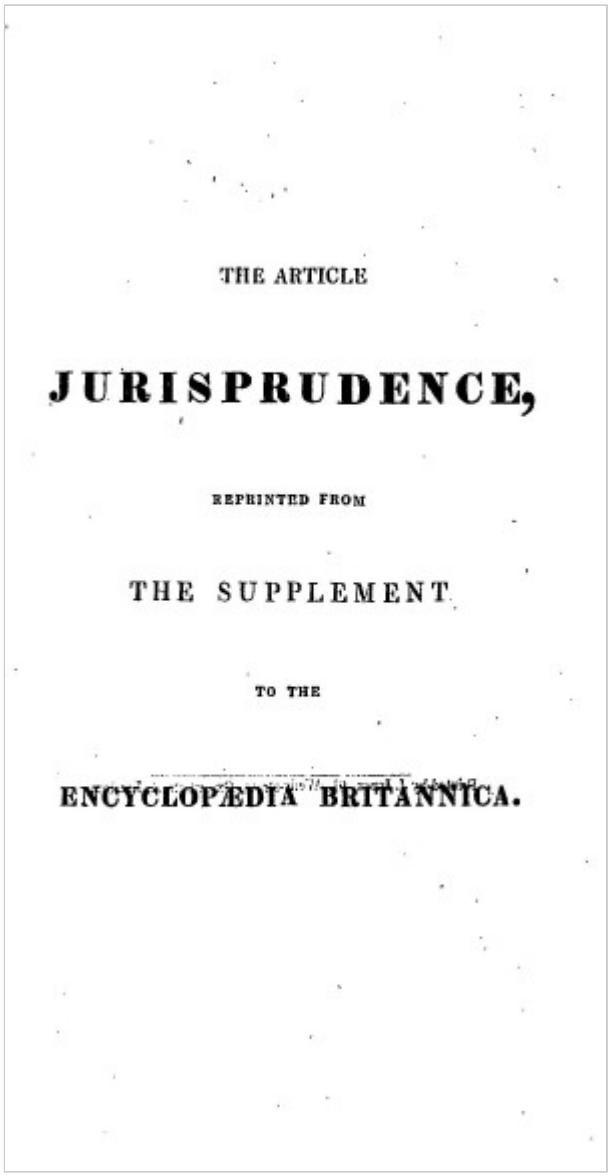
The Online Library of Liberty

A Project Of Liberty Fund, Inc.

James Mill, ***Jurisprudence*** [1825]


THE ARTICLE

JURISPRUDENCE,

REPRINTED FROM

THE SUPPLEMENT

TO THE

ENCYCLOPÆDIA BRITANNICA.

Edition Used:

Supplement to the Encyclopedia Britannica (London: J. Innes, 1825).

Author: James Mill

About This Title:

One of the articles James Mill wrote for the Encyclopedia Britannica.

About Liberty Fund:

Liberty Fund, Inc. is a private, educational foundation established to encourage the study of the ideal of a society of free and responsible individuals.

Copyright Information:

Fair Use Statement:

JURISPRUDENCE.

I.

The end of Jurisprudence, viz. the Protection of Rights.—Importance of the Inquiry, as involving Human Happiness.—Confusion in the vulgar uses of the word Right.—Use of the term Right, in the Science of Jurisprudence.—The principal ideas involved in the Jurisprudential sense of the word Right.—All Rights respect Objects desired; and desired as means to an end.—The Objects of Rights are twofold, viz. either Persons or Things.—Rights, when closely inspected, mean Powers—*legalized Powers.—Powers over Persons, and Powers over Things.—Every Right imports a corresponding Obligation.—No Creation of Good, by Rights, without the Creation of Evil.*

THE object and end of the science which is distinguished by the name of Jurisprudence, is the protection of rights.

The business of the present discourse is, therefore, to ascertain the means which are best calculated for the attainment of that end.

What we desire to accomplish is, The protection of rights: What we have to inquire is, The means by which protection may be afforded.

That rights have hitherto been very ill protected, even in the most enlightened countries, is matter of universal acknowledgment and complaint. That men are susceptible of happiness, only in proportion as rights are protected, is a proposition, which, taken generally, it is unnecessary to prove. The importance of the inquiry, therefore, is evident.

It is requisite, as a preliminary, to fix, with some precision, what we denote by the expression *rights*. There is much confusion in the use of this term. That disorderly mass, the Roman law, changes the meaning of the word in stating its division of the subject, *Jura Personarum*, and *Jura Rerum*. In the first of these phrases, the word *Jura* means a title to enjoy; in the second, it must of necessity mean something else, because things cannot enjoy. Lawyers, whose nature it

Table Of Contents

J. Innes, Printer, 61, Wells street, Oxford-street, London.

[Back to Table of Contents]

JURISPRUDENCE.

I.

The End Of Jurisprudence, Viz. The Protection Of Rights.—Importance Of The Inquiry, As Involving Human Happiness.—Confusion In The Vulgar Uses Of The Word Right.—Use Of The Term Right, In The Science Of Jurisprudence.—The Principal Ideas Involved In The Jurisprudential Sense Of The Word Right.—All Rights Respect Objects Desired; And Desired As Means To An End.—The Objects Of Rights Are Twofold, Viz. Either Persons Or Things.—Rights, When Closely Inspected, Mean Powers—*Legalized Powers.—Powers Over Persons, And Powers Over Things.—Every Right Imports A Corresponding Obligation.—No Creation Of Good, By Rights, Without The Creation Of Evil.*

THE object and end of the science which is distinguished by the name of Jurisprudence, is the protection of rights.

The business of the present discourse is, therefore, to ascertain the means which are best calculated for the attainment of that end.

What we desire to accomplish is, The protection of rights: What we have to inquire is, The means by which protection may be afforded.

That rights have hitherto been very ill protected, even in the most enlightened countries, is matter of universal acknowledgment and complaint. That men are susceptible of happiness, only in proportion as rights are protected, is a proposition, which, taken generally, it is unnecessary to prove. The importance of the inquiry, therefore, is evident.

It is requisite, as a preliminary, to fix, with some precision, what we denote by the expression *rights.* There is much confusion in the use of this term. That disorderly mass, the Roman law, changes the meaning of the word in stating its division of the subject, *Jura Personarum,* and *Jura Rerum.* In the first of these phrases, the word *Jura* means a title to enjoy; in the second, it must of necessity mean something else, because things cannot enjoy. Lawyers, whose nature it is to trudge, one after another, in the track which has been made for them, and to whose eyes, that which is, and that

which ought to be, have seldom any mark of distinction, have translated the jargon into English, as well as into other modern languages.

This is not all the confusion which has been incurred in the use of the word *right.* It is sometimes employed in a very general way, to denote whatever ought to be; and in that sense is opposed to wrong. There are also persons—but these are philosophers, pushing on their abstractions—who go beyond the sense in which it is made to denote generally whatever ought to be, and who make it stand for the *foundation* of whatever ought to be. These philosophers say, that there is a right and a wrong, original, fundamental; and that things ought to be, or ought not to be, according as they do, or do not, conform to that standard. If asked, whence we derive a knowledge of this right and wrong in the abstract, which is the foundation and standard of what we call right and wrong in the concrete, they speak dogmatically, and convey no clear ideas.* In short, writers of this stamp give us to understand, that we must take this standard, like many other things which they have occasion for, upon their word. After all their explanations are given, this, we find, is what alone we are required, or rather commanded, to trust to. The standard exists,—Why? Because they say it exists; and it is at our peril if we refuse to admit the assertion. They assume a right, like other despots, to inflict punishment, for contumacy, or contempt of court. To be sure, hard words are the only instruments of tyranny which they have it in their power to employ. They employ them, accordingly; and there is scarcely an epithet, calculated to denote a vicious state of the intellectual, or moral part, of the human mind, which they do not employ to excite an unfavourable opinion of those who refuse subscription to their articles of faith.

With right, however, in this acceptation, we have at present, no farther concern than to distinguish it clearly from that sense in which the word is employed in the science of jurisprudence. To conceive more exactly the sense in which it is employed in that science, it is necessary to revert to what we established, in the article Government, with regard to the end or object of the social union, for to that, every thing which is done in subservience to the social union, must of course bear a reference.

In that article it appeared, that, as every man desires to have for himself as many good things as possible, and as there is not a sufficiency of good things for all, the strong, if left to themselves, would take from the weak every thing, or at least as much as they pleased; that the weak, therefore, who are the greater number, have an interest in conspiring to protect themselves against the strong. It also appeared, that almost all the things, which man denominates good, are the fruit of human labour; and that the natural motive to labour is the enjoyment of its fruits.

That the object, then, of the social union, may be obtained; in other words, that the weak may not be deprived of their share of good things, it is necessary to fix, by some determination, what shall belong to each, and to make choice of certain marks by which the share of each may be distinguished. This is the origin of right. It is created by this sort of determination, which determination is either the act of the whole society, or of some part of the society which possesses the power of determining for the whole. Right, therefore, is factitious, and the creature of will. It exists, only

because the society, or those who wield the powers of the society, will that it should exist; and before it was so willed, it had no existence.

It is easy to see what is the standard, in conformity with which the rights in question *ought* to be constituted; meaning by *ought,* that which perfect benevolence would desire. It is the greatest happiness of the greatest number. But whether rights are constituted, that is, whether the shares of good things are allotted to each, according to this standard, or not according to this standard, the allotment is still the act of the ruling power of the community; and the rights, about which the science of jurisprudence treats, have this alone for the cause of their existence.

In this complicated term, it is obvious that there is involved, on the one hand, the idea of the person to whom a share is allotted, and on the other hand, an idea of the things which are allotted. The one is the owner of the right, the person to whom it belongs; the other is the object of the right, namely, the person or thing over which certain powers are given.

All rights of course are rights to objects of human desire,—of nothing else need shares be allotted. All objects which men desire, are desired, either as the end, or as means. The pleasurable state of the mind is the end; consisting of the feelings of the mind. It would be absurd, however, to speak of giving a man a right to the feelings of his own mind. The objects of desire, therefore, which are the objects of right, are not the pleasurable feelings themselves, which are desired as the end, but the objects which are desired as the means to that end.

Objects of desire, as means to that end, may be divided into the class of persons and the class of things. Both may be the object of rights. In framing our language, therefore, we may say, that all rights are the rights *of* persons; but they may be rights *to,* either persons, or things.

All that men desire, either with persons or things, is to render them subservient to the end, for which they are desired as means. They are so rendered by certain powers over them. All rights, then, when the term is closely investigated, are found to mean powers; powers with respect to persons, and powers with respect to things. What any one means when he says that a thing is his property, is, that he has the power of using it in a certain way.

