but it served as a model for better works that followed; after which, somebody has said, it was as useful as bows and arrows after the invention of gunpowder.

It was wholly superseded by what is known as the "Grand Abridgment" of Sir Anthony Fitzherbert, a

work, for its time, of great labor and merit, written in the reign of Henry the Eighth, and printed in 1514. It is an abridgment of all the cases in the Year Books down to the twenty-first year of the reign of Henry the Seventh, and cases of an earlier date than the Year Books, that are nowhere else to be found.

Half a century afterward — that is, in 1568 — Brooke's Abridgment appeared, which was founded upon Fitzherbert's. The cases in it were abridged with great care and accuracy; for he is supposed to have had access to the original records of the Year Books, and to have gone carefully over them.

A century later, 1668, Rolle's Abridgment was published, with a preface written by Sir Matthew Hale, in which the cases in Fitzherbert and Brooke relating to so much of the common law as had become obsolete were omitted. Hargrave has justly said of this abridgment, that for succinctness and legal precision it is an example for all other work of the kind. The succeeding abridgments were Bacon's, in 1726, an excellent one, which is still much in use, and Viner's, printed shortly after Bacon's, in twenty-four large folio volumes, a work of greater bulk than value. With these should be named Comyn's Digest, which for conciseness, clearness, accuracy and methodical arrangement, has never been surpassed.

In the latter part of the reign of Edward the First, or toward the beginning of the fourteenth century, the clerks of the courts that I have referred to, who took notes of cases, and were the earliest reporters, were appointed by the Crown for this especial purpose. Plowden, in the preface to his reports,

says he was informed they were four in number, and consulted together before settling upon the report. When the employment of them was discontinued, I think about two centuries afterwards, notes were taken by some of the judges and by lawyers practising in the courts, for their own use and future reference, in some of the instances extending over many years, which were afterwards printed from their manuscripts, and was the beginning of the long series of English common law reports, which must now embrace about six hundred volumes, as distinguished from the equity, ecclesiastical and admiralty reports. The earliest of these reports, such as Dyer's, Leonard's, and Plowden's, were of value from the care, learning and accuracy of the judges or lawyers whose names they bear; but in the course of time the booksellers printed anything that was brought to them, giving an account, however crude or brief, of adjudged cases, whether it was the original manuscript or a copy, no matter how imperfect or obviously incorrect, and where they did not know by whom the particular collection was made, they gave to it the name of some known lawyer or judge; the consequence of which was that in less than a century there was a collection of reports, good, bad and indifferent, and we find judges distinguishing some particular one as containing some good cases, and referring to others, like the three portly folios of Keble's Reports, as utterly worthless. After a century, however, the reports were greatly improved, and became, with some few exceptions, accurate and valuable.

It appears by the Introduction to the Roman Digest,

that, at the time of its composition, the Roman jurisprudence was distributed over more than two thousand treatises, containing three million passages or lines, which, allowing twenty-five lines for a page, and four hundred pages for a volume, would amount to about 311 volumes; all of which, the Introduction states, it was necessary to read entire and with reflection, so as to choose that which was the best.[1] This digest was completed by Tribonian and his coadjutors, in three years; so that such an undertaking with respect to the English Reports is capable of being achieved, though its utility or necessity may be questioned, as anything contained in these many volumes may be readily found by the excellent digests that we now possess. The contents, moreover, of these many volumes of reports of adjudged cases is very different from the material which the Roman jurists had to go over for the composition of the Pandects; for we are told in another part of the Introduction, that two thousand treatises which they went through were full of confusion, and contained very little that was useful;[2] whereas, even Jeremy Bentham concedes that the English adjudged cases are a "vast storehouse of material for legislation; and a storehouse, that without it, no tolerable system of law could be made, . . . the greatest quantity and wealth possessed in this shape by any other nation," he says, "is penury in comparison to that which has been furnished by the English common law."[3]

[1] "Les Cinquante Livres du Digest, à Metz," 1803, Second Preface, p. 15.

[2] "Corpus Juris Civilis," Leipsic, ed. of 1833, Vol. I., p. 56.

[3] Bentham's Works, Vol. IV., p. 490.

But these adjudged cases are something more than a storehouse of material for legislation. They are not only depositories of the law, but have also an educational value; for a legal rule or principle is never so fully impressed as when learned from a case to which it has been applied, or which may have given rise to it.

