Technical and Bibliographic Notes / Notes techniques et bibliographiques

The Institute has attempted to obtain the best original copy available for filming. Features of this copy which may be bibliographically unique, which may alter any of the images in the reproduction, or which may significantly change the usual method of filming, are checked below.

L'Institut a microfilmé le meilleur exemplaire qu'il lui a été possible de se procurer. Les détails de cet exemplaire qui sont peut-être uniques du point de vue bibliographique, qui peuvent modifier une image reproduite, ou qui peuvent exiger une modification dans la méthode normale de filmage sont indiqués ci-dessous.

- [ ] Coloured covers/ Couverture de couleur
- [ ] Covers damaged/ Couverture endommagée
- [ ] Covers restored and/or laminated/ Couverture restaurée et/ou pelliculée
- [ ] Cover title missing/ Le titre de couverture manque
- [ ] Coloured maps/ Cartes géographiques en couleur
- [ ] Coloured ink (i.e. other than blue or black)/ Encre de couleur (i.e. autre que bleue ou noire)
- [ ] Coloured plates and/or illustrations/ Planches et/ou illustrations en couleur
- [x] Bound with other material/ Relié avec d'autres documents
- [ ] Tight binding may cause shadows or distortion along interior margin/ La reliure serrée peut causer de l'ombre ou de la distorsion le long de la marge intérieure
- [ ] Blank leaves added during restoration may appear within the text. Whenever possible, these have been omitted from filming/ Il se peut que certaines pages blanches ajoutées lors d'une restauration apparaissent dans le texte, mais, lorsque cela était possible, ces pages n'ont pas été filmées.

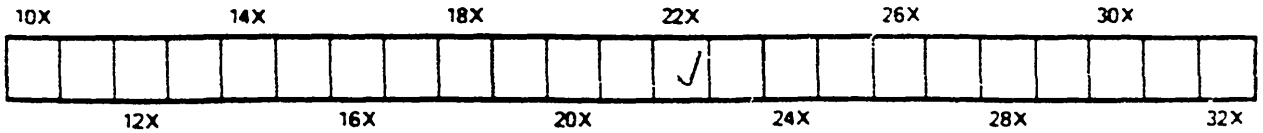
- [ ] Coloured pages/ Pages de couleur
- [ ] Pages damaged/ Pages endommagées
- [ ] Pages restored and/or laminated/ Pages restaurées et/ou pelliculées
- [x] Pages discoloured, stained or foxed/ Pages décolorées, tachetées ou piquées
- [ ] Pages detached/ Pages détachées
- [x] Showthrough/ Transparence
- [x] Quality of print varies/ Qualité inégale de l'impression
- [x] Continuous pagination/ Pagination continue
- [ ] Includes index(es)/ Comprend un (des) index

Title on header taken from:/ Le titre de l'en-tête provient:

- [ ] Title page of issue/ Page de titre de la livraison
- [ ] Caption of issue/ Titre de départ de la livraison
- [ ] Masthead/ Générique (périodiques) de la livraison

- [ ] Additional comments:/ Commentaires supplémentaires:

This item is filmed at the reduction ratio checked below/
Ce document est filmé au taux de réduction indiqué ci-dessous.



THE LAW REPORTER.

JOURNAL DE JURISPRUDENCE.

CRIMINAL LAW.

We are always disposed to look with favor on amendments, or what purport to be so, when applied to any system that is palpably faulty; but not so when it is proposed to interfere with the working of an institution so nearly perfect as our criminal law. We are ready to admit that the great English Law Reformers have done something to simplify criminal procedure, and the humble imitation now before us, in the former of these Bills,* we admit, follows pretty much their example; but we are disposed to doubt whether the advantages gained by this simplification will compensate for the risk of the change. In defence of Lord Campbell's last Act, (14 & 15 V. c. 100,) it is contended† that from the technicalities required under the old system, it was not uncommon for a guilty person to escape, and that a new trial did not always ensure conviction. This we admit, but it is also true that all the technicalities of the old system were not always sufficient to secure the innocent from an incorrect verdict. We can readily believe that Lord Campbell's act has not decreased convictions; but until we are convinced that some system has been discovered so perfect that no innocent man can ever escape and no guilty one ever be punished, as a sturdy old veteran, who had unbounded faith in all military institutions, once informed us was the case in Courts Martial, we shall not be disposed to look with much favor on such modifications as those proposed by Mr. Cameron.

But however popular may be this pretended reform, there is one section of this Bill, which we should think would hardly meet with much sympathy. We allude to the 38th Section, by which it is proposed to enact that "any person being one of Her Majesty's Counsel, learned in the law *in this Province*, may be an associate Justice of any such Court (Courts of Assize and Nisi Prius, Oyer, Terminer and General Gaol Delivery, sitting in Upper Canada) for the despatch of civil and criminal business at any county or place, or upon any Circuit in Upper Canada, and any such person shall and may be, and act as a Judge of such Courts, as fully, to all intents and purposes, as if he were duly commissioned as one of Her Majesty's Judges of the said Superior Courts."

* Bill to amend the Criminal Law of this Province. *Hon. J. H. Cameron.*
Acte pour amender et consolider les lois relatives aux crimes de faux et de supposition de nom. Mr. Felton.

† V. Preface to Lord Campbell's Acts, by *C. S. Greaves, Esq., Q. C., London*, 1851.

In a word, that any number of Queen's Counsel it may please the executive to name, may besiege any of the Courts of Law in Upper Canada, and there out-vote the regularly appointed Judges of the land.

We conjure Mr. Cameron, ere he renders himself instrumental in passing such a measure, to pause and consider what would be the consequences of an invasion of a new levy of some sixteen or twenty newly caught Queen's Counsel from Lower Canada, determined to sit on a case perhaps involving an intricate question of real property.

Amid this rage for law reform, we are also menaced with a bill introduced by the learned prosecutor for the Crown at Sherbrooke; which surpasses anything in the shape of legislation we have ever had the good, or rather ill fortune to read. To describe it minutely would not be easy, but its principal characteristic is that it endeavours to convert into a felony the most innocent actions of every man's life, that it presumes guilt and leaves innocence to be proved. As an instance of this, we may take the 14th and 19th sections, by which it is proposed to enact that if a person is aware that there is some forged promissory note, letter of credit or bank note lying in some one of his open fields, he is liable to being convicted of felony unless he can prove how it came there. It is not to be denied that, in the locality in which the learned legislator has acquired his professional experience, the crimes against which the Bill now under our consideration is directed are only too common; but this sort of rough legislation is not found to produce the effect intended, and for the simple reason, that by its operation innocence and guilt are so nearly allied, that the line of demarcation is lost, juries cannot be got to convict, or public opinion to blame them for not convicting.

ROMAN LAW.

Introductory Lecture on the Roman Law, delivered by Frederick W. Torrance, Esquire, in connection with the Law Faculty of McGill College, Montreal, in the Hall of the Court of Appeals, Montreal, on the 13th January, 1854.

"Comme si les grandes destinées de Rome n'etaient pas encore accomplies; èlle regne dans toute la terre par sa raison, après avoir cessé d'y regner par son autorité."—D'Aguesseau, Œuvres, 1, 157.

It having been committed to my charge to deliver a course of Lectures on the Roman Law, it is fitting that I should introduce the subject with such observations as shall tend to bring it home to our understandings. By this means, the attention of the hearer will be awakened, and he will enter upon the course with his feelings interested and his mind engaged. In pursuance of this plan the topics which naturally present themselves for our consideration in an introductory Lecture, are the national characteristics of the Ancient Romans—their national policy—the characteristics of their famous Jurisprudence—and the advantages to be derived from its study, by the man of education and the Lawyer.

The laws of a nation form the most instructive part of its history. If a man would learn much of the genius and habits of a people, and be instructed by the events of its history, he should study its laws.

There is not in the history of the world to be found a subject of more interesting and profitable contemplation than is presented by the rise, progress and downfall of the Ancient Roman Empire,—whether we consider the space it has occupied in the civilization of our earth, during the time of its existence, or the influence it has since exercised on the growth of modern civilization.