It is no part of the present inquiry to ascertain what rights *ought* to be constituted, or what rights perfect benevolence would choose to see constituted. That belongs to the question how government should be constituted; in other words, how the powers which are necessary for the general protection ought to be distributed, and the advantages of the union to be shared. At present our sole endeavour is to ascertain the most effectual means which the governing power of the state can employ for protecting the rights, whatever they are, which it has seen meet to create.

Rights, it must be remembered, always import obligations. This is a point of view, which, in the consideration of rights, has not, in general, attracted sufficient attention. If one man obtains a right to the services of another man, an obligation is, at the same

time, laid upon this other to render those services. If a right is conferred upon one man to use and dispose of a horse, an obligation is laid upon other men to abstain from using him. It thus appears, that it is wholly impossible to create a right, without at the same time creating an obligation.

The consequences of this law of nature are in the highest degree important. Every right is a benefit; a command to a certain extent over the objects of desire. Every obligation is a burthen; an interdiction from the objects of desire. The one is in itself a good; the other is in itself an evil. It would be desirable to increase the good as much as possible. But, by increasing the good, it necessarily happens that we increase the evil. And, if there be a certain point at which the evil begins to increase faster than the good, beyond that point all creation of rights is hostile to human welfare.

The end in view is a command over the objects of desire. If no rights are established, there is a general scramble, and every man seizes what he can. A man gets so much, and he is interdicted by the scramble from all the rest. If rights are established, he also gets so much, and is interdicted by his obligations from the rest. If what he obtains by his rights exceeds what he would have obtained by the scramble, he is a gainer by the obligations which he sustains.

If it is proposed to create rights in favour of all the members of a community, the limits are strict. You cannot give all your advantages to every one; you must share them out. If you do not give equal rights to all, you can only give more than an equal share to some, by diminishing the share of others, of whom, while you diminish the rights, you increase the obligations. This is the course which bad governments pursue; they increase the rights of the few, and diminish the rights of the many, till, in the case of governments virtually despotic, it is all right on the one side, all obligation on the other.

It may be necessary to say a word, to prevent misconstruction of the term “equal rights.” Rights may truly be considered as equal, when all the sorts of obligation under which a man lies with respect to other men, they are placed under with respect to him: if all the abstinence which he is obliged to practise with respect to their property, they are obliged to practise with respect to his; if all the rules by which he is bound not to interfere with their actions bind them equally not to interfere with his. It is evident, that inequality of fortune is not excluded by equality of rights. It is also evident, that, from equality of rights must always be excepted those who are entrusted with the powers of the community for the purposes of government. They have peculiar rights, and the rest of the community are under corresponding obligations. It is equally evident, that those must be excepted who are not *sui juris,* as children in non-age, who must be under the guidance of others. Of two such classes of persons the relation to one another, that is, their reciprocal rights and obligations, need to be regulated by particular rules.

It is presumed that these illustrations will suffice to fix, in the minds of our readers, the exact meaning which is intended, in the present discourse, to be attached to the word *rights.* The sequel is to be occupied in discovering the means which are most proper to be employed for affording *protection* to those rights.

[Back to Table of Contents]

II.

Meaning Of The Word Protection, In The Jurisprudential Phrase, Protection Of Rights.—The First Requisite To The Protection Of Rights Is To Make Them Capable Of Being Known.—Definition Of Rights, The First Instrument Of Protection.—Definition Of The Acts By Which Rights Are Violated, And The Application Of Preventive Motives, Another Instrument Of Protection.—Civil And Penal Codes,—What.—Code Of Procedure,—What.—Corpus Juris, *Or Body Of Law,—What.*

In the term protection, it is hardly necessary to give notice, that we do not here include protection against foreign enemies; that protection which is to be yielded by employing armies against invaders. The protection, of which it is the business of jurisprudence to find out and to describe the means, is that which is required by one member of the community against the other members. The members of the community, each of whom endeavours to have as much as possible of the objects of desire, will be disposed to take those objects one from another; to take them, either by force, or by fraud. The means of preservation must, therefore, be found. Certain members of the community, as organs of government, are furnished with powers for that purpose. The question is, what powers are required; and in what manner are they to be employed?

In proceeding to present what may be called a skeleton-map of the ill-explored country of Jurisprudence, it is necessary to warn the reader, that he must supply, by his own attention, what the limits of the work did not permit to be done for him. The several topics are rather indicated, than expounded. It is hoped they are indicated so clearly, that there will be no difficulty in spreading out the ideas in detail. It is necessary, however, that the reader should do this for himself. As the writer has not been able to dwell upon the several topics, though of the utmost importance, long enough to stamp the due impression of them upon the mind, unless the reader takes time to do this, by reflection on each topic, as it arrives, he will pass to the succeeding ones without due preparation, and the whole will be perused without interest, and without profit.

That a man’s rights may be effectually secured, it is obviously necessary, in the first place, that they should be made capable of being accurately known. This seems to be so undeniable, that it would answer little purpose to enlarge in its illustration. It is, however, exceedingly necessary that the importance of this requisite should be clearly and adequately conceived. How can a man’s rights be protected from encroachment, if what are his rights be uncertain or unknown? If the boundary by which his rights are distinguished is clear and conspicuous, it is itself a protection. It warns off

invaders; it serves to strike them with awe; for it directs the eyes and indignation of mankind immediately and certainly to the offender. Where the boundary, on the other hand, is obscure and uncertain, so far scope is allowed for encroachment and invasion. When the question, to which of two men an article of property belongs, comes for decision to the judge, it is easy, if accurate marks are affixed, to point out and determine the rights of each. If no marks are attached, or such only as are obscure and variable, the decision must be arbitrary and uncertain. To that extent the benefit derived from the creation and existence of rights is diminished.

It is, therefore, demonstrable, and we may say demonstrated (the demonstration not being difficult), that, in the inquiry respecting the means of protecting rights, the *Definition of Rights* may be entered at the head of the list. Without this, as the ground-work, all other means are ineffectual. In proportion as rights can be ascertained, are the judicial functions, and judicial apparatus, capable of being employed to any beneficial purpose: in proportion to the facility with which they can be ascertained, is the extent of the benefit which the judicial functions are enabled to secure.

Such, then, is the first of the means necessary for the protection of rights: That they may receive the most perfect possible protection, they must be as accurately as possible defined.

In supposing that rights have need of protection, we suppose that there are acts by which rights are violated. With regard to those acts, the object is twofold; to redress the evil of the act when it has taken place; and to prevent the performance of such acts in future. To prevent the performance, two classes of means present themselves; to watch till the act is about to be committed, and then to interpose; or, to create motives which shall prevent the will to commit. It is but a small number of cases in which the first can be done; the latter is, therefore, the grand desideratum. From the view of these circumstances we discover two other articles in the catalogue of means. Those acts by which rights are violated require to be made accurately known; in other words to be defined; and the motives which are fitted to prevent them must be duly applied. Motives sufficient to that end can only be found in the painful class; and the act by which they are applied is denominated punishment. The definition, therefore, of offences or of the acts by which rights are violated and which it is expedient to punish, and the definition of the penalties by which they are prevented, are equally necessary with the definition of rights themselves. The reasons which demonstrate this necessity are so nearly the same with those which demonstrate the necessity of the definition of rights, that we deem it superfluous to repeat them.

The definition of rights constitutes that part of law which has been generally denominated the *Civil Code.* The definition of offences and punishments constitutes that other part of law which has been generally denominated the criminal or *Penal Code.*

When rights are distributed, and the acts by which they may be violated are forbidden, an agency is required, by which that distribution may be maintained, and the violators of it punished. That agency is denominated Judicature. The powers, by which this agency is constituted, require to be accurately defined; and the mode in which the

agency itself is to be carried on must be fixed and pointed out by clear and determinate rules. These rules and definitions prescribe the form and practice of the courts, or mode in which the judicial functions are performed; and constitute that branch of law which has been called the *Code of Procedure.*

These three codes, the civil code, the penal code, and code of procedure, form together the whole subject of jurisprudence. Of the three, it sufficiently appears, that the last exists only for the sake of the other two. Courts and their operations are provided that the provisions of the civil and penal codes may not be without their effect. It is to be considered, therefore, as subordinate, and merely instrumental, in respect to the other two. They form the main body of the law; this is an accessary to the main body, though an accessary of indispensable use. It would be of great advantage to affix characteristic names to distinguish from one another the main and accessary parts of law. Unexceptionable names, however, it is not easy to find. Mr. Bentham, the great improver of this branch of knowledge, has called the civil and penal codes together, by the name of "substantive law," the code of procedure by that of "adjective law;" not, we may be satisfied, because he approved of those names, but because the language hardly afforded others to which equal objections would not apply. In the very sense in which either the term accessary, or the term adjective can be applied to the code of procedure, both may be applied to the penal code as it respects the civil. The penal code exists purely for the sake of the civil; that the rights, which are ordained by the legislature, and marked out by the terms of the code, may be saved from infringement. The civil code is therefore the end and object of all the rest. The code of procedure, however, is auxiliary to each of the other two; the penal code to no more than one.

Having now explained the nature of the three codes which constitute the body of law necessary for the protection of rights, it remains that we illustrate, as much in detail as our limits will permit, what is required for the perfection of each.

[Back to Table of Contents]

III.

What Is Required For The Perfection Of The Civil Code.—Operations Preliminary To The Definition Of Rights.—Two Things Necessary For The Definition Of A Right:—First, A Description Of Its Extent; Secondly, A Description Of The Facts Which Give It A Beginning And An End.

The grand object of the civil code is the definition of rights. Rights are sometimes more, sometimes less extensive. Thus the right of a man to a horse, may solely extend to use him in riding from one stage to another; or it may extend to the power of doing with him as he pleases. In like manner, the rights of a man with respect to a person may extend only to some momentary service, or they may go the length of slavery. Even slavery itself does not imply rights always equally extensive. In some cases, it implies rights as extensive over the slave as over the inferior animals.

All rights, when the essence of them is spoken of, are powers; powers to an individual, which the governing members of the community guarantee; powers, more or less extensive, of making either a person or a thing subservient to the gratification of his desires. To be made to gratify the desire of an individual, is to be made to render him a *service.* And the term *service* may, fortunately, be applied to both persons and things. A man receives a service from the field when it produces a crop, as well as from the servant and the horse who ploughed it. In one meaning of the word service, it implies only active service, or that rendered by the voluntary operations of sentient beings. In the present case, however, it is employed to denote both active and passive services. It is evident, that in every case in which any thing inanimate is rendered subservient to the gratification of a desire, the service is, properly speaking, a passive service. It is also evident, that even animate beings are rendered subservient to the gratification of desires in a way which may equally be called passive.