Bentham labored for more than fifty years of his life to have the great body of jurisprudence, stored up in these reports, replaced by statutory law; that is, by a general code and a system of particular codes, in which nothing he said ought to be referred to custom or to any other law, but which should be, as he expressed it, "a complete digest," so that "whatever was not in the code ought not to be the law," and by which any man that could read, "be he even without education in other respects, may, if it so please him, know more of law than the most knowing of lawyers can possibly know at present."[1] He was not only for excluding everything in the nature of custom or usage from the law, but all *unwritten* laws. He wrote a series of letters to President Madison in 1817, offering gratuitously to draw up, for such of the States of the Union as would accept it, "a complete body of proposed law, in the form of statute laws," in one of which letters he says, "so long as there remains any, the smallest scrap of *unwritten* law, unextirpated, it suffices to taint with its corruption — its own inbred and incurable corruption — whatsoever portion of *statute* law has ever been, or can ever be, applied to it"; oblivious of the fact that as long as jurisprudence

[1] Bentham's Works, Vol. III., 205; Vol. IV., pp. 454, 483, 514.

continues to be progressive among any people, there will always be unwritten law; for in the advance of civilization, and under new and changed conditions, cases will arise to which the rules on principles previously recognized will not apply, and the determination or decision of which gives rise to a new rule or principle or the modification of existing ones. All usage, which by becoming generally established is therefore law, is necessarily unwritten law; the courts simply recognizing its existence, either, as the Roman jurists said, by the tacit consent of all, or by taking proof of the fact; and a very considerable portion of the commercial law of England, down even to the time of Lord Chief Justice Ellenborough, came into existence in this way as the well-established and uniform custom of merchants; and a great deal of the law of conveyancing, in England, arose out of the methods conveyancers had adopted among themselves, which the courts recognized, for the reason that if they had not, it would have seriously affected titles to real estate and other rights incident to that kind of property.

Bentham, in his day, was of great service by calling attention to defects in the common law as it then existed, such as the semi-barbarous punishments that were inflicted for slight offences, — the imprisoning for non-payment of debts the unfortunate equally with the fraudulent debtor, the useless technicalities that encumbered the mode of legal procedure, and many other defects by which he dispelled the illusion the English people were under, after the horrors of the French Revolution, that their system was perfect and

incapable of improvement. Many of the reforms that followed afterwards in England, and some of those in this State, are traceable to his efforts; but he never appears to have appreciated, in his endeavors to have all law converted into statutory law, that, in the language of Sir William Markby, "the adaptation of language to the endless variety of circumstances and the complicated situations of an advanced civilization, is one of the most difficult tasks to which human ingenuity can be applied," [1] of the truth of which the great number of decisions that followed the adoption in this State of the Revised Statutes and of the Code of Procedure, to determine the exact meaning of the language used in these enactments, may be referred to as an illustration.

"Time," says Lord Bacon, "is the wisest of all things"; and guided by the light of experience it would seem that legislation should be resorted to rather to alter and amend the common law, when the necessity for it becomes obvious, than to attempt to substitute wholly for it a body of statutory laws.[2]

[1] "Elements of Law," § 194, 4th ed.

[2] "No human foresight," says Sir James Mackintosh, "is sufficient to establish such a system [he is referring to systems of law] at once, and if it were so established, the occurrence of unforeseen cases would shortly altogether change it; there is but one way of forming a civil code, either consistent with common sense, or that has ever been practised in any country; namely, that of building up the law in proportion as the facts arise which it is to regulate." — "Discourse on the Study of the Law of Nature and Nations," p. 75, Lond., 1835. "The prudence of one age," says Sir Matthew Hale in his preface to Rolle's Abridgment, "may go far, at one essay, to provide a fit law; but experience shows that new and unthought-of emergencies happen that necessarily require new supplements, abatements and explanations, and time, and experience, as well as wisdom and prudence, is required to discover

I have now indicated, gentlemen, as fully as such a general statement will admit, the nature of the system of law that, so far as it was applicable, was introduced into the colony of New York, and which, except to the extent that it may have been affected by particular acts of the legislature, continued to be the system in the State for half a century after the American Revolution.