The extent and grandeur of the Roman Empire far exceeded that of any other people of antiquity. It comprehended the fairest parts of the then known earth; and so majestic were its proportions, that its greatest historian ends his memorable history with the observation, that its decline and fall presents the greatest, perhaps, and the most awful scene in the history of mankind.*

It measured in breadth about 2000 miles from the wall of Antoninus and the northern limits of Dacia, to mount Atlas and the tropic of Cancer,—in length about 3000 miles from the Western Ocean to the Euphrates;—embracing the fairest portion of the temperate zone; it was supposed to contain 1,600,000 square miles, for the most part of

* Gibbon's Decline, v. 6, p. 541, cap. LXXI.

fertile and well cultivated land, covered by a population of 120,000,000, a number more than half the present population of the whole of Europe.*

This ancient people must ever remain the most attractive and profitable subject of study, and its literature form the basis of every enlightened system of education. The languages of Modern Europe are more than half formed from the language of Ancient Rome, but their obligations to it, are not greater than the obligations of their literature to her literature.

Her laws also have been in great part incorporated into the laws of modern nations both in Europe and America, and it is not too much to say that full grown manhood does not owe more to the studies of youth than does modern civilization to the civilization of ancient times.

The Roman *or* Civil Law forms the basis of every existing system of Commercial Law. It is believed to have constituted the body of the ancient Common Law of England, in which country as a Province of the Roman Empire the Roman Jurisprudence, polity and government, existed for upwards of three centuries and a half, and have left many traces behind. In Germany, Bohemia, Hungary, Poland and Holland, it has formed the Common Law. In Scotland for a time, it formed the only system of jurisprudence, and its Advocates were for a time examined on the Roman Law alone. It is taught and obeyed in France and Spain. It is law in the Islands of the Indian Ocean. It was introduced into the Island of Ceylon by the Dutch. It governs the New States in Spanish America. It flourishes on the banks of the Mississippi—in the State of Louisiana. It is taught and studied on the banks of the St. Lawrence by our own firesides;—proving the truth of the striking observation of the French Chancellor, D'Aguesseau, that "the grand destinies of Rome are not yet accomplished; she reigns throughout the world by her reason, after having ceased to reign by her authority."†

How can we then explain the mighty influences of Roman civilization? Among the causes, I would mention these three;—the immense duration of the Roman Empire,—the national characteristics of the Romans; their national polity.

When we consider the duration of this Empire, we find it presents a very great contrast in this respect to other nations.—The Athenian

* Gibbon's Decline, vol. 1, p. 32.—"Nothing conveyed a juster notion of the "greatness of Roman history than those chapters in Gibbon's work, in which he "brings before us the state of the east, and of the north, of Persia and Germany, "and is led unavoidably to write a universal history because all nations were mixed "up with the greatness and the decline of Rome. This, indeed, is the peculiar "magnificence of our subject, that the history of Rome, must be in some sort, the "history of the world; no nation, no language, no country of the ancient world "can altogether escape our researches if we follow on steadily the progress of the "Roman dominion, till it reached its greatest extent."
Arnold's History of Rome, p. 68, cap. XL.

† "Comme si les grandes destinées de Rome n'étaient pas encore accomplies; elle regne dans toute la terre par sa raison, après avoir cessé d'y regner par son autorité."—D'Aguesseau Œuvres, 1, 157.

power lasted but a few years, the empire founded by Alexander the Great fell to pieces with the death of its founder. We know little of the dynasties of the famous Babylon and Nineveh so remote is their history. In our own time the power of Napoleon the Great did not last his lifetime.

Far different were the fortunes of Imperial Rome. The Roman power was not the creature of a day. It was the steady growth of twelve centuries of progress, and its durability was proportioned to the tardiness of its growth and the solidity of its materials.

It has been remarked that the twelve vultures which Romulus beheld on the Palatine Hill were emblematic of the twelve centuries which beheld the existence of the empire of the west; and it required a thousand years more of corruption and decay to extinguish in the east this famous empire, which, regenerated by the genius of Constantine the Great, found in the wealth and incomparable situation of its metropolis, Byzantium, the modern Constantinople, some counterpoise to the effeminacy of Oriental manners and the fierce energy of the Scythian hordes.

I shall now say a few words on the national characteristics and national polity of the Romans, for, in contemplating the career of a people called to such exalted destinies, the national characteristics and national polity will suggest the chief causes of their wonderful fortunes and wonderful influences.

Among the striking characteristics of the Roman people, were the love of dominion—the love of conquest—a haughty and indomitable spirit. Hence the extension of the Roman power by war. This would appear to be the essence of the history of Rome—the carrying out of the purpose of its existence. And contemplating the fulfilment of this purpose, we are struck by the steady and solemn march of the Roman power. To use the beautiful language of an anonymous writer "Amid the twilight of Pelasgic and Oscan fable the foundations of the "Roman forum are laid. Then the narrative begins. First are seen "kings warring with petty tribes within sight of the walls. A "dominion gained by the last and most powerful of these kings is lost "by the revolution which makes the city free, is once more regained, "extended, carried by a long line of consuls, a long series of triumphs "to the Alps on the north, to the Sicilian Sea on the south. War fol-"lows war;—province is added to province;—an ever increasing cir-"cle owns the great city's sway; until, at last, fire worshippers of the "ast receive their monarchs from the Roman Senate, and Druidical "Chieftains from Gaul and Britain are led in triumph up the sacred "way."*

We know that there was a temple at Rome erected and dedicated to the God Janus, the gates of which were open in time of war and closed in time of peace, and we are told that during the long period of seven centuries—so unceasingly were the ancient Romans engaged in wars—this temple was closed but thrice.

* Times, Oct. 18th, 1853.

Nor were these wars little wars. Freqnently was the republic brought to the brink of ruin—and only saved by the obstinate determination of the people and their unswerving faith in their destinies. Terrible were the reverses which they met with again and again, but these reverses seemed only to develope their strength and to be among the direct causes of their dominion. The struggles with the Samnites and Etruscans were struggles for dominion, or rather for existence as a nation. We see the city taken and burnt by the Gauls, and only the Capitol saved by a miracle of good fortune. But notwithstanding all, —their progress is still onward. Again in the last coalition of the Italian States against Rome, we find Pyrrhus, the greatest prince and general of Greece called over to head it; and even in those early times so noble was the appearance of the great city, and so majestic the port of her inhabitants, that Cineas, the Ambassador of that king, carrying back his report to his master, likened the city to a temple, and her Senate he described as an assembly of kings.*

Then we have the tremendous contest with Carthage, and the three Punic wars, in the second of which, Rome, unbending under reverses, refuses to treat with Hannibal at her gates, and with this famous general within her territories for seventeen years, heroically carries on a contest with her enemies abroad, and eventually triumphs. Rome was no more assailed at home, but we see her engaged in another tremendous struggle and suffering other tremendous reverses in the collision with Mithridates the Great, ending, however, like the former ones, in the signal triumph of the Great City.

Another very striking characteristic of the ancient Romans was their appreciation of their Jurisconsults. They were jurisconsults by disposition.†

I am here reminded of a remarkable passage in the famous speech of Edmund Burke on conciliation with America, where he describes the American character and speaks of their addiction to legal studies. He says, "in no country perhaps in the world is the law so general a "study. The profession itself is numerous and powerful; and in most "provinces it takes the lead. The greater number of the deputies sent "to the congress are lawyers. But all who read, and most do read, "endeavour to obtain some smattering in that science."‡

This passage would seem well to describe the ancient Romans.

We are all familiar by our reading of Roman history with the relation of patron and client. The early jurisconsults had long trains of followers, and their business consisted both in advising and acting on

* "Conceive what that city was, which Cineas likened to a temple; what was "the real character of that people, whose senate he described as an assembly of "kings." Arnold's Rome, p. 362, cap. XXXIV.

† Arnold's Rome, Chap. VI, p. 36. "The most striking point in the character of "the Romans, and that which has so permanently influenced the condition of man-"kind, was their love of institutions, and of order, their reverence for law, their "habit of considering the individual as living only for that society of which he "was a member."