It is necessary to request attention to the explanation which is here given of the meaning in which the term *service* is to be employed; as both the English and the Roman lawyers use it in a very restricted sense. Here it is employed to denote the whole of that ministration to the gratification of our desires, which we are entitled, in consequence of rights, to derive either from persons or from things. Rights are powers, and the powers are means for the obtaining of services. We have now, therefore, a language, by the help of which we may speak with tolerable clearness.

Our object is to define rights, and rights are powers. But these powers can be defined, only by a reference to the services which they are the means of obtaining.

The first thing, therefore, to be done for the definition of rights is, to make out a list of all the kinds of services, which the legislature permits an individual to derive, first,

from persons, and secondly, from things. This would not be a matter of very great difficulty. It would be right to begin with the most simple cases, and go on to the more complex. Thus, of the services derivable from a person, some are limited to a single species of act, and that within a limited time, and at a particular place. Others are services, consisting of various acts, limited or not limited in space and time. And lastly, are the whole services which a man is capable of rendering; without limitation as to either space or time. Considerable pains would be necessary to make the list complete; and not only considerable pains, but considerable logic would be necessary, to classify the services, in other words, make them up into lots, the most convenient for the purpose in question; and to fix the extent of each by an exact definition. It is obvious, that as soon as all the possible gradations, in the services which one human being can render to another, are exhibited by such enumeration and assortment, it is easy for the legislature to point out exactly whatever portion of these services it is its will to give any individual a right to.

The same considerations apply to the class of things. In being made subservient to the gratification of our desires, they also render services. In proportion as a man has the right to derive those services from them, they are said to be his property. The whole of the services, which are capable of being derived from them, may, without much difficulty, be enumerated and classified; and when they are so, those which it may be the pleasure of the legislature to make any one's property, may be very easily and distinctly pointed out.

We may take land for an example. All the different services which are capable of being derived from the land may be enumerated, and, being classed under convenient heads, may be referred to with perfect certainty; and any portion of them, which is made the property of any individual, may thus be accurately described. A man may have a right simply to pasture a field; to pasture it for a day, or a year, or a hundred years. He may have a right to crop it; and that either in a particular manner, or in any manner he pleases; for a year, or for any other time. He may have a right to use it for any purpose, and that during a limited time, or an unlimited time. The services which it is capable of rendering may belong to him in common with a number of other persons, or they may all belong to himself.

In illustration of this subject, we may notice a classification of the services derivable from the land, made, though very rudely, by the English law. Blackstone, who, like other English lawyers, has, on this, as on all other occasions, no idea of any other classification, than that which is made by the technical terms of the English law, has distinguished certain lots of the services, derivable from the land, under the name of "Estates therein; Estates with respect to, 1*st,* Quantity of interest; 2*dly,* Time of Enjoyment; 3*dly,* Number and connection of the tenants:" That is, estates in fee simple, comprehending the whole of the services which are capable of being derived from the land, unlimited in point of time; estates in fee tail, implying always limitation in point of time, and often a limitation in respect to some of the services; estates for years; estates at will; estates at sufferance; estates on condition; estates in remainder; estates in reversion; estates in jointenancy; estates in coparcenary; estates in common. The Roman law has made no enumeration or classification of the services derivable from any thing, not even from the land. It speaks of property in the abstract,

and in two states; property in possession, and property in action. The English law does the same thing in regard to all other property but the land. “Property, in chattels personal, is either in possession or in action,” says Blackstone. He does, indeed, add, “The property of chattels personal is liable to remainders, if created by will, to jointenancy, and to tenancy in common.”

The services derivable from other articles of property than land, need not be divided under many heads. A piece of plate, for example, may render certain services without alteration of its form; it may be incapable of rendering other services till it has received an alteration of its form. It is chiefly, therefore, by limitation, of time, that the various quantities of interest in such articles need to be determined. A man’s right may extend to the use of a silver cup, for a day, or a year, or for his life. During this time the different services which it is capable of rendering have no occasion to be divided. They go naturally altogether. An unlimited right to its services implies the power of using it, either with or without alteration of its form, and without limitation of time. In most instances the limited right would be called loan, though, in the case of heirlooms and some others, there is a limited use to which the term loan is not customarily applied.

In speaking of the rights which a man may have to persons; as master, as father, as husband, and so on; there is one case so remarkable, that it requires a few words to be added in its explanation. It is that of one’s own person. In this case the rights of the individual have no proper limitation beyond the obligations under which he is laid, in consequence either of the rights conferred upon others, or of the means which are thought necessary for protecting them.

If we have enabled our readers to form a tolerable conception of what we desire to be accomplished under the title of an enumeration and commodious classification of the services derivable from persons and things, we have performed what we proposed. The enumeration and classification, themselves, are evidently incommensurate with the design of an article in the present work. That they are practicable may be confidently taken for granted. In fact, they amount to nothing more than a description of the different degrees in which the property of a thing may be possessed; a point which is decided upon in every legal dispute. If this be done, from time to time, for one article after another, it may be done once for all.

We have already said, that rights are powers, powers for the obtaining of certain services. We have also said, that those powers can be defined only by a reference to the services which they are the means of obtaining. When those services are enumerated and classified, what remains is easy. A right to those services must begin; and it may end. The legislature has only to determine what fact shall be considered as giving a beginning to each right, and what shall be considered as putting an end to it, and then the whole business is accomplished.

It is evident that, for the definition of rights, two things are necessary. The first is, an exact description of the extent of the right; the second is, the description of the fact which gives birth to it. The extent of the right is described by reference to the lots of services, in the title to which services all rights consist. The facts, which the

convenient enjoyment of rights has pointed out as the fittest for giving commencement to rights, have been pretty well ascertained from the earliest period of society; and there has, in fact, been a very great conformity with respect to them in the laws of all nations.

The following is an imperfect enumeration of them:—*An expression of the will of the legislature,* when it makes any disposition with regard to property; *Occupancy,* when a man takes what belongs to nobody; *Labour; Donation; Contract; Succession.* Of these six causes of the commencement of a right there is a remarkable distinction between the first three and the last three. The first three give commencement to a right in favour of one individual, without necessarily putting an end to a right enjoyed by any other individual. The last three give commencement to a right in favour of one individual, only by making the same right to cease in favour of another individual. When a man, by donation, gives a horse to another man, the horse ceases to be the property of the one man by the very same act by which he becomes the property of the other; so in the case of sale, or any other contract.

It is necessary for the legislature, in order that each man may know what are the objects of desire which he may enjoy, to fix, not only what are the facts which shall give commencement to a right, but what are the facts which shall put an end to it. In respect to these facts, also, there is a great harmony in the laws of all nations.

There is first the will of the legislature. When it confers a right, it may confer it, either for a limited, or for an unlimited time. In the term unlimited time, we include the power of tradition, or transfer, in all its shapes. If the time is limited, by the declaration of the legislature, either to a certain number of years, or the life of the party, the fact which terminates the right is obvious. If a man possesses a right, unlimited in point of time, the events are three by which it has been commonly fixed that it may be terminated: 1. some expression of his own will, in the way of gift or contract; 2. some act of delinquency; or, 3. his death.

The possessor of a right, unlimited in point of time, may, in the way of gift or contract, transfer his right either for a limited or for an unlimited time. Thus the owner of a piece of land may lease it for a term of years. He may also, in this way, convey the whole of the services which it is capable of rendering, or only a part of them. In this transaction, one event gives birth to a right in favour of the man who receives the lease, and terminates a right which was possessed by the man who gives it; another event, namely, the arrival of the period assigned for the termination of the lease, terminates the right of the man who had received the lease, and revives the former right of the man who gave it.

Acts of delinquency have been made to terminate rights, by the laws of most nations, in the various modes of forfeiture and pecuniary penalty.

The mode in which the event of death should terminate rights has been variously regulated. Sometimes it has been allowed to terminate them simply; and what a man left at his death was open to the first occupant. All but rude nations, however, have determined the persons to whom the rights, which a man possessed without limitation

of time, shall pass at his death. The will of the former owner, when expressed, is commonly allowed to settle the matter. When that is not expressed, it has by most legislators been regulated, that his rights shall pass to his next of kin.

What is the extent of each right; by what event it shall receive its commencement; and by what event it shall be terminated;—this is all which is necessary to be pre-determined with respect to it. To do this is the duty of the legislature. When it is done, the inquiry of the judge is clear and simple. Does such a right belong to such a man? This question always resolves itself into two others. Did any of the events, which give commencement to a right, happen in this case? And did any of those events, which terminate a right, not happen in this case? These are questions of fact, as distinguished from law; and are to be determined by the production of evidence. If a man proves that an event which gives commencement to a right, happened in his case, and if another man cannot prove that an event which terminates a right happened subsequently in that case, the right of the first man is established.

If we have now ascertained the importance and practicability of a civil code, and have shown what is to be done in order to obtain the benefit of it, we shall conclude, with some confidence, that we have rendered a great service to mankind. We proceed to the consideration of the penal code. The object of that code is, the acts by which rights may be violated.

[Back to Table of Contents]

IV.

What Is Necessary To The Perfection Of The Penal Code.—Acts Meet For Punishment.—What Is Required To The Definition Of An Offence.

In the term violation, we include all those acts by which the powers, conveyed by a right, are prevented from operating according to the will of the owner.

With respect to a part of such acts, all that it is found convenient to do, through the instrumentality of judicature, is, to remove the obstruction which prevents the enjoyment of the right, without inflicting any penalty for creating it. Thus, if a debt is not paid when due, the right is violated of the man who ought to receive it. Enough, however, is in this case supposed to be done, if the man who owes the debt is constrained to make payment. The act of secretly abstracting, with a view to appropriate, a property of perhaps less value, would be an act which the laws of all nations would punish as theft.

Of injurious acts, those alone, to the commission of which it has been deemed expedient that penalties should be annexed, are considered as the object of the penal code. Of injurious acts so perfect an analysis has been exhibited by Mr. Bentham; so perfectly, too, have the grounds been laid down upon which those acts which are destined for punishment should be selected from the rest; and so accurately have the principles, according to which punishment should be meted out, been established, by that great philosopher, that, on this part of the subject, the philosophy of law is not far from complete.

As acts are declared to be offences, and are made subject to punishment, solely for the protection of rights, it is evident, that all acts which enter into the penal code, are acts which infringe rights, either directly, or indirectly. Those which infringe them *directly,* are those by which injury is done to some individual or individuals; a blow, for example, an act of theft, and so on. We include also, under this division, all acts the *effects* of which produce an immediate infringement of rights; destroying a mound, for example, to inundate the lands of another man; importation of infection, by which the health or lives of others may be destroyed. Those acts by means of which rights are affected *indirectly,* are those which bear immediately upon the means which the state has provided for the protection of rights. The means which the state has provided for the protection of rights, are the operations of government generally. All acts, therefore, meet for punishment, are acts which disturb, either individuals in the enjoyment of their rights, or the operations required for the protection of those rights. The latter, though mediately, and not immediately hurtful, are apt to be more extensively mischievous than the former. An act which infringes a right immediately, is commonly injurious only to one individual, or a small number of individuals; an act which prevents any of the operations of government from proceeding in its natural course is injurious to all those individuals to whose protection the due course of that

operation is useful. Permit acts which interrupt all the operations of government, and all rights are practically destroyed.