In 1823, William Sampson, an Irish lawyer, at that time of some prominence at the bar, delivered a discourse at an anniversary meeting of the New York Historical Society upon "The Origin, Progress, Antiquities, Curiosities, and Nature of the Common Law." So far from being, as its title would indicate, an attempt by a competent legal historical investigator and critic, to explain what the common law was, or pointing out its defects and suggesting how they could be remedied, it was the production of a fluent rhetorical writer, denouncing the common law as a system wholly unsuited to our republican government, ignoring or probably ignorant of how much we are indebted to it for our free institutions, and that it was the attempt of George the Third and his ministers to deprive the colonists of rights and liberties which they insisted — and justly — were secured to them by the common law, that led to the War of Independence and the final separation of the colonies from Great Britain. How limited the author's knowledge of it was as a whole, will appear by a single

defects and apply apt supplements and remedies for them; and such is the common law of England, which is the product of wisdom, time and experience."

passage in which he says that Blackstone, with all his eloquence and grace, could not make that a science which was reducible to no fixed rules or general principles; but the more, he says, "as the sunny rays of his bright genius fell upon it, the more its grotesque forms became defined; the more they proved to be the wild result of chance and rude convulsions"; and delivered other derogatory opinions of it, with that highest of all confidence, the confidence of ignorance. Bentham, in his letter, in 1817, to Madison, went quite as far by referring to it as "that spurious and imposterous substitute, which to its makers and their dupes is an object of such prostrated admiration and such indefatigable eulogy, under the name of *common* or *unwritten* law"; and it was, I apprehend, this passage, and others like it in the same letter, which was published at the time, that was the source of Sampson's inspiration.[1]

The address, however, produced an effect. The editor of a weekly paper of the time declared that it electrified the public mind. It was made the subject of an article in the "North American Review," was noticed in England and in France, and may be regarded as the beginning of the movement in this State that led within a decade thereafter to the enactment of the Revised Statutes. What it urged was felt to be necessary, — a thorough revision and reconstruction of the entire system then existing in this State; and Sampson kept up the agitation for it, by speeches at public dinners, and by inserting in the newspapers articles written by himself, and letters sent to or received from

[1] 4 Bentham's Works, p. 460.

prominent men upon the subject; the general effect of which was to bring the common law into great disrepute in the State, especially among those lawyers who knew the least about it; and how long this unfavorable opinion remained with that class I am reminded, by an incident at which I was present. More than twenty years afterwards I was in the Court of Sessions when David Graham, then one of the most distinguished leaders of the bar of New York, advanced some proposition or made some point with the remark that it was the common law. The district attorney, James R. Whiting, a man of great force and power, that made him one of the best district attorneys the city of New York has ever had, but whose legal education had been limited, when he came to reply, did not attempt to show that the proposition was unsound or inapplicable, but broke out against the common law in a torrent of vituperative adjectives, upon which Mr. Graham rose, and with that bland courtesy for which he was distinguished, said, "Excuse me, Mr. Whiting, but I appeal to the court whether it is becoming in the district attorney to speak in such disrespectful terms of a gentleman with whom he has had such a slight acquaintance."

Although able lawyers sprung up immediately after the Revolution, the members of the bench were not particularly distinguished either for their learning or their industry, until Chancellor Kent became a member of the Supreme Court in 1789. He introduced the practice of preparing a written opinion in every case that was argued before the court, the value of which and the force of his example led the other members to

do the same; and in two years thereafter the first volume of the State's voluminous series of reports was published by Mr. Coleman, and in the quarter of a century that followed, a train of decisions appeared of great importance and value in the extensive department of the commercial law and in other branches of the law of personal property.

The law of real property, however, underwent no material change. It was too deeply embedded and settled by the commentaries of Coke, Preston and Cruise to be much altered or improved by judicial decisions. It was so technical, artificial, extensive and complicated, that it took years to acquire a knowledge of it. To have amended it in part by legislation would have but added to its difficulties, and the only remedy lay in its entire reconstruction. A French curé while engaged in blessing the fields of his parishioners stopped suddenly before a large tract with the exclamation, "Prayers are of no use here. This field must be broken up." Such was the case then not only with the law of real property, but of some other parts of the common law. They required subsoil ploughing, and they got it by a change so sudden, radical and sweeping in the enactment of the Revised Statutes of 1828, as to startle the legal profession. This was the work of the eminent jurists who were finally settled upon as the revisers, — Benjamin F. Butler, John Duer and John C. Spencer, — men who knew exactly what they were about and how lasting, widespread and beneficial would be the result of the changes they made.