‡ Burke's Wks., 2, p. 36.

behalf of their clients gratuitously. Their poets and satirists abound in allusions to this custom and Cicero informs us that they gave their advice or answers either in public places which they attended at certain times, or at their own houses, and not only on matters of law but on any thing else that might be referred to them.

Long before the time of Cicero the study of law had become a distinct branch from the study of oratory, and a man might raise himself to eminence in the state by his reputation as a lawyer, as well as by his oratorical power or military skill.*

Mr. Lerminier, lately a professor in the College of France at Paris, in a work published some twenty-four years ago on the History of Law, notices the prominent place held by the science of jurisprudence in the Roman mind in the following terms. "It is now time" he says "to "ask what was the position held by the science of the Law in the "Roman mind. In the East, law does not exist under precise and "individual forms. In Greece, it has more prominence; but ruled "over by religion and the State, it has not yet attained to indepen- "dence and therefore not to originality.† It is at Rome, that for the "first time, law is altogether separated from foreign elements, and "makes itself individual and puissant. Rome is not the World of Art "and of Science. Far from that, the love she exhibited for the "sciences and arts of Greece was a sign of decay for her genius. "Rome has not any more the universal and absolute genius of religion. "She is solely occupied with the State—with the citizen, with politic- "al and civil relations, in a word, with law; to such a degree that we "must not say that law has at Rome a suitable position, but that "Rome is truly the world of law "*tellement qu'il ne faut pas "dire que le droit ait à Rome un rang convenable, mais que Rome "est veritablement le monde du droit.*"‡

In the remarks already made, there is much from which we may infer the powerful influence of Roman civilization on the civilization of the world. But the author I have just now quoted has some striking observations on the intellectual influence and duration of the Roman Jurisprudence, which throw additional light on the genius of the Roman people. I translate. He asks, "How can we explain the intellectual power of the Roman jurisprudence and its political duration?" He answers, "In going back continually and unceasingly to the contemplation of the genius of Rome; in burying ourselves in the study of Roman originality, in order to snatch from her the secret and the reason of this inimitable legislation. The Roman, severe, austere, avaricious, of a positive spirit, was passionately attached to his origin and his national peculiarities; a zealous follower of the customs of his fathers, and of their ancient constitution, he never broke the chain of

* Smith's Ant., p. 537. *Verbo*, Jurisconsulti.

† I would add that Adam Smith in his wealth of nations remarks that Law did not attain to the dignity of a science in any Greek Republic. Smith's Wealth, B. V., Cap. 1.

‡ P. 386, 2nd edit.

years; always bound to the ancient traditions, the new ideas, carried in his designs, an indissoluble continuity, and in their execution an immoveable constancy. Hence, the statesmen, the men of political genius, the great jurisconsults. Rome has, eminently, political genius. I do not say, social genius, for she trampled under feet the nations, and to her triumphs she harnessed kings. But the idea, the sentiment of the State, of right, of law, of the constitution, of what is national, paternal, preoccupies and fills her; for her the arts, philosophy, the pleasures of thought, are only an amusement, and a distraction. Abroad, she displays an implacable perseverance in bringing to a successful issue her designs: neither reverses prostrate, nor artifices deceive her; she subdues all, she penetrates all: what she has resolved, she always brings to pass. It is in vain that Carthage shines conspicuous, and strengthens herself:

Dives opum, studiis que asperrima.

Neither her commerce nor her riches will save her; in the midst even of the victories of her Hannibal, there is a presentiment of her ruin, and she would seem always to see hovering over her the Roman Eagle fascinating her with his glance, until he causes her to fall into his inevitable grasp.* Compare the Grecian spirit to the Roman genius, you will find in the Grecian statesman, if you except the great Themistocles, Pericles the Olympian, and a few Spartans, something trifling, without consistency, futile, characters which do not hold. The proud Roman was not mistaken in it, and said "*Græculus quidam*"• In Greece, at Athens, people thought more of the ideas of Plato, and the verses of Aristophanes than of the Peloponesian war; but at Rome, you saw, walking in the forum grave and austere men who only thought of maintaining their rights at home, and abroad, of conquering the world.†"

So it was Virgil truly conceived the genius of his nation when he pictured to us Anchises addressing Aeneas, the ancestor of the Romans, in language which has been often quoted and admired.

> "Excudent alii spirantia mollius aera;
> Credo, equidem, vivos ducent de marmore vultus:
> Orabunt causas melius, cœlique meatus
> Describent radio, et surgentia sidera dicent.
> Tu regere imperio populos; Romane, memento;
> Hæ tibi erunt artes; pacis-que imponere morem;
> Parcere subjectis; et debellare superbos."
>
> Aeneidos, VI.. 848-854.

Thus paraphrased by Dryden.

> Let others better mould the running mass
> Of metals, and inform the breathing brass,
> And soften into flesh a marble face;
> Plead better at the bar; describe the skies,
> And when the stars descend and when they rise.

* Juvenal.
† Pp. 20-22.

But Rome! 'tis thine alone, with awful sway,
To rule mankind, and make the world obey,
Disposing peace and war thy own majestic way;
To tame the proud, the fettered slave to free;
These are Imperial arts, and worthy thee."
Dryden's Æneid, v. v. 1168–1177.

Having now these national characteristics of the Romans in our recollection, it is not difficult to imagine what their national policy would be. I believe the mission of the Romans to have been to reform and renovate the ancient world—to substitute a Roman—say rather a world-wide civilization for the imperfect civilizations of half barbarous nations;—above all, if we may indulge in speculation, the purpose of its existence was, to prepare the world for a heaven-sent faith, which should sweep away the innumerable fantastic forms of human creeds.

The policy of the Romans was pursued with unswerving resolution. We hear much in these days of the restless, subtile and encroaching spirit of the Czars of Russia, and of the religious scrupulosity with which they pursue the sagacious counsels of Peter the Great, and push their conquests, south, east, and west. The policy of the Russians gives a faint conception of the domineering and astute policy of the Romans.

It has not unfrequently happened that, when a people has been vanquished and reduced to subjection, the conquerors have left to them the free enjoyment of their civil rights and laws. Far otherwise did the Romans. When a tract of country was made a Roman Province, they determined to make every thing about it Roman. The Latin language was introduced into the various civil and judicial acts, rendering indispensable to the natives the study of this language. The tenure of the land gradually received an Italian organization. The superior classes experienced and even sought a transformation which tended to their interests and flattered their taste. The emperor by a wise and judicious policy attached to the Roman interests the distinguished persons of the Provinces, laid open to them the avenues of dignities and even made them members of the Senate.*

Roman literature became their study, and when the invasion of the barbarians severed France from the Roman power, the ancient inhabitants of the country had altogether disappeared, and there were only Romans to be found; and we have indeed indubitable proof long before this event; that the provinces had been assimilated to Rome, when all the subjects of the Roman Empire had accorded to them the famous right of Roman citizenship, of the communication of which in earlier times Rome had been so jealous and so chary.

In the subject provinces, the Roman municipal system—the Roman laws—the Roman magistracy—in their entirety were introduced. Roman judges appointed by the emperor and removeable at pleasure, administered the laws—and the emperor at Rome himself constituted the

* Giraud, 1, 76, 7.

highest court of appeal.* We are here reminded of the memorable incident in the life of the Apostle Paul; when his life was sought by the fanatical zeal of his Jewish persecutors, he saved himself from their fury and in a moment ousted the Roman proconsul of his jurisdiction by a solemn appeal to the justice of Cæsar.