If, as it thus appears, acts are meet for punishment, only because they infringe a right, or because they interrupt the operations provided for the protection of rights, it is evident, that, in the definition of one set of those acts, must be included the specification of the right which is infringed; and, in the definition of the other, must be included the specification of the operation disturbed. Before, therefore, an accurate penal code can exist, there must exist an accurate civil code, and also what we may call a constitutional or political code; the latter consisting of an accurate definition of the powers created for the purposes of government, and of the limitations applied to their exercise.

From what has been said, it may appear, that the definition of offences, by which name we shall hereafter distinguish punishable acts, consists necessarily of two parts. The first part is the specification of the right infringed, or the operation of government disturbed; and the second part is the definition of the mode. Thus, for the definition of an act of theft, the right which the act has violated must be distinctly marked, and also the mode in which the violation has been committed. In one and the same class of offences, those against property for example, the mode in which the violation is performed is that chiefly which constitutes the difference between one offence and another. In a theft and a robbery, the right violated may be exactly the same; the mode in which the violation was effected constitutes the difference.

For several purposes of the penal code, it is useful, that, in the specification of the right violated, the value of what has been violated, in other words, the amount of the evil sustained, should sometimes be included. It is evident, that the value of rights can be judged of ultimately, only by a reference to human feelings. Of these feelings, however, certain outward marks must be taken as the standard. In offences which concern property the modes of valuation are familiarly known. In injuries to the person, those marks which denote injuries regarded by mankind in general as differing in magnitude; the size, for example, or position, of a wound; in injuries to reputation, the words used, and the occasion when, and so forth, are the only means of distinction which can be employed.

It may be necessary also to remark, that, in that part of the definition which relates to the mode, are to be distinguished the parties, when more than one, who engage in the same offence with different degrees of criminality; meaning, by different degrees of criminality, nothing more than demand for different degrees of punishment. The chief classes of such persons are those of principals and accessaries; and of accessaries both those before, and those after the fact.

In the definition of the mode, the act is first to be described in its ordinary shape. The act, however, may be attended wiih aggravating circumstances on the one hand, or extenuating circumstances on the other; presenting a demand for increased punishment in the first case, and diminished punishment in the second. Mr. Bentham has logically remarked, that the circumstances which are to be regarded as aggravating, and the circumstances which are to be regarded as extenuating, being

pretty nearly the same in all cases, they may be defined, in a separate chapter, once for all. This being done, the code proceeds in the following manner: The definition is given of the offence in its ordinary shape, and the appropriate punishment is annexed; then immediately follows the same offence with aggravating circumstances; punishment so much the more severe: the same offence with extenuating circumstances; punishment so much the less.

Thus far we have spoken of the definition of offences, into which we have entered the less in detail, because we do not think there is much of controversy on the subject. Many persons, who doubt the possibility of framing a civil code; though, after the preceding exposition of the subject, it is a doubt which could not, we should imagine, very easily maintain itself; allow, that offences may all be defined; and that it is possible to prevent the monstrous iniquity of punishing men for acts, as offences, which they have not the means of knowing to be such.

[Back to Table of Contents]

V.

The Doctrine Of Punishment.—Satisfaction.—Penalties.

After offences, comes the consideration of the punishment to be annexed to them. This is a subject of considerable detail; it has been, however, so fully and admirably treated by Mr. Bentham, that only some of the more general considerations, necessary to mark out the place and importance of the topic, need here to be introduced.

When a right has been infringed, there are two things, it is evident, which ought to be done: The injury which has been sustained by the individual ought to be repaired: And means ought to be taken to prevent the occurrence of a like evil in future.

The doctrine of Satisfaction is not at all difficult, as far as regards the regulating principles; the complication is all in the detail. The greater number of injuries are those which concern property. A pecuniary value can generally be set upon injuries of this sort; though it is not very easy to determine the *pretium affectionis,* a matter of considerable importance, which the English law, so much made up of clumsiness in one part, and false refinement in another, wholly overlooks. For injuries to the person, also, it is most frequently in the pecuniary shape alone that any compensation can be made. In making these estimates, some general marks are all that can be conveniently defined by the law, and a considerable discretion must be left to the judge. Indeed, the question of damages is always a question of fact, which must be determined by the evidence adduced in each instance.

It accords with the feelings of every man to say, that he who has committed an injury, should be made to repair it. One part of punishment, therefore, ought, wherever special reason does not intervene, to consist in making satisfaction to the party injured. Pecuniary satisfaction, where the delinquent is rich, may be a small part of the due punishment; still, however, there is an obvious propriety, in making it a part so far as it can go. In the cases in which the delinquent has no property, there is the same propriety in making his labour subservient to that end. Hard labour, with the most economical fare, till the produce of the labour equals the amount of the satisfaction required, is, therefore, a species of punishment, recommended by the strongest considerations. It is not said that labour so limited would always be sufficient punishment, and there are many cases in which it would be too much; but even then, it should go as far as it can in the one case, and as far as it ought in the other.

When the injury is done to reputation, there is a manifest propriety in making the injurer contribute to the reparation, wherever it can be done. In many of the cases, too, the proper mode is abundantly obvious: all those, for example, where the publication of falsehood is the injurious act. The author of the injury may be obliged to declare, in a way as public as that of the offence, and as well calculated as possible for the

reparation of the injury, that he has been solemnly adjudged to have propagated a falsehood, and is condemned to publish his own shame.

In the case of those offences which affect rights indirectly, namely, by affecting the securities provided for them, satisfaction seldom can have any place, because no determinate individual or individuals have sustained an injury.

This may suffice, in exposition of the first thing which is desirable where an injury has been committed, namely, that reparation should be made. The second is, that measures should be adopted for preventing the future occurrence of similar events.

Acts are performed, only because there are motives to the performance of them. Of course injurious acts are performed, only because there are motives to the performance of them.

Corporal restraint being out of the question where all the members of the community are concerned, it is evident that only two means remain for preventing injurious acts; either, first, to take away the motives which provoke to them; or, secondly, to apply motives sufficient for the prevention of them.

From the very nature of many of the acts it is impossible to take away the motives which provoke to them. From property stolen it is impossible to detach the value of the property; from vengeance it is impossible to detach the hope of that relief which is sought by the blow that is aimed.

What is wanted, then, is a sufficiency of motive in each instance to counteract the motives which lead to the crime. Whatever the motives of the alluring kind which lead to an act, if you give stronger motives of the same kind to abstain from the act, the act will, of course, be prevented. The man who would steal from you 5*l.* will assuredly not do so, if he knows that he shall receive 6*l.* for abstaining.

The question may then be started, Why should not all crimes be prevented in this way, since reward is much more desirable and humane than punishment? The answer is most satisfactory, and is built upon a ground which ought to receive profound attention, on many occasions, on which it is treated with the most perfect disregard. No reward can be given to one man, or set of men, but at the expence of some other man or set of men. What is reward to one is therefore punishment to others. If 6*l.* be given to the man who would steal 5*l.,* it must be taken from some one or more individuals of the community. If one man is elevated by any title or distinction, all the rest with regard to him are degraded and depressed. This is utterly unavoidable. The one event is necessarily included in the other. The giving of rewards, therefore, is a matter of serious import. It is not that simple act, that pure creation of good, which it is often so fraudulently given out to be, and so credulously and foolishly admitted to be.

Other reasons, which prove the insufficiency of rewards for preventing injurious acts, are too obvious to require to be mentioned. We shall not, therefore, dwell upon this topic. This at least is sufficiently evident, that to counteract the motives which lead to

the commission of an act, we have but two methods. If we cannot apply motives of the pleasurable sort, to induce the party to abstain from committing the act, we must apply such motives, of the painful sort, as will outweigh the motives which prompt to the performance. To prevent, by such means, a theft of 5*l.,* it is absolutely necessary to affix to that act a degree of punishment which shall outweigh the advantage of possessing 5*l.*

We have now, it is evident, obtained the principle by which punishment ought to be regulated. We desire to prevent certain acts: That is our end, and the whole of our end: We shall assuredly prevent any acts, if we attach to them motives of the painful kind, sufficient to outweigh the motives of the opposite kind which lead to the performance. If we apply a less quantity of evil than is sufficient for outweighing those motives, the act will still be performed, and the evil will be inflicted to no purpose; it will be so much suffering in waste. If we apply a greater quantity of evil than is necessary, we incur a similar inconvenience; we create a quantity of evil which is absolutely useless; the act, which it is the tendency of the motives of the pleasurable kind to produce, will be prevented, if the motives of the painful kind outweigh them in the smallest degree, as certainly as if it outweigh them to any degree whatsoever. As soon, therefore, as the legislator has reached that point, he ought immediately to stop. Every atom of punishment which goes beyond is so much uncompensated evil, so much human misery created without any corresponding good. It is pure unmingled mischief.

As no exact measure, indeed, can be taken of the quantity of pain which will outweigh a supposed quantity of pleasure, it is sometimes necessary to risk going somewhat beyond the mark, in order to make sure of not falling short of it. And, in the case of acts of which the evil is very great; of the higher order of crimes, in short; it may be expedient to risk a considerable degree of excess in order to make sure of reaching the point of efficiency.

In estimating the quantity of evil which it may be necessary to create, in order to compensate the motive which leads to a mischievous act, two circumstances should be taken into the account. These are, certainty, and proximity. It is of the less importance here to enter far into the illustration of these topics, that they are now pretty generally understood. It is well known that the prospect of an evil which is to happen within an hour, or two hours, produces a much greater uneasiness, than the prospect of the very same evil removed to the distance of years. Every man knows that he will die within a certain number of years; many are aware that they cannot live beyond a few years; and this knowledge produces no uneasiness. The effort, on the other hand, which enables a man to behave with tranquillity, on the prospect of immediate death, is supposed to be so difficult, that it is this which makes the hero. It is, therefore, of the greatest importance, that punishment should be immediate; because, in that case, a much smaller quantity of evil suffices. It is imperatively required, by the laws of benevolence, that, if evil is a necessary means to our end, every expedient should be used to reduce it to the smallest quantity possible. It is cruelty; it belongs only to a malignant nature; to apply evil in a way which demands a quantity of it greater than would otherwise have been required. Suppose a law, that no act of theft should be punished or challenged till twenty years after the commission, or till the life of the thief was supposed to be near its end. It is evident that all

punishment in this case; that death, in the greatest torture, would be nearly destitute of power. This is partly the ground of the complaint, of the little efficacy of religious punishment, though dreadful beyond expression in the degree.