The reconstruction of the law of real property was chiefly the work of Mr. Butler, who struck at the vital

part of the huge fabric that the English real property lawyers and judges had been building up for three centuries, until the whole toppled and fell. Even Chancellor Kent, himself a reformer, stood aghast at the extent of the demolition, and gave expression to his feelings in this passage, which is almost pathetic:

"The judicial 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 forever to the renowned discussions in Shelley's case, which were so vehement and protracted as to arouse 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 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 dissertations 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 criticisms of Reeves.

What I have, therefore, written on this subject may be considered, so far as my native State is concerned, as an humble monument to the memory of departed learning."

Mr. Butler, however, was no fanatical iconoclast. He was more thoroughly read than any man of his years in the State, in all the intricacies of the law of real property, and if he destroyed the old edifice, he replaced it by a more simple, useful and symmetrical structure.

I had intended to have given an account of the nature and extent of the changes made by the revisers in the common law, and how greatly those changes improved the law as a science; to have shown how extensively the result of the revisers' labors were made use of in other States of the Union and in Great Britain; but the ordinary limits of a discourse like this have been already passed, and it is the less necessary as Mr. William Allen Butler has published an interesting volume upon the revisers and their labors, and I will, therefore, briefly close by referring, but only in the most general way, to what they did.

They remodelled the whole law of descent, sweeping away nearly everything that had grown out of the aristocratic state of society in England. They simplified the creation and division of estates, and by introducing grants for all transfers of land, they got rid of a host of subtle distinctions and useless proceedings, by which they rendered the acquisition of real property more simple and the possession of it more certain. They remodelled real actions, abolishing the fictitious suits in which those two venerable gentlemen, John

Doe and Richard Roe, had so long been the parties, and changed the whole law of perpetuities and of limitations, of last wills and testaments, and reconstructed the entire law relating to executors and administrators, by introducing important changes that made it more methodical and easy of administration. The vast subject of uses and trusts underwent at their hands a thorough revision, by which this important branch of the law became more simple, equitable and practical; and to these great changes are to be added the simplifying of proceedings upon the writ of habeas corpus, and in other legal remedies the changes made in the law of divorce, and the general provisions respecting the domestic relations. "They have," said an English law-writer, in a publication shortly afterwards, "rendered the principles of law applicable to real property more simple and equitable; the rules of construction more conformable to common sense; the modes of transferring property more cheap, direct and expeditious, the title to it more clear and easily investigated, and its purchasers more secure; and have remedied most of the evils of the English system."[1]

These great changes the State afterwards followed up by abolishing imprisonment for debt, the establishment of the registration of deeds of real property and incumbrances upon it, the administration of legal and equitable remedies in the same tribunal, allowing parties to be witnesses in their own behalf, and the enactment of a code of practice or procedure, and of a penal code.

[1] Parke's "Statutes and Orders of the Court of Chancery," etc., p. 10, Lond., 1830.

When all this is considered in connection with what has been done by the courts of New York in expounding and adding to the law during a period now of about a century, which fills over five hundred volumes, or nearly half as many volumes of reports as had been printed in England in three hundred and thirty-two years, you will feel that what has been done in New York for the science of jurisprudence is in harmony with the State's motto, EXCELSIOR.

APPENDIX.

NOTE A.

ROMAN LAW IN WALES.

WE would naturally look for some remains of the Roman law in Wales, as it had not been subdued by the Saxons, but, on the contrary, retained its independence, institutions and laws until it was conquered and a large part of it incorporated with England, by Edward the First, in the thirteenth century; but from the statement of Owen, the translator and editor of the "Ancient Laws and Institutes of Wales," there is little known of the Welsh laws that can be regarded as reliable, until the tenth century, when the Welsh king Howell, finding that the laws were falling into neglect, caused them to be examined by a competent body of men, "so that what was wholesome might be retained, what was ambiguous expounded, and what was superfluous or injurious abrogated," who made a compilation or code, known thereafter as the Laws of Howell the Good; and upon looking over Flintoff's summary of what is contained in this code, I find nothing that can be said unmistakably to be of Roman origin; but it appears throughout to be a collection of usages, customs and laws, of the same general character as those which existed among the northern nations of Europe prior to the Saxon invasion.

