THE STATE OF ENGLISH LAW: CODIFICATION.

[From the Westminster Review, April, 1865.]

1. Speech of the Lord Chancellor on the Revision of the Law.
2. Address of Sir J. P. Wilde, delivered before the National Association for the promotion of Social Science.

Nearly half a century has passed away since Bentham wrote his celebrated "Papers relative to Codification," which, though in some respects crude and imperfect, may be regarded as having given the first impetus in this country to the modern ideas on this the most important branch of law reform. And although up to this time but little of tangible result has been obtained, yet symptoms are not wanting that the views propounded by Bentham, and enforced and developed by Sir S. Romilly, J. Austin, and H. S. Maine, are gradually forcing themselves upon the attention of our leading lawyers and jurists. The seed has fallen on a soil not altogether barren, and after a long period of germination, has at length given signs of bursting into blossom. The conviction is getting more and more universal that something must be done to rescue the law from its present chaotic condition, and to control its future growth. It is felt to be a reproach that the country which assumes to be the leader in civilization can point to nothing for her laws but some 1100 volumes of well and ill-decided cases, supplemented by a huge pile of partly operative, partly repealed statutes, the whole arranged on that worst of all possible plans—a chronological one. It is seen that legal principles and legal rules which are daily enunciated by counsel at the bar and by judges on the bench must, from the nature of the case, admit of being expressed in intelligible language, and of being grouped in an accessible form. On the other hand, the real difficulties to be overcome in recasting the law are, perhaps, not sufficiently appreciated by many of those who feel most strongly that the law ought not to remain in its present shape. It is not uncommon for those who have had no practical experience, who have never tried their hands at framing a rule of law, to suppose that the task is a simple one, and to suspect that the difficulties are created by those whose interest it is that the law should not become too readily *cognoscible*. Those who think thus would do well to ponder the words of the late Mr. Austin, whose competence as an authority will not be questioned. Mr. Austin ("Jurisprudence," vol. ii, p. 370,) writes:—

"Whoever has considered the difficulty of making a good statute will not think lightly of the difficulty of making a code. To conceive distinctly the general purpose of a statute, to conceive distinctly the subordinate provisions through which its general purpose must be accomplished, and to express that general purpose and those subordinate provisions in perfectly adequate and not ambiguous language, is a business of extreme delicacy and of extreme difficulty, though it is frequently tossed by legislators to inferior and incompetent workmen. I will venture to affirm that what is commonly called the *technical* part of legislation is incomparably more difficult than what may be styled the *ethical*. In other words, it is far easier to conceive justly what would be useful law than so to construct that same law that it may accomplish the design of the lawgiver."

Such is the opinion of one of the acutest of thinkers and most ardent of law reformers, and there can be little doubt that every practical draughtsman will add his testimony on the same side. Indeed, it is probable that a sense of the magnitude and difficulty of the undertaking has operated fully as much as any other cause to deter our lawyers from attempting the consolidation and re-arrangement of our statute and case law. However, there are signs—and among them none more noteworthy than the remarkable addresses which form the subject of this paper—that the attempt will be made, and at no distant period. The present, therefore, seems a suitable time for drawing attention to the subject, and for giving a fair consideration to the arguments of those who are opposed to codification. For it is the fact that some lawyers of eminence have doubted and still doubt the possibility of success in this work. It is argued that a code will introduce greater evils than those it cures; that the wisest legislator can foresee only a small part of the combinations to which human affairs will give rise; and that the infirmities of language will not allow him adequately to provide for the cases he does foresee. Appeal is made, in confirmation, to the actual working of existing codes, all of which, it is said, are in fact supplemented by a mass of comment and traditional interpretation far exceeding in bulk the codes themselves. We shall examine in due course the value of these arguments. We believe it will be found that the objections raised apply rather to a code in the form in which it is commonly proposed that it should be cast, than to a code in the best form in which it is possible to cast it. We think the error of most codifiers has been to rely on the exclusive use of tersely-worded abstract propositions, each intended by force