The want of certainty is a defect of equal importance. If it is a matter of doubt, whether a threatened evil will take place, the imagination is prone to magnify the chance of its not happening; and, by indulgence, magnifies it to such a degree, that the opposite chance at last excites a comparatively feeble influence. This is a remarkable law of human nature, from the influence of which even the most wise and prudent of men are not exempt; and of which the influence is predominant in these inconsiderate minds which are the most apt to give way to the allurements of vice. To illustrate this law, the influence of the religious punishments affords the most instructive of all examples. The punishments themselves go far beyond what the imagination can conceive. It is the complaint of divines, and the observation of all the world, that, with the great body of men, the efficacy of them is exceedingly small. The reason is, that to the want of proximity is added the greatest uncertainty. If a man puts his fingers in the candle, he knows that he will be punished, and immediately, by being burned. If a man commits even a heinous sin, he has no fear of receiving the religious punishment immediately, and he conceives that, in the mercy of his Judge, in repentance and faith, he has a chance of escaping it altogether. This chance his imagination exaggerates, and most men can, in this way, go on sinning with tranquillity, to the end of their days. If all punishments were as certain and immediate as that of putting a finger in the candle, the smallest quantity it is evident, beyond what would form a counterbalance to the advantage of the forbidden act, would suffice for its prevention. If uncertainty is admitted, to any considerable degree, no quantity of evil will suffice. It is a fact, which experience has most fully established, and which is now recognized in the most vulgar legislation, that undue severity of punishment runs counter to its end. This it does by increasing uncertainty; because men are indisposed to be the instruments of inflicting evil by which their feelings are lacerated. That legislation, therefore, is bad, which does not take measures for the greatest possible degree of proximity and certainty in the punishments which it applies.

The sources are three, from which motives of the painful sort, applicable to the purposes of the legislator, are capable of being drawn:—1. The physical; 2dly, The moral; and, 3dly, The religious.

I. Pains from the Physical Source may be communicated to a man through,

1. His person,

2. His connections,

3. His property.

Through his person, they may be communicated in four principal ways,—by death, disablement, restraint and constraint, simple pain.

A man's connections are either public or private; private, as spouse, parent, servant, master, &c.; public, as ruler, subject, teacher, scholar, and so on.

The modes in which a man is punished through his property need no explanation.

II. Pains, from the Moral Source, are the pains which are derived from the unfavourable sentiments of mankind. For the strength of the pains, derived from this source, we must refer to the writers who have treated of this part of human nature. It is sufficient here to advert to what is universally recognized, that these pains are capable of rising to a height, with which hardly any other pains, incident to our nature, can be compared; that there is a certain degree of unfavourableness in the sentiments of his fellow creatures, under which, hardly any man, not below the standard of humanity, can endure to live.

The importance of this powerful agency for the prevention of injurious acts, is too obvious to need to be illustrated. If sufficiently at command, it would almost supersede the use of other means. It is, therefore, one of the first objects to the legislator to know, in what manner he can employ the pains of the popular sanction with the greatest possible effect.

To know how to direct the unfavourable sentiments of mankind, it is necessary to know in as complete, that is, in as comprehensive a way as possible, what it is which gives them birth. Without entering into the metaphysics of the question, it is a sufficient practical answer, for the present purpose, to say, that the unfavourable sentiments of men are excited by every thing which hurts them. They love that which gives them pleasure; hate that which gives them pain. Those acts of other men which give them pleasure or save them from pain, acts of beneficence, acts of veracity, and so on, they love. Acts, on the other hand, which give them pain, mendacity, and so on, they hate. These sentiments, when the state of mind is contemplated out of which the acts are supposed to arise, are transformed into approbation and disapprobation, in all their stages and degrees; up to that of the highest veneration, down to that of the deepest abhorrence and contempt.

The unfavourable sentiments, which the legislator would excite towards forbidden acts, must, therefore, in each man, arise from his conception of the mischievousness of those acts. That conception depends upon three circumstances; 1*st,* The view which he himself takes of the act; 2*dly,* The view which appears to be taken by other people; 3*dly,* Every thing which operates to render more or less permanently present to his mind his own and other men's conception of its mischievousness. From these circumstances, the practical rules for applying this great power, as an instrument of the legislator for the prevention of mischievous acts, are easily deduced. 1. Let the best measures be taken for giving the people a correct view of the mischievousness of the act; and then their unfavourable sentiments will be duly excited. 2. Let proper pains be taken that the people shall know every mischievous act that is committed, and know its author; that, so, no evil act may, by concealment, escape the punishment which their unfavourable sentiments imply. 3. Let the legislature, as the leading section of the public, make publication of its own unfavourable sentiments; let it brand the act with infamy. 4. Let the same publication of his own unfavourable

sentiments be made by the judge in the shape of reprimand and other declarations. 5. The legislature may increase the effect of these declarations, where the case requires it, by symbolical marks; or, 6, by personal exposure. 7. The legislature may so order matters in certain cases, that the mischievous act can be done only through another act already infamous; as when it is more infamous to break a vow to God than to make false declarations to men, a witness may be made to swear that he will tell the truth. 8. As the favourable sentiments of mankind are powerfully excited towards wealth, a man suffers through the popular sanction when his property is so diminished as to lessen his rank.

III. In pointing and proportioning the apprehension of divine punishment, the legislator can do three things:

1. He can declare his own apprehension, and the measure of it, which should be as exactly proportioned as possible to the mischievousness of the acts:

2. He can hire other people to declare similar apprehensions, and to make the most of the means which are available for their propagation:

3. He may discountenance the pointing of religious apprehensions to any acts which are not mischievous; or the pointing of them more strongly to acts which are slightly, than to acts which are deeply mischievous. Whatever power of restraining from mischievous acts may be lodged in religious apprehensions, is commonly misapplied and wasted. It would be worth the cost, therefore, of pretty forcible means to prevent such a misapplication and waste of religious fears.*

In drawing from one, or more, of these sources, a lot of punishment adapted to each particular case, the following properties, desirable in a lot of punishment, ought to be steadily borne in view. Every lot of punishment ought, as much as possible, to be,

1. Susceptible of graduation, so as to be applied in different degrees.

2. Measurable, that the difference of degrees may be duly ascertained.

3. Equable, that is, calculated to operate with the same intensity upon all persons.

4. Such, that the thought of the punishment may naturally excite the thought of the crime.

5. Such, that the conception of it may be naturally vivid and intense.

6. Public, addressed to the senses.

7. Reformative.

8. Disabling; viz. from crime.

9. Remediable; viz. if afterwards found to be undeserved.

10. Compensative; viz. to the party injured.

11. Productive; viz. to the community, as labour.

Of all the instruments of punishment which have yet occurred to the ingenuity of man, there is none which unites these desirable qualities in any thing like an equal degree with the *Panopticon Penitentiary,* as devised and described by Mr. Bentham.

One general rule applies, in the case of all the lots of punishment. It is this: That the private good which has operated as the motive to the injurious action, should, in all possible cases, be cut off, and the expected enjoyment prevented. Where this can be done completely, all the additional punishment necessary is only that which would suffice to compensate the want of certainty and proximity in the act of deprivation; for no man would commit a crime which he was sure he could not profit by; no man would steal, if he knew that the property stolen would that minute be taken from him. The interests which are capable of being promoted by a criminal act, may be summed up under the following titles:

1. Money, or money's worth.

2. Power.

3. Revenge.

4. Vanity, emulation.

5. Sensual pleasure, chiefly venereal.

6. Safety in respect to legal punishment.

With respect to four of these interests, viz. money, power, vanity, and safety in respect to legal punishment, the contemplated benefit is capable, in many cases, of being completely intercepted.

In the case in which revenge has operated through the degradation of the party suffering, the evil doer may be disappointed by re-exaltation of the degraded party.

Sensual pleasure, having been enjoyed, is beyond the reach of this operation.

It is highly worthy of observation, that, among the advantages constituting the motives to crime, those which can be cut off, and from the enjoyment of which the offender can be precluded, constitute by far the most frequent incentives to crime.

This must suffice as a summary of what should be said on the mode of applying pain most usefully for the prevention of certain acts. It only remains to add, that the following are the cases in which it may be pronounced unfit that pain should be employed for that purpose:

1. Where the evil to the community does not overbalance the good to the individual.

2. Where the evil necessary for the punishment would outweigh the evil of the act.

3. Where the evil created is not calculated to prevent the act.

4. Where the end could be obtained by other means.

[Back to Table of Contents]

VI.

The Code Of Procedure.—First Stage Of The Judicial Business.—Second Stage Of The Judicial Business.

We have now, therefore, stated, what the limits of this discourse enable us to adduce, on the subject of the main body of the law; the enactments of the legislature with respect to rights, and with respect to those acts by which rights are violated. It remains that we consider that subsidiary branch of law, by which an agency is constituted for the purpose of carrying those enactments into effect. The inquiry here is, 1. what are the operations essential to that agency; 2. by what agents are they most likely to be well performed; and 3. what are the best securities that can be taken for the good conduct of those agents.

It most significantly illustrates the manner in which ignorance gropes its way in the dark, to observe, that the agency, the sole end of which is to carry into execution the civil and penal laws, was created first, and was in operation for ages, before the idea of the other branches of law was even tolerably framed. It is also worthy of remark, that the men, whose wisdom rules our affairs, are in the habit of calling the mode in which ignorance gropes its way in the dark, by the name of experience; the mode of acting upon a plan, and with forethought, by the names of theory and speculation.

There is instruction, in observing the mode, in which this inverted course of law-making was pursued. Men disputed; and their disputes were attended with the most destructive consequences. Originally, the king, at the head of the military force, and his subordinates, each at the head of a section of that force, interfered in those disputes. After a time, the king appointed functionaries, under the name of judges, for that particular service. Those judges decided, without any rule, by their own discretion. The feelings of the community, grounded upon their experience of what tended to good and evil upon the whole, pointed vaguely to certain things as right, to other things as wrong; and to these the judge, as often as he was *bona fide,* conformed his decision. The mode was similar both in arbitrating, and in punishing.

As punishing, especially in the severer cases, was an act which made a vivid impression upon the mind, the mode in which that act had been performed in previous cases was apt to be remembered: of the several modes, that which was most approved by the public would naturally be followed the most frequently; and at last there would be a species of scandal, if it was unnecessarily departed from. In this way a uniformity, more or less perfect, was established, in punishing the more heinous offences; and in regard to them custom first established what had some small portion of the attributes of a law.