NOTE B.

ALLEGED ORIGIN OF THE TRIAL BY JURY IN WALES.

Forsyth, after a very full investigation, is of the opinion that the trial by a jury, at least in the form in which we now have it, of determining the fact in controversy, after the jury have heard the testimony of witnesses examined before them under

oath, is of English origin (Forsyth's "History of Trial by Jury," pp. 83, 126, 128, 131, 132, 150–153, 165, 241); which mode came into use about the time of Edward the Third (Forsyth, 155), and into general use throughout England, in the reigns of Edward the Sixth and Queen Mary (Fortescue, p. 95; Amos, note 1, Cincinnati, 1874). Probst, however, in the preface to his work, "The Ancient Law of Cambria," says that the Saxons did not bring the trial by jury with them from Germany, but derived it from the Welsh; that there is no proof of this mode of trial among them before the time of Alfred the Great, whose counsellor and bosom friend, he says, was a Welsh bishop, and that the Welsh had, at that time (the tenth century), "a code of laws that distinctly specified a jury, mentioned *their number*, and stated their qualifications." He does not name this particular code, or what was their number, or their qualification, and in looking over the laws translated in his work, and those in the fuller work of Owen, before referred to, and the late Mr. Lewis's commentary on the ancient laws of Wales, Lond., 1889, I find nothing that can be regarded as confirmatory of this statement; but in an essay on this mode of trial, by Prydain Ap Aeed Mawr (a bardic *nom de plume*), published in 1856,[1] it is shown that from an early period there was a jury in Wales, the celtic name of which, Raith, was derived from two roots, "growing straight" and "an enforcer of the laws." That in the Institute of Prydain, who, as therein declared, first established a system of government in the Isle of Britain, and is supposed to have lived in the fifth century B.C., there is a Triad; — it being the custom of the bards, in reciting laws, or other matters, to rhythmically combine three things together, — in which it is said that the "three pillars of the Isle of Britain are a jury of a country, sovereignty and judicature"; but the extent of the jurisdiction of the jury there named is not known. It is not known whether it extended to individual cases or was limited to matters of a public or social nature.

[1] Supposed to have been written by George O. Morgan, a writer at that time upon legal subjects.

Whether it was formed of the heads of families, or clans, or of a certain number of adults, or of how many it was composed, except that if there should not be three efficient bards upon it, it was necessary that the verdict should be rendered by three hundred. In the Triads of Dyneval Moelmud, who is supposed to have flourished about 450 B.C., there is one that gives as "the three strong supports of law, a learned judge, a truthful witness and a *conscientious jury*." But the authenticity of the Triads attributed to him has been questioned by Owen, in his preface to the work before referred to; but Mawr, whose essay was written after the publication of Owen's work, says that there is every reason to believe that they are, upon the whole, genuine. Triads of a later date refer to certain suits "in which the parties are oppressed," that are to be decided by a jury of three hundred men,[1] and Mawr says that it is obvious, from some of the Triads, that the jury, to which they refer, acted as *compurgators*, rather than as inquisitors, or judges, and that this body was varied from seven to fourteen and upwards; "the stages of gradation being regulated by the mystic number seven, which was particularly venerated by the Druids, as by other pagan nations." But in the sixth century A.D., as appears from a manuscript which he quotes, Morgan Mwynvawr, king of Glamorgan, adopted the sacred number twelve, in honor of the Holy Disciples, who "shall sit upon twelve thrones, judging the twelve tribes of Israel." The passage in the manuscript is this: "He" (the king of Glamorgan) "established an ordinance that enjoined the appointment of twelve wise, erudite jurors and merciful men, to determine all causes; the king being their supreme counsellor, which was called the Apostolic law, because it is thus that Christ and his twelve Apostles judge the world and so should the king and his twelve wise men judge the country in mercy and mildness" (Cambrian Journal, *id.* 259).