A writer in the Paris *Revue de Legislation* of last year† describes in graphic language, the effect on Gaul of its conquest by the Romans "Let us mark above all," he says, "that the Roman conquest had the effect of insensibly and gradually depriving Gaul of everything that could make up her nationality. The barbarians after their invasion did not impose their own laws on the vanquished; Visigoths, Burgundians and Francs all admired the system of personal laws found in the Roman Jurisprudence, whether because they were wanting in ambition or because they obeyed unconsciously that inward feeling of admiration and respect which civilization always inspires in barbarians. But the Romans had proceeded in a very different manner; their astute and ambitious policy consisted in extending their rule by their language, by their manners and above all by their laws. Never has there been another civilization more encroaching and more absorbing than the Roman civilization. "*Aucune autre civilization ne fût plus envahissante et plus absorbante que la civilization Romaine.*"

The testimony of the philosophic Guizot in his lectures on civilization in France is to the same effect.

"The Roman civilization," he says, "has had the terrible power of extirpating national laws, manners, languages, religions; of assimilating and bringing to one form all the Roman conquests."‡

I shall now make a few remarks on the characteristics of the Roman Jurisprudence. It affords unquestionably the example of a more complete and self connected system than the Jurisprudence of any modern nation can exhibit, and we need only consider the large and comprehensive views of the science entertained by the Roman jurisconsults themselves, to have some insight into the causes of its wonderful excellence and exalted position.

The definition § which the Roman Jurisconsults gave of Jurisprudence is the knowledge of things divine and human, in order to distinguish the right and wrong. One is reminded here of the famous definition of law by Dr. Samuel Johnson, as "the science in which the greatest powers of the understanding are applied to the greatest number of facts," and the noble observation of Edmund Burke comes to our mind when he speaks of law as "The Science of Jurisprudence, the pride of human intellect, which, with all its defects, redundancies and errors, is the collected reason of ages, combining the principles of original justice with the infinite variety of human concerns."

* Histoire du droit Francais au moyen age. Giraud, Vol. 1, p. 91.
† A.D. 1853, p. 14.
‡ 11th Lecture, 1, p. 368.
§ Jurisprudentia est divinarum atque humanarum rerum notitia, justi atque injusti scientia. Inst. 1. 1. 1.

And comparing the modern with the ancient definition of Jurisprudence, we are struck with the thought that the wisdom and experience of the wisest of moderns has added nothing to the noble conceptions of the old Romans.

It is indeed a memorable truth that the professors of law in ancient Rome were grand masters in moral as well as legal science,—they drank deep of the fountains of Grecian philosophy—the philosophy of Plato and Aristotle and Zeno. Mr. Lerminier, the author I have already quoted, observes, "The Stoics, appearing in the heart of the republic at the "moment when she was about to fall, instructed the jurisconsults, and "it is to this alliance of the porch and the forum that we must attri- "bute this philosophic jurisprudence, this legislative style, which em- "braces in forms so severe, the decisions of a strict justice and an "inexorable reason."*

But it was not from philosophy alone that the Roman jurisconsults drew their marvellous sagacity. One is struck with the immense variety of their accessary accomplishments. They were deeply read in all human lore. They laid under contribution human genius in its every phase,—Historians, Orators and Poets; and in their writings are found quotations from such Grecian authors as Homer, Hippocrates, Plato, Demosthenes.†

Nor were they oppressed with an unusual weight of learning. The native impulses of their genius have had the fullest developement.

The affinity between law and philosophy in the Roman mind is said to have given a remarkably scientific cast to the cases and opinions of the Roman jurisconsults, who have frequently been likened (for this reason perhaps) to mathematicians. Kant, an illustrious German philosopher, remarks on the method with which the Roman jurisconsults develope their ideas, and Leibnitz a great mathematician as well as philosopher, who, in the opinion of men of science abroad, disputes with Newton some of his most illustrious discoveries, declares that he knows nothing which approaches so near, to the method and precision of Geometry as the Roman Law.‡ The rules of law—*regulæ juris*, (as they are called,) contained in the last Book of the Pandects of Justinian are famous for their sententious wisdom. "Parsimonious in words—prodigal of meaning," it has been remarked of them that they are the greatest body of condensed reasoning to be found in uninspired writings.

The Roman law is singularly free from technicalities. This may have arisen in some measure perhaps from the simplicity of society when the fundamental principles of the Roman law were developed, and the jurisconsults of all nations have paid their homage to its marvellous beauties by uniting to distinguish it as "the system of written reason," as "the Civil Law."§

* P. 19.
† Hugo.
‡ Vide Hugo, Droit Romain.
§ "The law of Rome has the distinguished honor of vindicating to itself the "exclusive title of the Civil Law."—Anonymous. Vid. Halifax, Pref.

I have already alluded in my remarks on the national polity of the Romans, to the rule which gave the inhabitants of the different provinces an appeal to Rome from the decisions of the local Courts. It is worthy of observation that it may have been the immense variety of cases submitted to the jurisconsults of Rome by way of appeal from the many divisions of this vast empire, which communicated to the decisions of the Roman law the spirit of comprehensiveness and breadth for which in all ages they have been celebrated. It was only natural that the efforts of the jurisconsults of Rome should be directed to reduce to one harmonious system the jurisprudence of the many different Provinces of this vast empire, and decide according to strictly equitable and rational principles, all causes submitted to them, whether from Gaul or Britain—Asia Minor or Egypt.* Add to this as another cause of the excellence of the Roman law, a cause to which I have already adverted, the distinguished place in which this science was always held in the Roman world.

The above observations will suffice as regards the matter of the Roman jurisprudence. But a very remarkable characteristic of this system to which I have not yet adverted, is its *style* and *language*. The purity of the language of the Pandects has always been commended; and so perfect and elegant in style, are they held to be, that it has often been remarked that the Latin language might be restored from them alone though all other Latin authors were lost.

A modern French writer alluding to this quality of the Roman law, says, "its texts are the master pieces of the juridical style, and never "more may law be written as it was composed under the pen of "Ulpian and Papinian. One would say the method of Geometry ap-"plied in all its rigour to moral speculations."†

David Hume in his history of England,‡ adds his testimony.

"It is remarkable," he says, "that in the decline of Roman learning, when the philosophers were universally infected with superstition and sophistry, and the poets and historians with barbarism, the lawyers, who in other countries are seldom models of science or politeness, were yet able by the constant study and close imitation of their predecessors to maintain the same good sense in their decisions and reasonings, and the same purity in their language and expression."§

I will now suggest a few of the advantages to be derived from a study of the Roman Jurisprudence by the man of education and the lawyer. I can do it but cursorily, in the limits of a lecture. I shall state my propositions, but have little space to say much by way of proof and illustration.

These advantages may be viewed in relation to the scholar—to the

* Vid. Hugo, *Droit Romain*, 1, p.p. 249-259.

† Lerminier, p.p. 19-20.

‡ 1, p. 444, cap. 23.

§ Campbell in his Philosophy of Rhetoric, remarks on the pith of Latin maxims and mottoes. "They (the Greek and Latin languages) are, in respect of vivacity, "elegance, animation, and variety of harmony incomparably superior."—Rhet. "p. 409.

divine—to the statesman—to the lawyer. First in relation to the scholar. An acquaintance with the Roman law is very necessary for an understanding of the Latin classics—in which are to be found many passages altogether unintelligible without this acquaintance. But more than this, the body of the Roman law contains the application of the eternal principles of justice and equity to the affairs of a highly civilized people during several centuries, by accomplished sages—from whom lessons of wisdom are to be derived of inestimable value. It is an interesting fact that the revival of the study of the Roman law in the middle ages commenced the revival of letters and the study of the Roman law, and the study of ancient literature have always since gone hand in hand and flourished or declined together.*

On this head I cannot do better than quote the words of Sir William Hamilton, Professor of Logic and Metaphics in the Edinburgh University, a great authority in France and Germany, in an article contributed by him to the Edinburgh Review in the number for October, 1836. They are as follows: "An acquaintance with the Roman jurisprudence has been always viewed as indispensable for the illustration of Latin philology and antiquities, insomuch, that in most countries of Europe, ancient literature and the Roman law have prospered or declined together; the most successful cultivators of either department have indeed been almost uniformly cultivators of both.—In Italy, Roman law, and ancient literature revived together, and Alciatus was not vainer of his Latin poetry than Politian of his interpretation of the Pandects. In France, the critical study of the Roman jurisprudence, was opened by Budœus, who died the most accomplished Grecian of his age; and in the following generation, Cujacius and Joseph Scaliger were only the leaders of an illustrious band, who combined, in almost equal proportions, law with literature, and literature with law. To Holland the two studies migrated in company; and the high and permanent prosperity of the Dutch schools of jurisprudence has been at once the effect and the cause of the long celebrity of the Dutch schools of classical philology. In Germany, the great scholars and civilians, who illustrated the 16th century, disappeared together; and with a few partial exceptions, they were not replaced until the middle of the 18th, when the kindred studies began and have continued to flourish in reciprocal luxuriance."