In those cases in which, without a call for punishment, the authoritative termination of a dispute was all that was required, the experience of what was necessary, not only for any degree of mutual comfort, but even for the means of subsistence, soon established

a few leading points of uniformity. Thus, when a man had cultivated a piece of ground, which belonged to nobody more peculiarly than to himself, it was evidently necessary that the crop should be considered as belonging to him; otherwise, no crops would be raised, and the community would be deprived of the means of subsistence.

These general feelings, with the remembrance, more or less perfect, of what had been done in similar cases, were the only guide; and it is surprising to what an extent, over the surface of the whole globe, law has, in all ages, remained in that state of imperfect existence, if, indeed, with any propriety, it can be called a state of existence. In every part of Asia, and in all ages, law has remained in that state of existence, or non-existence. In Europe, where, at a pretty early period, it became the practice to record in writing the proceedings of the judges, the natural propensity of referring to the past as a rule for the present, begat in time a species of obligation of being directed by the examples which had already been set. This created a uniformity and certainty, which, however imperfect, afforded something better than the arbitrary proceedings of Asiatic judges. Yet this was a benefit which had a dreadful alloy. A body, not of law, but of decisions, out of which, on each particular occasion, a law for that particular occasion, as out of the crude ore, was to be smelted, hammered, and wire-drawn, was the natural material out of which to manufacture a system of chicane. How accurately the system of law, in the several nations of Europe, has conformed to the character of a system of chicane, is matter of present and lamentable experience. The uncertainty, the delay, the vexation and expence, and that immorality of the worst species with which they inundate the community, are not the only evils, great as they are, of laws constructed upon such a plan. A system of laws, so constructed, becomes an instrument of conservation for the barbarous customs and ideas of the times in which they were engendered; and infests society with the evils of an age, which it has left behind.

To conceive the operations which are necessary to give effect to the enactments of the legislature, it is necessary to conceive the occasions which call for them.

When the legislature has established rights, so long as there is no dispute about those rights, and so long as there is no complaint of any violation of them, so long there is no occasion for any agency to give to the enactments of the legislature their effect. The moment, however, one person says, the right to that object is mine, and another person says no, but the right to that object is mine; or the moment any man complains that such or such a right belonging to him another man has violated, that moment occasion for the agency in question begins.

It is evident, also, that the operations necessary to give effect to the enactments of the legislature are confined to those two occasions; namely, that on which a right is disputed, and that on which it has been violated. On the occasions on which a right is disputed, it is requisite to determine to whom it belongs. On the occasions on which a right has been violated, it is sometimes only required to compel reparation to the injured party; sometimes it is necessary, besides, to inflict punishment upon the offender. The question is, What are the operations required for these several results?

Where a right is disputed, all possible cases may be resolved into that of A who affirms, and B who denies. That right is mine, says A, it is not yours, says B.

The first question to be asked of A is, which, among those facts, which the legislature has determined shall give commencement to rights, happened in such a manner as to give commencement to that which is claimed as a right by him.

If no such fact is affirmed, the right does not exist. If some such fact is affirmed, it may be met by the opponent in one of two ways. B either may deny the fact, and affirm that the right never had a commencement; or he may allow the fact, and admit that the right had a commencement, but affirm that there had subsequently happened one of those facts which put an end to rights: admitting that A bought the horse, and had a right to him in the month of July, he might affirm that A sold him again in August, and by that transaction put an end to his right.

When B meets the affirmation of A in the first way, that is, by denying the commencement of the right, he may do it in either of two ways. He may deny the investitive fact which A affirms, or not denying the fact, he may affirm some antecedent fact which deprived it of its investitive power. Thus, if A affirmed that he got the property by occupancy, B may affirm that it was not open to occupancy, but the property of another person. If A affirmed that he got the property by succession to his father, B may allow the fact of the succession, but affirm that the property did not belong to the father of A at the time of his death.

Whenever the legislature has accurately determined what are the facts which shall give commencement, and what those which shall give termination to a right, the whole confused and intricate mass of what in English law is called *Pleading,* reduces itself to those clear and simple elements. A begins, by affirming some one of the facts which gives commencement to a right. B may deny this fact directly. A affirms contract for example, B denies it; and then, of course, comes the evidence: Or, instead of denying it, B may affirm an antecedent fact which deprived the fact affirmed by A of its investitive force; or he may affirm a subsequent fact, which put an end to the right. In those two cases, in which B affirms a new fact, A must be called upon for a reply, in other words, asked whether he admits or denies it. If he admits, there is an end, of course, to the claim of A. If he denies, then again we have affirmation and denial upon a matter of fact, which is to be determined by the production of evidence.

This is the first part of the proceeding, neither intricate nor obscure. The next is, the adduction of evidence. A fact is disputed; affirmed on the one side, denied on the other. A produces evidence to prove the fact, B produces evidence to disprove it. The decision is on the one side or the other, and the dispute is at an end.

If both parties obey the decision, there is no occasion for another act. If the losing party disobeys, force is necessary to compel obedience. This is called execution, and terminates the agency required.

It is needless to particularise a penal proceeding; all the possible varieties of which fall under one or other of the cases illustrated.

Thus, when a man is charged with a crime, the prosecutor affirms one of the acts violating rights, to which punishment is annexed by the legislator. The defendant can meet this affirmation in one of two ways only. First, he may deny the act, and then the second stage of proceeding, the adduction of evidence, immediately takes place. Or, not denying the act, he may affirm some previous act, which prevented it from having the effect of violating a right. Not denying the fact of taking the horse out of the field with a view to appropriate him, he may affirm a previous purchase, gift, &c. The adduction of evidence has nothing peculiar in the case of a penal proceeding at law. In the last stage, that of execution, the peculiar act of inflicting punishment is required.

Having thus a view, though very summary, of the operations required, we shall be the better able to judge of the agents necessary for the performance.

The stages, we have observed, are three. The *first* is that in which the plaintiff adduces the fact on which he relies, and is met by the defendant either with a denial of the fact, or the affirmation of another fact, which, to maintain the suit, the plaintiff must deny. The *second* is that in which evidence, to prove or disprove the fact on which the affirmation and denial of the parties ultimately rests, is adduced and decided upon. The *third* is that in which the operations are performed necessary for giving effect to the sentence of the judge.

What is desirable in the operations of the first stage is, 1*st,* That the affirmations and negations with respect to the facts should be true; and 2*dly,* That the facts themselves should be such as really to have the quality ascribed to them. For the first of these purposes, all the securities, which the nature of the case admits of, should be taken, for the veracity of the parties. There is the same sort of reason that the parties should speak truly, as that the witnesses should speak truly. They should speak, therefore, under all the sanctions and penalties of a witness. They cannot, indeed, in many cases, swear to the existence or non-existence of the fact; which may not have been within their cognizance. But they can always swear to the state of their belief with respect to it. For the second of the above purposes, namely, that it may be known whether the facts affirmed and denied are such as to possess the quality ascribed to them, two things are necessary; the first is, that all investitive and devestitive facts, and all acts by which rights are violated, should have been clearly predetermined by the legislature, in other words, that there should be a well-made code; the second is, that the affirmations and denials with respect to them should be made in the presence of somebody capable of telling exactly whether they have the quality ascribed to them or not. The judge is a person with this knowledge, and to him alone can the power of deciding on matters so essential to the result of the inquiry be entrusted.

To have this important part of the business done, then, in the best possible way, it is necessary that the parties should meet in the very first instance in the presence of the judge. A is asked, upon his oath, to mention the fact which he believes confers upon him or has violated his right. If it is not a fact capable of having that effect, he is told so, and his claim is at an end. If it is a fact capable of having that effect, B is asked whether he denies it; or whether he affirms another fact, either one of those, which, happening previously, would prevent it from having its imputed effect, or in a civil case one of those which, happening subsequently, would put an end to the right to

which the previous fact gave commencement. If he affirmed only a fact which could have neither of these effects, the pretension of B would be without foundation.

Done in this manner, the clearness, the quickness, and the certainty of the whole proceeding are demonstrated. Remarkable it is, that every one of the rules for doing it in the best possible manner, is departed from by the English law, and that, to the greatest possible extent. No security whatsoever is taken that the parties shall speak the truth; they are left with perfect impunity, aptly by Mr. Bentham denominated the *mendacity-licence,* to tell as many lies as they please. The legislature has never enumerated and defined the facts which give commencement, or put a period to or violate rights; the subject, therefore, remains in a state of confusion, obscurity, and uncertainty. And, lastly, the parties do not make their affirmations and negations before the judge, who would tell them whether the facts which they allege could or could not have the virtue abscribed to them; they make them in secret, and in writing, each along with his attorney, who has a motive to make them not in the way most conducive to the interests of his client, but in the way most conducive to his own interests and those of his confederates, from the bottom to the top of the profession. First, A, the plaintiff, writes what is called the declaration, an instrument for the most part full of irrelevant absurdity and lies; and this he deposits in an office, where the attorney of B, the defendant, obtains a copy of it, on paying a fee. Next B, the defendant, meets the declaration of A, by what is called a plea, the form of which is not less absurd than that of the declaration. The plea is written and put into the same office, out of which the attorney of the opposite party obtains a copy of it on similar terms. The plea may be of two sorts; either, 1*st,* a dilatory plea, as it is called; or, 2*dly,* a plea to the action. To this plea the plaintiff may make a *replication,* proceeding through the same process. To the replication the defendant may put in a *rejoinder.* The plaintiff may answer the rejoinder by a *sur-rejoinder.* This, again, the defendant may oppose by a *rebutter,* and the plaintiff may answer him by a *sur-rebutter.*

All this takes place without being once seen or heard of by the judge; and no sooner has it come before him, than some flaw is perhaps discovered in it, whereupon he quashes the whole, and sends it to be performed again from the beginning.

This mischievous mess, which exists in defiance and mockery of reason, English lawyers inform us, is a strict, and pure, and beautiful exemplification of the rules of logic. This is a common language of theirs. It is a language which clearly demonstrates the state of their minds. All that they see in the system of pleading is the mode of performing it. What they know of logic is little more than the name.

The agency necessary for the performance of this portion of the business, is some person, who, when he hears a fact affirmed and denied, can tell whether it is one of those facts to which the legislature has attached the power of giving commencement or of putting a period to rights. It is evident, that on such occasion, any one person, with the requisite knowledge, attention, and probity, is as competent to the task as a hundred. If he is single, the attention and probity is likely to be the greatest, as responsibility is not weakened merely, it is almost annihilated by being shared. There should be one judge, therefore, and not more, to superinted that branch of procedure which consists of pleading.

The agency best adapted to the business of the second stage of judicature, is that which next demands our attention. It is the business of taking evidence; in other words, the doing all that is necessary to ascertain whether the disputed fact happened or did not happen.