Under the code of Howell the Good, in the tenth century, before referred to, Mawr says that "the judges, the priests,

[1] Cambrian Journal of 1856, p. 120.

and apparently to some extent, elders and freeholders, discharged the functions of a jury"; but this, he says, was not the Raith, and it appears from that code that the decision, in certain cases, was given upon the testimony of witnesses (Owen's "Ancient Law and Institute of Wales," Vol. I., pp. 142–157). Mawr further says that there were two kinds of raithmen; the first being composed of men of note and mark, and the other of such as could be obtained; the last being the ordinary jury, in which he says is seen the difference between the grand and the petit jury, and that the latter, or ordinary jury, varied in point of number, according to the nature and importance of the case. In certain trials the jury consisted partly of men and partly of women; women being excluded in cases of murder or theft. The accused had the right of selecting his own jury and for the most part from his own relations or kindred, and whilst in the case of the "nod raithmen," or upper jury, the joint opinion of a portion was decisive, in the ordinary or petty jury unanimity was required, the words of the law being "if one nodman fail, the whole Raith fails."[1]

It appears by the "Welsh Ruthun Court Rolls" ("Cymmrodorion Record Series," No. 2, pages from 13 to 45, and Introduction from II. to X.), discovered in the middle of this century and now in the Record Office in London, that in the twenty-second year of the reign of Edward the First, which was after a considerable part of Wales had been annexed to England, the whole not having been annexed until the reign of Henry the Eighth, a man was accused of stealing a horse, who, upon being brought before the court for trial, put himself, as the record expressed it, upon the country; that is, appealed to a jury of men of the neighborhood, and that the jurors were composed of six Welshmen and six Englishmen, who, being sworn, the entry says, found that the accused took the horse without leave, but not with the intention of stealing it, upon which the court declared that the accuser was in mercy on a false complaint.

[1] See for these various statements, Prydain Ap Aeed Mawr's Essay in the Cambrian Journal for 1856, pp. 15–20, 29, 35, 130, 256–260, 265, 325.

The entries upon these Rolls show that the court sometimes decided the case upon the defendant's explanation or statement. That in other cases the defendant wagered his law; that is, relieved himself of the charge by getting twelve compurgators that would swear to their belief in his innocence, who went with him to the church, and placing their hands upon the altar, with the hand of the accused, took that oath,[1] or the accused put himself "upon the country," a trial by a jury of his neighborhood; a man's country, in this procedure, being "his hundred, or enlarged tribe, or family, settled in a certain district, which was a brotherhood of freemen and a separate community" (Lewis, etc., p. 388). In several of the entries the names of the jurors are given; in one the number being twelve, and in another, where all the names cannot be deciphered, it is twelve or thirteen. The entries are not in the Welsh language, but in Latin, and the Rolls are those of the Court Baron of an English lord, Reginald de Grey, Justicier of Chester, to whom the occupancy of the Castle of Ruthun and the lands about it, was granted by Edward the First. In this neighborhood, after the conquest of this part of Wales, the English had settled largely, and this tribunal was known as the "English Court." In 1280, Edward the First caused enquiries to be made alike of the Welsh and the English, whether in this part of Wales, "the points in dispute were decided by the dictum of the jury on the inquest or in some other way," and whether the principles of the Laws of Howell the Good were "applied only to ancient matters, or to all matters equally new or old." As to the latter enquiry, these Rolls supply no information; but as to the former, I infer from them that the jury rendered their verdict upon testimony given before them, as there are entries stating that the jury found that "the complaint was partly *proven* and partly not," and that where an article that had been stolen was found in the possession of the accused and he alleged that he had bought it, he was directed "to produce his warranty at the next Court," which, as appears by other entries, was to

[1] Lewis's "Ancient Laws of Wales," § 395–396.

produce his proof. If these Rolls warrant this conclusion, then, at this early date, 1299 A.D., the verdict of a jury was given after hearing the testimony of witnesses examined before them, a mode of trial, generally supposed, as before stated, not to have come into use until the reign of Edward the Third. These Rolls, however, whilst they give the year of the reign of the king when the Court was held, do not state which King Edward, but the translator has given satisfactory reasons for his assumption that the reign they refer to was that of Edward the First (Introduction to the Rolls, "Cymmrodorion Record Series," No. 2).