Secondly: As to the utility of the Roman law to the Divine. This depends upon the question whether classical studies are essential to the divine. I have not time to do more than state the proposition, "that theology is little else than an applied philology and criticism; of which the basis is a profound knowledge of the languages and history of the ancient world. To be a competent divine is in fact to be a scholar."†

I have already pointed at the importance of the Roman law to the scholar. From that, follows its importance to the divine.

Thirdly: On the importance of the Roman law to the statesman.

* Hamilton's Discussions, p. 328. Irving's Civil Law, p. 7.
† Same author, p. 330.

It has been well said that "it is impossible that foreign nations "could carry on their transactions with each other without having "recourse to some common standard, by which to regulate their dis- "putes; and this common standard, by the consent of all, is the "Roman law; in which the rights and privileges of ambassadors, the "interpretation of leagues and treaties, the incidents of war and "peace, are discussed with a care and precision in vain to be sought "for in the institutions of other kingdoms."*

Hence I would remind you of the practice which has not unfrequently obtained in state affairs, when a state paper is to be prepared, requiring a knowledge of international law, and great skill in its composition, to retain the services of an eminent jurisconsult, and the document sent from his hand, goes forth to the world, as the manifesto or vindication of a government. I can give an interesting illustration of this from the life of Edward Gibbon, the author of the Decline and Fall of the Roman Empire. This celebrated historian was an accomplished jurisconsult. His famous 44th Chapter on the Roman Jurisprudence has been translated and commented on by French and German professors, and forms the text book of students on Roman law in some of the continental universities. On one occasion the services of Gibbon in the composition of an important state paper were requested by the British Government. He tells the circumstance in his memoirs, "at "the request," he says, "of the Lord Chancellor and Lord Weymouth, "then Secretary of State, I vindicated aginst the French manifesto, "the justice of the British Arms. The whole correspondence of "Lord Stormont, our late Ambassador at Paris, was submitted to my "inspection and the *memoire justificatif* which I composed in French, "was first approved by the Cabinet Ministers, and then delivered as a "state paper to the Courts of Europe."†

It now remains for me to say a few words with respect to the advantages of the study of the Roman law to the Lawyer.

I have pointed out among the intrinsic excellences of the Roman law its philosophic character and the beauty of the language in which it is written.

It has in consequence been deservedly called a model code, and with much truth and force it has been said that the Roman law is to the modern Lawyer what the beautiful masterpieces of antiquity are to the Statuary and Sculptor.‡

I would further observe that the compilations of the Roman law are less laws than applications of laws made, or cases decided by jurisconsults and magistrates who were eminent for profound learning and exact logic, and the experience and wisdom of the Roman jurisconsults make these opinions of inestimable value in similar cases, which at the present day are continally presenting themselves.§ The most valuable

* Halifax's Analysis, Pref. XIX, and Seq.
† Gibbon's Mem., p. 99.
‡ Blondeau, Chrestomathie, Pref., p. 3, (note).
§ Blondeau, XXV.

parts of these compilations are in fact cases or reports of cases and opinions on them given by the most celebrated jurisconsults of the Roman Empire, and these cases and opinions are unquestionably as valuable to the Civil Lawyer as the reports of cases in the English Law Reports are to an English Barrister.

This is readily seen if we consider under what circumstances these opinions were given. For example a question arises as to the precise extent of the civil responsibility of a public officer--a magistrate—a tutor —curator--or trustee—for some act of mal-administration, or a question arises in the interpretation of a will or a contract, whether at Rome or in the Provinces. The case is referred to the emperor*—by him referred to the imperial jurisconsults,† perhaps a bench of Judges in position not unlike the Judicial Committee of Her Majesty's Privy Council, who decide cases from the Colonies. The report of the Roman jurisconsults was the rule of decision in the case submitted and all similar cases.

Further ;—many of the principles and maxims of modern Jurisprudence are derived from the Roman Law. Many of the dispositions of modern codes are taken from it, and new laws are always made clearer by a comparison with those which precede them, and from which they are derived.

To show how dependent modern Jurisprudence is upon the Roman Law, I will make a few observations on the English and French Law supported by weighty authorities, by which you can judge of its influence upon them—and their obligations to it.

First as to England, we are accustomed to view the English law as anti-Roman. Yet it is a fact too incontestable to be denied that certain parts and principles of the Roman Law have been incorporated into the English. The learned Selden in his dissertation of Fleta has shewn that during the greatest part of the subjection of the island to the Romans, or from the time of Claudius to that of Honorius, about three hundred and sixty years, it was chiefly governed by the Roman Law; within which interval, Papinian, Ulpian, Paulus and others of the Roman Lawyers whose responses make so distinguished a figure in the Digest, presided in the Roman tribunals in Britain.‡

After the Roman Jurisprudence had been expelled by the arms of the northern barbarians, and supplanted by the crude institutions of the Anglo Saxons, it was again introduced into the Island, upon the recovery of the Pandects, and taught in the first instance with the same zeal as on the continent.§

But the rivalship and even hostility which soon afterwards arose between the civil and common law; between the two universities and the Law Schools or Colleges at Westminster; between the clergy and laity, tended to check the progress of the system in England and to

* Giraud, 1, 92.
† Vid. Blondeau Chrestomathie, Intro., p. XC.
‡ Halifax, Pref., p. xxi.
§ Id. xxii.

confine its influence to those Courts which were under the more immediate superintendence of the clergy. The Ecclesiastical Courts, and the Court of Chancery accordingly adopted the canon and Roman Law; and the Court of Admirality, which was constituted about the time of Edward I., also supplied the defects of the laws of Oleron from the civil law, which was generally applied to fill up the chasms that appeared in any of the municipal systems of the modern European nations.

A national prejudice was early formed in England against the civil law. But the more liberal spirit of modern times has justly appreciated the intrinsic merit of the Roman system.*

I will here give you the testimony of English witnesses as to the merits of the Civil Law.

Bishop Burnet in his life of Lord Chief Justice Sir Matthew Hale says: "He set himself much to the study of the Roman Law; and he "often said that the true grounds and reasons of law were so well deliv-"ered in the Digests, that a man could never understand law as a science "so well as by seeking it there, and he therefore lamented much that it "was so little studied in England."†

That great English Lawyer Lord Holt is said to have spoken on this matter as follows: "Inasmuch as the laws of all nations are doubtless "raised out of the ruins of the Roman empire, it must be owned that "the principles of our law are borrowed from the civil law;—there-"fore grounded upon the same reason in many things."‡

A similar opinion is delivered by Dr. Wood: "Upon a review," he says, "I think it may be maintained that a great part of the Civil Law "is part of the law of England and interwoven with it throughout."

According to Dr. Cowell, "the Common Law of England is noth-"ing else but a mixture of the feudal and the Roman Law." And in reference to the Pandects, that accomplished scholar Sir William Jones, says: "it is a most valuable mine of judicial knowledge; it "gives law at this hour to the greater part of Europe and though few "English Lawyers dare make the acknowledgement, it is the true "source of nearly all our English laws that are not of a feudal origin."§

The English and American Statutes of distribution of intestates' effects were essentially borrowed from a Statute of Justinian known as the 118th Novel—the English Statute being drafted by a civilian on this Novel, and we may observe how necessary for the proper understanding of these Statutes, is the power of appreciating the original Novel upon which they are based.