The subject of evidence is a matter of complexity in the detail. And where any thing complex is to be stated in words, there is always difficulty in the expression, how plain soever the ideas. Such general considerations, however, as we can even here adduce, will, we hope, throw sufficient light upon the subject, to leave no doubt with respect to the conclusions which we have it in view to establish. This is one of the topics, connected with law, which Mr. Bentham has exhausted, though a small part only of what he has written upon it has yet seen the light.*

With respect to all facts, legally operative, that is, which give or take away rights, it is desirable that evidence, amounting to proof, should, if possible, always exist. With respect to a great proportion of them, it is in the power of the legislature to take measures, that evidence of them shall be collected at the moment of their happening, and shall be preserved. This is the case with all those of which an evidentiary writing can be made and preserved by registration; all contracts, births, deaths, marriages, and so on. The proportion is really very great of the whole number of facts, legally operative, in regard to which a legislature, by proper means, might secure the existence of evidence, and to that extent might either prevent disputes, or render the decision of them easy. That so little of this most important and obvious work has any where been done, only shows how ill the legislatures of the world have hitherto performed their duty. It is in the power of the legislature, by a proper classification, to have an accurate formulary, for the different species of *contracts, wills,* and other *evidentiary writings.* Those formularies properly made and printed with blanks to fill up, would render the business of *Conveyancing,* which, in England, is a boundless, trackless, and almost impenetrable jungle; abounding with expence, with delay and vexation to parties, with wealth and almost boundless power over the fortunes of other men to lawyers; a thing of the greatest simplicity, certainty, and ease.

Into the question of what might be, and ought to be, done by the legislature, for making and preserving evidence of the principal facts by which rights are made to begin or to end, we cannot enter at length, on the present occasion. The great importance of the subject is evident from what we have thus shortly advanced.

The business of him, who is only called upon to determine whether a disputed fact did or did not happen, is, to make the best use of all the evidence which exists; whether it were, or were not, desirable, that more had been made to exist. For the best use of that which exists, three things are necessary:

1*st,* That the whole of it should be made to bear, that is, should be taken and applied.

2*dly,* That it should be taken in those circumstances which are most conducive to trust-worthiness.

3*dly,* That the proper value should be set upon each article, and upon the whole.

1. That the evidence may be taken as completely as possible, two things are necessary. The first is, that the judge should have power to send for, and to compel the attendance of, all persons and things which may be capable of affording evidence. The second is, that the evidence should all be taken, and nothing be omitted or lost.

It is not necessary here to enter into any details with respect to the first of those requisites. The necessity of the power is obvious, and the end to be attained is so precise and perspicuous, that there can be no difficulty in conceiving the mode of putting together and applying the means. There is no limit, it is obvious, to the physical power which should be placed at the disposal of the judge. He ought to have the right of calling upon every man, upon the whole community, to aid him in any act which is necessary to the performance of any part of his judicial duty; because any force, opposed to the performance of that duty, there ought to be a force sufficient promptly to overcome. It is convenient, however, to the community, instead of being liable to be called upon, individually, for the performance of the ordinary services auxiliary to the business of the judge, to provide him with a proper number of officers, paid for attending to execute his commands. Their principal business, as regards this stage of the judicial proceedings, is, to serve notice upon any persons whose own presence, or that of any writing or other thing which they may possess, is required by the judge. Persons or things, subjected immediately to the operations of judicature, have a particular name in English. They are said to be *forthcoming,* a word which has an exact equivalent in few other languages, and is exceedingly appropriate and useful. It is of the greatest convenience, when a concrete term, the use of which is very frequent, has an abstract term corresponding to it; as good, has goodness; hard, hardness, and so on. There was not any word in the language corresponding in this way to *forthcoming.* Mr. Bentham, perceiving the great need of it, made the term *forthcomingness;* not exceptionable on the score either of harshness or obscurity. The small wits thought proper to laugh at him. We shall, nevertheless—sorry at the same time that we cannot supply a defect in the language without offending them, make use of the word; in which we find great appropriateness and great convenience. This particular branch, therefore, of the judicial agency is that which relates to *forthcomingness;* and forthcomingness is required for two purposes, both for evidence, and for justiciability; for evidence, that a true decision may be passed; for justiciability, that the sentence of the judge may not fail of its intended effect.

So much with respect to the forthcomingness of evidence. The second condition, required to give the decision the benefit of all existing evidence is, that the whole should be taken, and that not any part of it which can be taken without preponderant inconvenience should be excluded and lost.

Of the several articles of evidence, some will always be of more importance, some of less; and some may be of very little importance; but whether of little or of much, it is always desirable that all should be taken, and every the smallest portion counted for what it is worth. The discovery of truth is promoted by taking advantage of every thing which tends to throw light upon the subject of dispute.

These propositions, it may appear to be useless, indeed impertinent, formally to state. They are too evident, it may be said, to be disputed, and too important to be

overlooked. Important as they are, and undisputed by all the rest of the world, they are not only disputed, but trampled upon by lawyers, especially English lawyers. They have unhappily established a set of rules in direct opposition to them. These rules they applaud in all forms of expression, and celebrate as guards and fences of all that is dear to mankind.

In all causes, they have determined, that persons so and so situated, things so and so situated, though apt to be pregnant with information beyond all other persons and things, shall not be admitted as sources of evidence. Thus, in English law, we have incompetency of witnesses, that is, exclusion of them, 1*st,* From want of understanding; 2*dly,* From defect of religious principle; 3*dly,* From infamy of character; 4*thly,* From interest. These are undisguised modes of exclusion; besides which, there is an extensive assortment of disguised modes. Under this title comes the rule, that only the best evidence be given which the nature of the case admits of; according to which, it often happens that the only evidence which can be had is excluded. Under this title also falls the rule, making certain kinds of evidence conclusive, by which proceeding all other evidence is excluded. To the same list belongs the rule, that hearsay evidence is not admissible. The rules, so extensive in their application, by which writings are wholly rejected, only because they want certain formularies, are rules of exclusion; and so are the limitations with respect to time, and to number of witnesses. Into the very extensive subject, however, of the absurdity and mischievousness of the rules of evidence in English law, we cannot pretend so much as to enter. A remarkable exemplification of them was afforded on the trial of Warren Hastings, to which, for this purpose, the reader may be referred. (See Mill's *History of British India,* Book VI. Chap. ii.)

The only conceivable reasons for the exclusion of evidence are three:

1. Irrelevancy.

2. Inconvenience in obtaining and producing.

3. Danger of deception.

With regard to irrelevancy the decision is clear. What has no tendency either to prove or disprove the point in question, it would be loss of time to receive.

With regard to inconvenience, it is no doubt liable to happen, that when all the good which can be expected from the obtaining of a lot of evidence is compared with the evil of the delay, cost, and vexation, inseparable from the obtaining of it, the evil may be more than an overmatch for the good. In all such cases, it is expedient that the lot of evidence should be foregone.

As a guard against the danger of deception, it is equally certain that no evidence ought ever to be excluded. An account of all the reasons by which the absurdity of exclusion on this ground is demonstrated, and of the wide and deplorable mischief which, in the vulgar systems, is produced by it, would be far too extensive for the contracted limits of the present discourse. Reasons, however, decisive of the question, present

themselves so obviously, that hardly any man, with an ordinary understanding, not fettered by prejudice, can look at the subject without perceiving them.

If evidence is to be received from no source from which evidence, liable to produce deception, is capable of coming, evidence must not be received at all. Evidence must be received from sources whence false evidence, as well as true, is liable to flow. To refuse all information from such sources, is not the way by which a knowledge of the truth can be obtained. This is the way to make sure of not having that knowledge. The means of obtaining it are, to receive evidence from every possible source, and to separate the bad from the good, under all those securities, and by the guidance of all those marks, of which understanding and attention know how to avail themselves.

It is not enough to say, we will receive information from those sources only which are least likely to yield deceptious evidence, refuse to receive it from those which are most likely. You are obliged to receive it from sources differing in almost all possible degrees of likelihood. Where are you to draw the line of separation? Is not the same discernment which guards you against the danger of false information from the sources which you deem the least likely to yield it, sufficient to guard you against it from those sources which you deem the most likely to do so? In fact it will be still more sufficient; because in this case you will be much more apt to be upon your guard. The very best information is, in truth, liable to be derived from the very worst of sources,—from a man who, you know, would not tell you one word of truth, if he could help it.

The securities that a man will give true information, independently of those artificial securities which the legislature can apply equally to all, are, 1*st,* Intelligence, 2*dly,* Probity, 3*dly,* Freedom from interest. Suppose that one, or two, or all of these securities are wanting; it only follows, that what he states should be heard with a proportional distrust. It may still be of the utmost importance to the discovery of the truth that he should be heard. Hear him with the proper allowances. This must always be more favourable to the discovery of the truth than that he should not be heard at all. His testimony may appear, when heard, to be utterly unworthy of credence. But that could not be known till it was heard and examined. It might have so been, that it was not only worthy of credence, but completed the proof of a fact of the greatest possible importance. That a man should not be heard as a witness, on account of his religious creed, is an absurdity which we cannot descend to notice.

2. The second of the three things which we found necessary, as above, for making the best use judicially of whatever evidence to the fact in question, exists, was, that it should be taken under those circumstances, which are most conducive to trust-worthiness. Those circumstances are constituted by the artificial securities, which arrangements can be made to apply. The following enumeration of them has been made by Mr. Bentham *(Introduction to the Rationale of Evidence,* p. 54), and appears to be complete.

1. Punishment.

2. Shame.

3. Interrogation, including counter-interrogation.

4. Counter evidence,—admission of.

5. Writing,—use made of it for giving permanence, &c. to evidence.

6. Publicity,—to most purposes and on most occasions.

7. Privacy,—to some purposes, and on some occasions.

For developing the import of these several securities, we can afford to say nothing. The principal operation of the judicial functionary in this part of the business is, to preside over the interrogation; to see that it is properly and completely performed. The question, then, what is the sort of agency best adapted for the performance of this part of the task of taking evidence is not difficult to answer. There is nothing in it which one man, with the proper intellectual and moral qualifications, is not as capable of performing, as any number of men.

3. All the existing evidence being collected and received, it only remains that the proper value should be attached to the several portions, and a corresponding decision pronounced.

It is sufficiently evident that, for the performance of this duty, no very precise instructions can be laid down. The value which belongs to an article of evidence often depends on minute and almost indescribable circumstances; and the result must be left to the sagacity and conscience of the judge.