What has been given in this note does not support Probst's statement that the Saxons derived the trial by jury from Wales; and, on the contrary, Lewis, the purpose of whose work on the "Ancient Laws of Wales" was to trace in the early institutions of England vestiges of a state of society similar to that described in the Welsh laws (see Lloyd's preface to the work), and who discussed the origin of the trial by jury at some length, gave as a conclusion from the evidence, that a trial by a jury, deciding the matter in dispute upon testimony given before them, was "an old common-law institution not derived from the assize, but descended from some primitive popular court of arbitration," and he quotes the dicta of Justice Thorpe, from the Year Books, that a trial by jury of the country was "a foundation of the common law" (Lewis's "Ancient Laws of Wales," pp. 386, 387).

Note C.

Objections made to trial by jury.

Like all human institutions, the trial by jury has its defects. Juries may be led by appeals to their sympathies, prejudices, or passions on the part of skilful or eloquent advocates, to give an erroneous verdict; and a single juror, from pride of opinion, obstinacy or corruption, may prevent the coming to an agreement. This, however, does not amount to a failure of justice; for, in the first case, the court has the power to grant a new

trial, and invariably does so if there is reason to believe that the verdict proceeded from any such cause, and in the second case there is a new trial, as a matter of course. The ill effects in such cases is the increased expense of another trial, and the loss of time to the witnesses and to the parties who have again to attend the court; but the happening of such occurrences is, I am disposed to think, very much more than counterbalanced by the great benefit, in all cases, of having the thorough consideration, discussion and patient investigation which is secured by requiring the verdict to be unanimous.

UNANIMITY.

Forsyth, the author of the "History of the Trial by Jury," whilst he thinks unanimity should be required in criminal cases, agrees with the English commissioners of 1830, that in civil cases "it is difficult to defend the justice or wisdom of it." As he was a Queen's Council, his opinion is entitled to weight, but not greater than that of Lord Brougham, who, though not especially successful at the bar, according to Lord Campbell ("Lives of the Chancellors," VIII., pp. 280, 281), had experience in the trial of cause before juries, and, who, though one of the most radical of legal reformers, was in favor of unanimity. In his speech on local courts, in 1830, after saying that he would have a jury to decide all cases of conflicting testimony, he added, "But I would not have that verdict the verdict of the majority, for, paradoxical as it may seem, I would have a forced unanimity among the jury. Were it otherwise, there would never be that patient investigation which is necessary to come at the truth."

After the introduction of that mode of trial in Scotland in 1815, Lord Cockburn declared that "always requiring unanimity was nonsense," and that "experience had not in the least diminished his Scotch aversion of it." Lord Meadowbank, on the contrary, an equally eminent Scotch judge, published a pamphlet explanatory of the working of the principle of unanimity, in which he said that "by producing discussions and

concessions among jurors, it makes a verdict by even compulsory unanimity, a truer extract of the average sense of the whole of them, than if all the reasoning had been superseded by a vote." Commissioner Adams, who presided over the jury court from its introduction in Scotland until it was merged in the Court of Sessions, a period of twenty years, — a man, Cockburn says, with "a very clear head and practical sense," and whose opinion therefore from his experience would be entitled to greater weight than either of the foregoing, — said that requiring unanimity had proved "most practical and most successful."[1] My own experience has been a large one. I was for forty-two years a judge of one of the principal courts of record in the city of New York, a court of unlimited jurisdiction in civil cases, that sat daily, except for a short period during the heated term of summer. My chief occupation in it was presiding upon trials by jury, and in the earlier years of my service I was frequently called upon, as there was then but one law judge in the Court of Sessions, to preside at criminal trials, some of them of great public interest and importance; and when the acts were passed many years ago, allowing action at law to be tried, by consent of parties, before a judge without a jury, and giving the court jurisdiction in equitable as well as in legal actions, I had during many years as a judge to try and decide contested questions of fact. The result of this long experience is a thorough conviction that a jury is much better adapted for the determination of questions of fact, upon conflicting evidence, than a judge. The jury, being taken promiscuously from the city or county where the trial takes place, it brings together men of different pursuits, experience in life, opportunities for observation and judgment of character, habits of thought, and other peculiarities in which men differ from each other; and the unanimous conclusion of a body thus composed, upon a question of fact, where the evidence is conflicting, and especially where

[1] Lord Cockburn's Memoirs, Ch. V.; Forsyth's History of Trial by Jury, p. 321.

