creative jurist we have seen. He is the Benthan of American jurisprudence, without the blemishes of that great critic. It was Bentham's misfortune too often to overshoot his mark, perhaps as much by not being thoroughly grounded in the law he criticised as through any other cause. Livingston shared with Bentham his contempt for the rubbish and the useless fictions that disfigured (and in part still disfigure) the common law of England and the United States; but he had moderation and clearer perceptions, and was not only a master of the common law, but was thoroughly acquainted with the civil law and widely read in the continental writers. To this he added a store of common sense, an intimate knowledge of humanity, the spirit of high purpose, and, watching and restraining all, an eye for the feasible and the practical in legislation. One passage from his Code of Criminal Procedure will perhaps suggest the comprehensiveness of his mind and his acute perception of legislative ends and their means. The selection is from the part of the code giving a discretion to the judge as to the apportionment of punishment when circumstances of aggravation exist,—*

Hunt mentions (Life, p. 278), among those who have expressed their admiration for his work, Hugo, Villemain, Bentham and Maine (who called him 'the first legal genius of modern times"); Taillandier, Livingston's translator in France, mentions ('Notice Nécrologique") in a similar list Julius, Mittermaier, de Beaumont, and de Tocqueville.

* "Art. 433. The following are to be considered as circumstances of aggravation:

"1. If the person committing the offence, was by the duties of his office, or by his condition, obliged to prevent the particular offence committed, or to bring offenders committing it to justice.

* * * "3. Although holding no office, if his education, fortune, profession, or reputation placed him in a situation in which his example would probably influence the conduct of others.

* * * "7. When the condition of the offender created a trust which was broken by the offence or afforded him easier means of committing the offence.

* * * "10. When the injury was offered to one whom age, sex, office, conduct, or condition entitled to respect from the offender.

"11. When the injury was offered to one whose age, sex, or infirmity rendered incapable of resistance.

"12. When the general character of the defendant is marked by those passions or vices which generally lead to the commission of the offence of which he has been convicted.

"Art. 434. There are also circumstances which ought to enhance the punishment, although they form no aggravation of the offence: these are:—

"1. The frequency of the offence.

"2. The wealth of the offender * * * Where the punishment is an alternative of fine or imprisonment * * * and the wealth of the offender is so great as to render the payment of the highest fine that can be imposed a matter of little importance, imprisonment ought to be inflicted. * * * "

a subject which in existing systems of legislation has received far too little development.

Leaving the figures of this attractive period,—what was the process of codification and how far was it accomplished?

In the early days of American dominion there took place a large influx of lawyers from other States (Livingston among them), and naturally a strong effort (claiming as its justification an equivocal expression in the congressional ordinance relating to the territory) was made by them to secure the adoption of the common-law rules in which they had been bred, at least for the forms of procedure to be followed. But the unfairness of such a measure, in a community accustomed only to law of a Roman origin, excited the opposition of the native lawyers, and of Livingston, long convinced of the superior excellence of the civil law. The champions of the common law were defeated and Livingston was selected to draw up a code of procedure.* His code was adopted in 1805, and simple yet adequate, stood successfully the test of use until it was replaced by the more ambitious code of 1825.† In 1808, Moreau Lislet and James Brown (afterwards Minister to France), who had been appointed to prepare a civil code, presented their results, which were adopted by the second territorial legislature. But this document did not purport to cover the whole body of the laws, and to a limited extent only did it abrogate reference to the Spanish law. It was modeled on the *projet* of the Code Napoleon (for a complete copy of the latter was not at that time accessible), and the whole body of French jurisprudence was thus introduced into the arguments and decisions of the courts of Louisiana. Martin's Digest, authorized by the legislature, appeared in 1816, but it included only statute law. In 1820 the codifying spirit acquired fresh zeal, and by the Act of Feb. 10, the preparation of a criminal code was authorized.‡ His preliminary report was ap-

* E. Livingston: "Aux Electeurs du premier district, etc.," 21 Mai, 1825: Eustis, C. J., in 7 La. Ann. 418.

† Bentham's Works (Bowring's ed.) xi, 52.

‡ An opening sentence in the preamble—"It is of primary importance in every well-regulated State that the code of criminal law should be founded on one