The great Lord Mansfield won for himself the noble title of "founder of the commercial Law of England," and he always maintained that the foundation of Jurisprudence was the Roman Civil Law. He was deeply indebted to that source for his profound views, and the high authority his decisions have attained. It was for his continual allusions

*Kent Com. vol. I., p. 594,5.
† P.p. 23-4.
‡ 12 mod. R. 482.
§ Irving. 95-6.

to the Roman Law that the celebrated author of the letters of Junius launched out his anathemas against him.*

Hume, in his History of England, speaks of the Roman Law as an inestimable boon to the rude nations of Europe in the middle ages and says that "a great part of it was transferred into the practice of the Courts of Justice in England." †

Chancellor Kent, in his Commentaries on American Law,‡ says, speaking of the Roman Law: "The title *de diversis regulis* in the Pandects, as well as the sententious rules and principles which pervade the whole body of the Roman Civil Law, show how largely the Common Law of England is indebted to the Roman Law for its code of proverbial wisdom. There are scarcely any maxims in the English law but what were derived from the Romans; and it has been affirmed by a very competent judge that if the fame of the Roman Law rested solely on the single Book of the Pandects which contains the *Regulæ juris*, it would endure for ever on that foundation." This American Jurist sums up the merits of the Roman Law in language so just and appropriate that I will read it.

"The value of the Civil Law is not to be found in questions which "relate to the connexion between the government and the people, or "in provisions for personal security in criminal cases. In every thing "which concerns civil and political liberty, it cannot be compared with "the free spirit of the English and American Common Law. But "upon subjects relating to private rights and personal contracts, and "the duties which flow from them, there is no system of law in which "principles are investigated with more good sense, or declared and en- "forced with more accurate and impartial justice. I prefer the regu- "lations of the Common Law upon the subject of the paternal and "conjugal relations, but there are many subjects in which the Civil "Law greatly excels. The rights and duties of tutors and guardians "are regulated by wise and just principles. The rights of absolute "and usufructuary property, and the various ways by which property "may be acquired, enlarged, transferred and lost, and the incidents "and accommodations which fairly belong to property, are admirably "discussed in the Roman Law, and the most refined and equitable dis- "tinctions are established and vindicated. Trusts are settled and "pursued through all their numerous modifications and complicated de- "tails, in the most rational and equitable manner. So, the rights and "duties flowing from personal contracts, express and implied, and un- "der the infinite variety of shapes which they assume in the business "and commerce of life, are defined and illustrated with a clearness and "brevity without example. In all these respects, and in many others "which the limits of the present discussion will not permit me to exa- "mine, the Civil Law shows the proofs of the highest cultivation and

*Blaxland, Codex, p. 155. Kent 1, 542.—Campbell's Justices 2,327.
† Vol. 1, p. 444, cap. xxiii.
‡ 2,.552.

" refinement; and no one who peruses it can well avoid the conviction, " that it has been the fruitful source of those comprehensive views and " and solid principles which have been applied to elevate and adorn " the jurisprudence of modern nations."*

Taking up now the subject of French Law. It is important to remark that the Roman Law continued to exist from the fall of the Western Empire till the revival of letters, as a living system.

The contrary opinion for a long time prevailed and has been popularized (if I may use the expression) in many of our household books, that the Roman law disappeared with the fall of the Empire, and was only resuscitated in the 12th century by the discovery of a manuscript copy of the Pandects at Amalfi, in Italy. This error was pointed out in a work of M. Savigny a German author entitled " History of the Roman law in the middle ages," published in the first quarter of the present century, in which work are gathered all the traces of the Roman Law from the 5th to the 12th century, proving that during this period it never ceased to exist.

Since the revival of learning, France has produced most illustrious commentators on the Roman Law, who have exhibited such marvellous aptitude for learning and instruction,and made such impression upon their own and subsequent ages, that with reference to them it may truly be said, there were giants in those days. One of these epoch men was the celebrated Cujacius, mentioned already, and born about 1552. All the jurisconsults of Europe are agreed in considering him as the first and greatest of expositors on the Roman Law.

I should here remark that the body of the French Law is, in great part, composed of the Roman Law and the Customary Law, and while Cujacius was the prince of commentators on the former branch of the French Law, a great luminary in the customary law appeared shortly before him in the person of Charles Dumoulin (styled in Latin Molinaeus) who was called the French Papinian,—the prince of the French Customary Law. These two branches of the French jurisprudence,—the Roman Law and the Customary Law,—(*Les Coutumes*) may be said with some justice to hold the same relation to each other which the English Chancery System and Common Law hold to one another in the English Law, but blended together in some measure, and not separated, like the branches of the English Law.

Of Dumoulin, it has been said that he applied the principles and enlightenment derived from his study of the Roman Law, to the interpretation of the French municipal usages. †

Time does not permit me more than to mention the name of Domat as an illustrious Commentator on the Roman Law, born in 1625, the friend and almost the pupil of the celebrated Pascal.

The author of greatest renown in our Courts on French Law, is unquestionably Robert Joseph Pothier, born in 1699, the most distinguished jurisconsult of France in the last century, and eminent both as a

* Com. 1, 547,7.

† De Trosne. Eloge de Pothier. Œuvres de Pothier, vol. I., XLIII.

Commentator on the Customary Law and on the Roman Law in France.

He is emphatically to the French and Lower Canada Lawyer, what Blackstone in the popular mind is to the English Lawyer, though in intellectual power and accomplishments, immeasurably the superior of Blackstone.

One of my aims in this lecture is to shew the advantages of the study of the Roman law to the French Lawyer. Pothier is the great oracle on law in our country, and we cannot better demonstrate the importance of the Roman law to the jurisconsult than by pointing out the obligations of Pothier to it.

His first great labour in the course of his illustrious career was his great work on the Pandects of Justinian, which occupied him 12 years till its completion, or 25 years if we include his preliminary studies.* To accomplish this work, his familiarity with the Roman law was extreme, as was testified by the worn appearance which was exhibited, (his biographer tells us) by the copy of the *Corpus juris* in daily and incessant use by him, and if you take up his treatises on sales, on wills, and legacies, on agency, or other contracts, you will see at once that the French law books on the subjects are only commentaries on the Roman law, and in many places taken word for word from the Roman law.

It is here interesting to state as illustrative of the influence of the Roman law on modern institutions that many of the doctrines enunciated by Pothier in his treatises are incorporated in the celebrated code of Napoleon, and in many parts form the text—word for word—of this code. On this head, I find the following language in a late number of the Paris Revue de Legislation. "The basis of the theories of contracts and obligations in the code comes to us almost entirely from the Roman law. It is sufficient in order to be convinced of this origin to place in juxta-position and compare the texts of the code with the works of Domat and Pothier."†

Since the code of Napoleon became law, the most illustrious commentator on it was the late Mr. Toullier, whose works are a necessary part of every modern French Lawyer's library It was an indispensable part of this author's education that he became an accomplished Roman Lawyer, like Pothier, and his Biographer tell us that after Cujacius, his favorite author was Vinnius, on the institutes of Justinian, which he left covered with notes, yellow, and torn with constant use.

Another illustrious French Lawyer, still living, and at the head of his profession, and who has filled the high office of Chancellor of France, is the celebrated M. Dupin. At the time when most of the French youth were filled with the opening glories of the Empire of Napoleon, Dupin, an obscure young man, occupied a humble lodging in a small street in Paris, and following the example of Pothier and the native bent of his own genius, spent his days and nights in searching the Roman law, and Cujacius its most illustrious commentator.

* De Trosne, Id. XXXV.
† A.D. 1853, p. 56.