the credibility of witnesses that are in direct conflict is involved, is more likely to be correct than that of a single man, though a judge of experience in the trial of causes. Judges, when they are brought together for the determination solely of questions of law, differ as jurors do upon questions of fact. It not unfrequently happens that the judges of our court of last resort, the Court of Appeals, decide a question of law by a simple majority, though a strong dissenting opinion may leave the profession uncertain as to whether the decision enounced correctly states the law. But the question must be decided, as it is the last resort, the appeal being a final one in respect to the law. If judges are equally divided, the judgment below is affirmed; and if not so divided, it must be decided by the majority, whereas if the jury cannot agree, the cause is tried over again, which almost invariably results in an agreement. In my forty-two years' experience I remember but one case where the jury disagreed also upon the second trial. Cases of disagreement, according to my experience, are comparatively few, and Commissioner Adams states that in his twenty years' experience only one case happened of a jury separating, after being together for several hours, without agreeing upon their verdict, and that upon the second trial a verdict was given that was not disturbed.[1]

Forsyth says that "it is quite certain that in many cases the unanimity is only apparent, and not real."[2] I do not, of course, know upon what amount of knowledge he founds this very positive statement, and can only say that such has not been my experience. Commissioner Adams bears high testimony to the conduct of jurors in Scotland during the time that he presided in the jury court. He says, "They were distinguished for intelligence, attention and impartiality." This has been my experience of American jurors. I have frequently noted the pertinency of the questions asked, by them, of witnesses, in respect to the facts. My observation has been

[1] Forsyth, p. 321; Irvine *v.* Kilpatrick, 7 Bills Appeal Cases, 186.
[2] Forsyth, p 247.

that they are very attentive to the testimony upon disputed questions; that they show a marked sense of the responsibility they are under, and a manifest desire to do justice. From what I have heard from the jurors themselves, from the officers having them in charge during their deliberations, and from the lawyers who have conversed with them after the rendering of their verdict, the impression left upon my mind is not as Forsyth says, "that it is *certain* that in many cases the unanimity is only apparent and not real"; but that it is the result of a conscientious yielding after discussion, investigation and argument, or a concession, that where so many differ from them, the view taken by the larger number may be right. I might mention many illustrations, and will refer to one which I recall, as it was somewhat striking, in which a single juror, by holding out against the rest for a long time, finally succeeded in getting them all to unite in his view of the facts, and that in a subsequent hearing before me, in the same case, in another matter, facts were disclosed that showed, beyond all question, that the verdict was right. I recall, also, another case in which I thought the finding of the jury was erroneous, and as they had rendered it after a very short absence, I was induced, a day or two after, to ask one of the jurors, whom I knew personally, about their coming so quickly to a conclusion, and he gave a very satisfactory reason that had never occurred to me, nor to the counsel in whose favor the verdict was rendered.

Upon the question of unanimity there has been, and will probably continue to be, difference of opinion among those having experience. Lord Campbell[1] introduced a proviso in the Procedure Bill of 1854, that if a jury could not agree after the expiration of twelve hours, the verdict of nine or ten should have the same effect as a verdict of twelve; which the House of Commons amended by providing that if they did not agree in twelve hours they should be discharged; but as Lord Campbell, in the House of Lords, would not accept

[1] Life of Lord Campbell, by his daughter, c. xxvii., 2d ed., pp. 324, 325.

the amendment, neither was passed, and the law in respect to unanimity remained as before. Neither, in my judgment, should have been adopted. If a jury cannot agree after twelve hours' deliberation it is more satisfactory to have the cause tried over again than to make it compulsory that the verdict may then be rendered by nine, with three dissenting; and as to discharging the jury after twelve hours, that had better be left to the discretion of the judge in the particular case, as it is now. I have never kept a jury out beyond twelve hours, except in one instance, where I directed that if they did not agree they should be kept together until the opening of the court upon the following day, because the case had been a very long time upon trial, and it would have been a heavy expense and a great loss of time to all concerned in it to have to try it again; the result being that the jury agreed before midnight, returning a sealed verdict.

Experience upon a question of this nature is worth much more than any amount of theoretical reasoning, and whether it will lead to a change in the law in this respect or not, I may close this note by saying that in my judgment, the trial by jury, for the determination of contested questions of fact, is the best tribunal that the wisdom of man has devised; and I have never known a lawyer who had had much experience in the trial of causes before juries, — and I have conversed with many veterans of the bar upon the subject, — who was not of that opinion.