These illustrious instances will suffice to demonstrate the necessity of a familiarity with the Roman law to any lawyer who would aspire to eminence in his profession. No one is more deeply alive than myself to the importance of a knowledge of practice and pleading to the successful lawyer, (of the necessity, (to use a favourite expression of the late Daniel O'Connell,)* of being a thorough tradesman in one's profession, but these are the mechanical parts of the profession, beyond which, if a man would rise, he must be able to go to the fountain heads of legal lore, and not sluggishly remain by the streams which are tainted with impurities gathered in the flow of ages. No independent and conscientious jurisconsult will be content with the opinion of Pothier or Toullier when he knows, that that opinion has been got second hand from the Roman law, and perhaps altered and modified according to the mental bias of the commentator. There can be no finality in law any more than in politics. The labours of the jurisconsults of the 16th or 17th or 18th centuries on the Roman law will not suffice to the jurisconsult of the 19th century. His inquisitive eye will not be bounded by the view of Cujacius, or Domat, or Pothier, when, beyond that,—he may examine and scrutinize for himself the broad and fertile tracts of the Roman Law.†

I trust that it is not requisite for me to dwell on the absolute necessity or the vital importance of the study of the Roman law to the lawyer of Lower Canada.

The prominent position held by the Roman law in the studies of the modern lawyer, is sustained by the regulations of Universities, and the enactments of Legislatures. In France, in Germany, in Scotland, the student of law is only admitted to practise as an Advocate, after a regular course of studies on Roman law in the Universities, in which the professorial chairs are occupied by the most eminent jurisconsults.

I will now give one view more in illustration of the position which the Roman Law rightly holds in the modern mind.

It has been finely and most truly observed that the Roman law bears the same relation to law in general, which the classics do to literature.‡

And considering the relation in which the classics stand to literature it has always struck me as a most forcible argument in favour of their cultivation, that in this way, the greatest intellects in the various civilized countries of the world,—having the same studies in common,—have been carried onward in the same direction, and so have tended to produce the greatest intellectual results, manifesting in this way a marvellous unity of purpose in the diversity of these countries. The modern mind being formed upon the same intellectual basis—being turned in the same direction—by the combined efforts of many different thinkers in different countries—has produced marvellous utilitarian results.

* Vid. Campbell's Lives of Chief Justices, 2, 167.

† "En droit comme en histoire, comme en politique, comme en tout, c'est une pretension déraisonnable de vouloir rompre avec le passé."—Troplong, Vente, Pref. XXX.

‡ Savigny.

It is not difficult to conceive that a system of jurisprudence so perfect and comprehensive as the Roman law,—being familiar to the minds of the legislators of different countries in different parts of the world, and being in fact their model code, and the ground work of their legal education, should have the effect of removing the jarring and discordant elements in the various modern codes.

The tendency of this noble jurisprudence undoubtedly is, to lessen the deplorable antagonism so well known among jurisconsults by the name of the conflict of laws, and to bring the legislations of modern nations into harmony with one another—to bring to pass for national codes in general—what has in a great measure come to pass—and through its agency,—as regards the commercial law of the world—to bring the laws of modern nations into a grand unity and harmony.

In the magnificent fortunes of this noble jurisprudence, we see exhibited the majestic influences of the human intellect through countless years—we see exhibited the triumph of mind over matter.

The Roman Jurisprudence is still engaged in its august mission of harmonizing the nations of the earth—unchanged and unchangeable—because it laid its foundations in the bye-gone ages of the ancient world—deep in the eternal principles of jnstice. And—as we contemplate its onward progress—we are again reminded of the noble observation of D'Aguesseau, quoted in the beginning of this lecture, that the grand destinies of Rome are not yet accomplished—she reigns throughout the world by her reason, after having ceased to reign by her authority."

LIST OF AUTHORS QUOTED OR REFERRED TO IN THE FOREGOING LECTURE.

1. Gibbon; Decline and Fall of the Roman Empire, with Notes by Milman, 6 vols, New York, Harper & Brothers, 1852.
2. Arnold; History of Rome, 1 vol, New York, Appleton & Co., 1853.
3. D'Aguesseau; Œuvres, 13 vols, Paris, 1759.
4. Hume; History of England, 2 vols, Edinburgh, 1841.
5. Edmund Burke; Works, 9 vols, London, 1845.
6. Smith; Dictionary of Greek and Roman Antiquities, London, 1842.
7. Lerminier; Introduction Générale à l'Histoire du Droit, 2nd ed., Paris, 1835.
8. Giraud; Essai sur l'Histoire du Droit Francois au Moyen Age, 2 vols, Paris, 1846.
9. Guizot; Histoire de la Civilization en France, 5 vols, Bruxelles, 1839.
10. Blondeau; Chrestomathie, Paris, 1843.
11. Hamilton; Discussions on Philosophy and Literature, Education and University Reform, New York, Harper & Brothers, 1853.

12. Campbell; The Philosophy of Rhetoric, Oxford, 1838.
13. Gibbon; Miscellaneous Works and Memoirs, London, B. Blake, 1836.
14. Irving; An Introduction to the Study of the Civil Law, 4th ed., London, 1837.
15. Kent; Commentaries, 7th ed., 4 vols, New York, 1851.
16. Halifax; An Analysis of the Civil Law, Edition by Geldart; Cambridge, 1836.
17. Campbell; Lives of the Chief Justices of England, 2 vols, Boston, Little & Brown, 1850.
18. Blaxland; Codex Legum Anglicanarum, London, 1839.
19. Savigny; History of the Roman Law during the Middle Ages, Translated by E. Cathcart, Edinburgh, 1829.
20. Hugo; Droit Romain, French Translation, 2 vols, Paris.
21. Troplong; Vente, 4th ed., 2 vols, Paris, 1845.
22. Bishop Burnet; The Life and Death of Sir Matthew Hale, 1 vol, London, Wm. Baynes, 1805.

(From London Legal Observer.)

Court of Exchequer.

Kirby v. *Simpson.* June 3, 26, 1854.

ACTION AGAINST MAGISTRATE.—QUASHING ORDER OF COMMITMENT. —NOTICE OF ACTION.

Held, *that an action cannot be maintained against a Magistrate for committing the Plaintiff to prison on a charge under Masters and Servants' Act* (26 *Geo.* 2, c. 14), *without first quashing the Commitment.* *

Held, *also, that inasmuch as the trespass was caused by the Defendant in his capacity of Magistrate and in the execution of his office, the Defendant was entitled to notice of action under the* 11 *&* 12 *Vict. c.* 44, *and a rule was discharged to set aside a nonsuit, where such notice had not been given.*†

---

* The 11 & 12 Vic., c. 14, sect. 2, enacts:—That for any Act done by a Justice of the Peace in a Matter of which by Law he has not Jurisdiction, or in which he shall have exceeded his Jurisdiction any Person injured thereby, or by any Act done under any Conviction or Order made or Warrant issued by such Justice in any such Matter, may maintain an Action against such Justice in the same Form and in the same Case as he might have done before the passing of this Act, without making any Allegation in his Declaration that the Act complained of was done maliciously, and without any reasonable and probable Cause: Provided nevertheless, that no such Action shall be brought for anything done under such Conviction or Order until after such Conviction shall have been quashed, either upon Appeal or upon Application to Her Majesty's Court of Queen's Bench; nor shall any such Action be brought for anything done under any such Warrant which shall have been issued by such Justice to procure the Appearance of such Party, and which shall have been followed by a Conviction or Order in the same Matter, until such Conviction or Order shall have been so quashed as aforesaid; or if such last-mentioned Warrant shall not have been followed by any such Conviction or Order, or if it be a Warrant upon an Information for an alledged indictable Offence, nevertheless if a Summons were issued previously to such Warrant, and such Summons were served upon such Person, either personally or by leaving the same for him with some Person at his last or most usual Place of Abode, and he did not appear according to the Exigency of such Summons, in such Case no such Action shall be maintained against such Justice for anything done under such Warrant.

† Our Provincial Statute 14 and 15 Vic. c. 54, sec. 2, is in effect, the same as sec. 9, of this Imperial Statute.

That no Writ shall be sued out against any Justice of the Peace or other officer or person fulfilling any public duty, for any thing by him done in the performance of such public duty, whether such duty arises out of the common law, or is imposed by Act of Parliament, either Imperial or Provincial, nor shall any judgement or verdict be rendered against him, unless notice in writing of such intended Writ, specifying the cause of action with reasonable clearness, shall have been delivered to such Justice, officer or other person, or left at the usual place of his abode, by the Attorney or Agent of the party who intends to sue out such Writ, at least one calendar month before suing out such Writ, and in computing such calendar month, the day of the service of such notice and the day of suing out such Writ shall both be excluded, and on such notice shall be written the name and place of abode of such Attorney or Agent suing out such Writ, and by the cause of action stated in such notice the party suing out such Writ shall be bound, and shall not be allowed to give evidence of any other cause of action at the trial thereof.

This was a rule *nisi* obtained on April 20 last, to set aside the nonsuit and for a new trial of this action, which was brought by the Plaintiff, as next friend of his son, to recover damages from the Defendant for assaulting his son and giving him into custody, and for maliciously instigating his master to prefer a charge against him under the 26 Geo. 2, c. 14 (the Masters and Servants' Act), under which he was convicted, committed to Beverley gaol for three weeks, and whipped. It appeared that the Plaintiff's son was in the service of a person, and had accidently killed one of the Defendant's ducks, and the Defendant had dismissed the boy with a reprimand, on his stating his belief the duck was a wild one, but had, about a week afterwards, proceeded under the above Statute on his master bringing the boy before him and saying he had told him not to kill the duck. The Commitment directed the boy to be corrected, and on the governor of the gaol writing to the Defendant whether it was to be carried into effect, he had replied in the affirmative as the boy was very bad, and both his masters had complained to him they could do nothing with him. The Defendant pleaded "not guilty by Statute," and on the trial before *Cresswell*, J., at the last York Assizes, a nonsuit was directed on the ground that the Defendant was entitled to notice of action under the 11 & 12 Vict. c. 44.

B. Thompson showed cause against the rule, which was supported by *Price* on the ground that the question, whether the Defendant had acted *bonâ fide*, should have been put to the Jury, as if the Defendant had acted *mâla fide* he was not entitled to notice, citing *Booth* v. *Clivé*, 10 C. B. 827; 2 L. M. & P. 283.

The *Court* said, that the first count of the declaration was in trespass and complained that the Defendant had committed the Plaintiff to prison. In order to prove this it was necessary to give in evidence the commitment, which put the Plaintiff out of the Court, as until it was quashed no action could be brought. It also showed on the face of it that the trespass was caused by the Defendant in his capacity of a Magistrate, which entitled him to notice. The second count was for maliciously inciting the Plaintiff's master to make a charge before the Defendant under the Masters and Servants' Act, and for maliciously and without reasonable and probable cause committing the Plaintiff to prison on that charge. This was a count for an act done in execution of the office of a Magistrate, inasmuch as it showed there was a charge before the Defendant on which he acted, although it might be that he had incited it, but of which there was not sufficient evidence. The Defendant was therefore entitled to notice, and the rule must be discharged.

Regina v. *Pratt.* June 2, 1854.

INDICTMENT FOR STEALING GOODS.—ASSIGNMENT FOR BENEFIT OF CREDITORS.—BAILMENT.

The defendant who, according to arrangment, remained on the premises to complete certain works, had removed goods which were included in an assignment for the benefit of his creditors, with the fraudulent intention of depriving the parties beneficially interested therein, but the jury found that he was not in possession as agent for the trustees at the time of the removal: Held, *that he could not be convicted of having stolen the same, as his possession was lawful, and the conviction was quashed.*

This was an indictment against the prisoner for having stolen certain property, which he had assigned over for the benefit of his creditors. It appeared that the prisoner carried on the business of a thimblemaker and manufacturer, and that it had been arranged he should be allowed to complete certain unfinished work, and he accordingly remained in possession for the purpose, and had availed himself of the opportunity to remove the property in question. On the trial before the Recorder of Birmingham, the jury found that the property was removed after the assignment, and with the fraudulent intent of depriving the parties beneficially interested under the deed, but that the prisoner was not at the time of such removal in the care and custody of the goods as agent for the trustees.

Bittleston & *Field* for the prisoner.
A. Wills for the prosecutors.

The *Court* said, that as the finding of the jury clearly negatived a bailment, and the prisoner was in lawful possession of the goods, the conviction must be quashed.

Regina v. *Featherstone.* April 29, 1854.

SIGNATURE OF CASE RESERVED ON DEATH OF JUDGE.—PRACTICE.

On the death of a Judge who tried a prisoner, held *that the case which had been reserved could be signed by the other Judge on the circuit.*

Huddleston applied for the direction of the Court in reference to this case, which had been reserved by the late Mr. Justice *Talfourd* but who had died before signing the same.

The *Court* said, that all cases at the assizes were stated to be tried before the two Judges, and that therefore the signing of Mr. Justice *Wightman*, who was on the circuit with the late Judge, would be sufficient.

Regina v. *Pratt.* June 3, 1854.

INDICTMENT FOR STEALING AGAINST DEBTOR ASSIGNING FOR BENEFIT OF CREDITORS.—CONTINUING POSSESION.

The owner of certain laths had assigned all his property to trustees for the benefit of his creditors, but he remained in possession. On an indictment for stealing such laths, the Jury found that the prisoner had removed them after the execution of the deed and with intent to defraud the parties beneficially interested, and not as agent for the trustees. The conviction was quashed on the objection that the possession of the property had never been changed.

It appeared that the prisoner had been the owner of certain laths and had assigned all his property to trustees for the benefit of his creditors, but remained in possession and carried on the business for the trustees. The Jury had found, on an indictment for stealing laths by removing them, that he had removed them after the execution of the deed, and with intent to defraud the parties beneficially interested, and not as agent for the trustees. The prisoner was convicted.

Bittleston for the prisoner on the ground the possession of the property had never changed.

W. J. Willis for the prosecution.

The *Court* said the conviction must be quashed.

Regina v. *Featherstone.* June 3, 1854.

CONVICTION OF PARTY ASSISTING WIFE TO STEAL FROM HUSBAND LARCENY.

Held, *that although a wife cannot be found guilty of larceny for stealing her husband's property, yet if she commit adultery, and then steal the goods with the adulterer, he is guilty of felony, as she then determined her quality of wife, and was no longer recognized as having any property in the goods.*

This was an indictment against the prisoner for stealing 22 sovereigns from the prosecutor, whose wife, it appeared, had taken them from his bedroom without authority, and given them to the prisoner, upon whose person they were found. On the trial, before *Talfourd*, J., the prisoner was found guilty, but judgment was respited, for the

opinion of the Court to be taken whether the delivery of the husband's goods by the wife to the prisoner with the knowledge by him that she took them without her husband's authority, was sufficient to support the conviction.

No counsel appeared.

The *Court* said, the general rule was that the wife could not be found guilty of larceny for stealing her husband's goods. But if she took away and converted to her own use his goods, it was no larceny, since they were one person. This was, however, subject to the qualification that if she committed adultery, and then stole the goods with the adulterer, she then determined her quality of wife, and was no longer recognized as having any property in the goods, and the prisoner assisting her in stealing them was guilty of felony: *Dalton*, c. 157. The conviction would therefore be affirmed.

Regina v. *Larkin*. June 3, 1854.

INDICTMENT.—AMENDEMENT AFTER VERDICT.—NEW INDICTMENT.

In an indictment for stealing goods, the property of A. B., *the second count charged the receipt of the property knowing it to be stolen, but by mistake the prosecutor's name, instead of the prisoner's, was used:* Held, *quashing a conviction, that the quarter sessions could not amend after verdict by substituting the prisoner's for the prosecutor's name, but that a fresh indictement against the prisoner might be preferred.*

In this indictment for stealing a quantity of beef, the property of Abraham Brouksbank, the prisoner had been found guilty on the second count for receiving the property, knowing it to be stolen, and on the prisoner's counsel moving in arrest of judgment on the ground of the mistake inserting the prosecutor's name in such count instead of the prisoner's, the Court of quarter sessions amended the indictment.

Heaton for the prisoner; *Hale* for the prosecution.

The *Court* said, that the motion in arrest of the judgment was right, as there could be no amendment after verdict, and the indictment was bad on the face of it, for not stating that the prisoner received the property knowing it to be stolen. The conviction would be quashed, but a fresh indictment must be preferred.