At the same time, however, service to this end, and of the greatest importance, may be, and, of course, ought to be, rendered by the legislature. The different marks of trust-worthiness may, to a certain extent of particularity, be very correctly described. This being done, the difference between the value of any two lots of evidence, to which those marks attach, may be very exactly ascertained. One has a certain number of the marks of trust-worthiness, as laid down by the legislature; another has all these and so many more; the result is clear. It is evident, that as far, in this respect, as experience and foresight can go, nothing should be left undone by the legislature.

Another important service can be rendered by the legislature; and that is, to provide an accurate language for the judge; a language in which he can express precisely the degree of value which he allots to each article of evidence, and to the whole. Various expedients may be adopted for this purpose. A very obvious one is, to fix upon some particular, well known, article of evidence, the value of which all men appreciate equally; the clear testimony, for example, of a man of the ordinary degree of intelligence and probity, as a standard. Is the value to be expressed, which the judge attaches to any other article of evidence? If inferior to the standard, it falls below it by so many degrees, one, two, three, four: If superior, it rises above it by so many.

Having provided an accurate language, the legislature should take security that it be used; and admit of no vague and general expressions in the account of the value

which the judge attaches to each article of the evidence on which he grounds his decision.

At the same time that the legislature insists upon the use of precise language in stating the value of evidence, it should insist upon reasons; upon receiving from the judge a precise statement of the grounds upon which he attaches such a value, and no other, to each and every article of evidence; that is, upon receiving a reference, as exact as language can give, to each of the circumstances which contributed to suggest to him that particular estimate which he says he has formed.

Of the importance of all these expedients we presume that no illustration is required.

We come now to the third and last stage of the business of judicature; when all that remains is to carry into effect the sentence of the judge.

When they, upon whom the sentence operates, are willing to obey, all that is necessary is, to afford them notice of what it requires them to perform. In well ordered countries, all but a very insignificant number will be found to be cases of this description. When opposition is to be overcome, a physical force must be provided, sufficient for the purpose. As there seems nothing mysterious in determining how this should be formed, and under what rules it should act, to secure the ends for which it is provided, with the smallest possible amount of collateral evil, we shall here take leave of the subject.

[Back to Table of Contents]

VII.

The Judicial Establishment; Or Inquiry What Is The Best Form Of The Agency Required For Giving Effect To The Laws.—Securities For The Intellectual Endowments Of The Judge.—Securities For The Moral Qualities Of The Judge.

We have now seen the whole of the operations to be performed. The parties are received to state before the judge the investitive or devestitive facts on which they rely. If they state, for this purpose, a fact which is not possessed of those qualities, they are immediately told that it is not possessed of them, and not calculated to support their claim. They come, by two or three steps, at the longest, to a fact upon which the question ultimately turns; and which is either contested, or not contested. In a great many cases it would not be contested. When the subject was stript of disguise, the party who had no right, would generally see that he had no hope, and would acquiesce. The suit would thus be terminated without the adduction of evidence. When it was not, the cases would be frequent in which it might be terminated by the evidence which the parties brought along with them. In these cases, also, the first hearing would suffice. A vast majority of the whole number of suits would be included in these two sets of cases. For the decision of a vast majority, therefore, of the whole number of suits, a few minutes would suffice. When all the evidence could not be forthcoming at the first hearing, and only then, would a second hearing be required. In this mode of proceeding, justice would be, that without which it is not justice, expeditious and cheap.

In all this there is nothing which one man, with the appropriate intellectual and moral qualities, is not as competent to perform as any number of men. As one man is cheaper than any greater number, that is one reason why no more than one judge should be allowed to one tribunal.

The next object of inquiry is, to ascertain what securities can be provided, that those who are entrusted with the business of judicature shall possess the requisite intellectual and moral endowments.

The intellectual endowments depend upon those who have the power of choosing and of dismissing the judges: and who do or do not appoint men whose knowledge and capacity are ascertained. The moral behaviour of the judges depends upon the interests which act upon them in the situation in which they are placed.

Into the question, who should have the appointment of the judges, we do not intend to enter. The answer would be different under different forms of government; and this is not the place to compare the different forms of government, either for this or any other of the ends of its institution. One thing only we shall state, because it carries its

evidence along with it. Those who appoint the judges ought to have no interest contrary to the best administration of justice.

As the uprightness of the judge is assailed by interests inseparable from his situation; viz. the profit which he may derive from misdecision, it is necessary to counterbalance them by opposite interests, assuming the character of securities. Several of the securities, which we have already seen applying to the situation of witness, apply also to the situation of judge: Some are peculiar to each. The following is the list of those which apply to the situation of judge.

1. Punishment.

2. Shame.

3. Publicity.

4. Writing, for the sake of accuracy and permanency.

5. Singleness of the functionary.

6. Appeal.

For the *Punishment* of the several kinds of judicial offences, provision ought to be made in the penal code.

In the case of the judge there is particular occasion to point accurately, and to strengthen to the utmost, the operation of *Shame;* for in the situation of judge it is possible to be guilty of offences very numerous and very serious, without permitting so much of evidence to attach to any definite act, as would suffice to form a ground for punishment.

The great instrument for the application of shame is *Publicity.* The importance of publicity, therefore, is paramount. It is not only the great instrument for creating and applying the moral sanction, the approbation and disapprobation of mankind; but it is of essential service towards the application of punishment, by making known the occasions on which it is deserved. It is not only a great security in itself, but it is the principle of life and strength to all other securities.

All other publicity is feeble and of little worth compared with that of the *Press.* Not only, therefore, ought this to be allowed to operate with its utmost force upon the judge, but effectual provision ought to be made to cause it to operate upon him with its utmost force. Not only ought the judgment hall to be rendered as convenient as possible for the reception of the public; not only ought the greatest freedom to be enjoyed in publishing the proceedings of the judge; and in publishing all manner of observations upon them, favourable or unfavourable; but measures ought to be taken to make a public, and to produce publication, where there is any chance that a voluntary public, and voluntary publication, would be wanting. For this purpose, unless other very important considerations intervene, the judgment seat should always

be in that place, within the district to which it belongs, where the most numerous and intelligent public, and the best means of publication, are to be had.

In England, where there is no definition of libel, and where the judges, therefore, are allowed to punish, under the name of libel, whatever writing they do not like, the publishing of unfavourable observations on the conduct of a judge—nay, in some instances, and these the highest in importance, the simple report of his proceedings—is treated as one of the most heinous of all possible offences. No wonder! Allow judges, or allow any men, to frame laws, and they will frame them, if they can, to answer their own purposes. Who would not, if he could, make a law to protect himself from censure? More especially if he were a man disposed to act in such a way as to deserve censure.

Would you allow falsehood to be published against the judge? The word falsehood is here ambiguous. It means both erroneous opinions, and false statements with regard to fact. Erroneous opinions we would undoubtedly permit, because we know no standard for ascertaining them, other than that which is afforded by public discussion; and because this is an adequate remedy for all the evil which erroneous opinions have any tendency to produce. Affirmation of facts injurious to the judge, if false, and made without reasonable grounds for having been believed to be true, we would prevent.

Allow facts, injurious to the judge, to be published, even when true; allow comments, unfavourable to the judge, to be made upon his actions, you discredit the administration of justice. Discredit the administration of justice, to which the people are resorting every day for the greatest of all possible benefits, protection from injury! As well talk of discrediting the business of a bread-baker, a meat-seller, if the fraudulent dealer is exposed to the censures of the public! Discredit the administration of justice, indeed, by taking measures of security against the vices of judges, indispensable for its perfection!

The importance of *recording, in permanent characters,* what takes place before the judge, we must content ourselves with assuming. We may do so, it is presumed, with propriety, on account of the facility with which the reasons present themselves. We must also leave it to our readers to draw the line of distinction between the occasions on which it is requisite, and the occasions on which it may be dispensed with; the occasions, for example, where every thing is simple and clear, and all parties are satisfied.

It is a great security, both for diligent and for upright conduct in the judge, that he occupy *singly* the judgment seat. When a man knows that the whole credit and reward of what is done well; the whole punishment and disgrace of what is done ill, will belong to himself, the motive to good conduct is exceedingly increased. When a man hopes that he can shuffle off the blame of negligence, the blame of unfairness, or fix a part of it on another, the uncertainty of the punishment operates, as we have already seen, to the diminution, and almost to the extinction, of its preventive force. Certain common, and even proverbial expressions, mark the general experience of that indifference, with which a duty, that belongs in common to many, is apt to be performed. What is every body's business is nobody's. This is as true in the family as

in the state; as true in judicature as in ordinary life. Much remains to be said upon this topic, which is one of great importance; but we must pass to the next.

Of the use of *appeal,* as a security against the misconduct of the judge, there is the less occasion to adduce any proof, because it seems to be fully recognized by the practice of nations.

One thing, however, which is not recognized by that practice, is, that, if it is necessary in any one sort of causes, so it is in every other, without exception. Not a single reason can be given why it should exist in one set of cases, which is not equally strong to prove that it should exist in every other.

It is instructive to observe the cases in which it has been supposed that it ought to exist, and the cases in which it has been supposed that it might be omitted. The cases in which it has been thought necessary, are those which concern property of considerable value. Those in which it has been dispensed with are those which concern property of inconsiderable value. The first set of cases are those which are of importance to the aristocratical class; the second are those which are of no importance to that class. It is the aristocratical class who have made the laws; they have accordingly declared that the suits which were important to them should have the benefit of appeal; the suits not important to them should not have the benefit of appeal.

We recognize only one standard of importance; namely, influence upon human happiness and misery. The small sum of money for which the suit of the poor man is instituted is commonly of much greater importance to him, than the larger sum for which the suit of the rich man is instituted is to the rich. Again, for one rich man there are thousands and thousands of poor. In the calculation, then, of perfect benevolence, the suits for the small sums are not, as in the calculation of perfect aristocracy, those of the least, or rather no importance; they are of ten thousand times greater importance than the suits for the largest sums.

If an appeal ought to be had, how many *stages* should there be of appeal? This question, we imagine, is easily answered. If you go for a second judgment, you should, if possible, go to the very best source: and if you go at once to the best source, why go any farther?

What is required to be done, in the case of an appeal, is the first thing which deserves to be ascertained. An appeal takes place in consequence of a complaint against the previous judge. Where no complaint, there is no appeal, nor place for appeal.

A complaint against the judge must relate to his conduct, either at the first, the second, or the third stage, of the judicial operations.

If to his conduct at the first stage, it must be a complaint of his having permitted a party to rest upon a fact which had not the investitive or divestitive quality ascribed to it; and this implies either a mistake with respect to the law, or that he allowed the decision to turn upon a fact which did not embrace the merits of the question. It is

evident, that for the decision of this question, all that is necessary is an exact copy of *the pleadings,* and transmission of it to the court of appeal.

If the complaint relates to his conduct at the second stage, it must turn upon one of two points; either that he did not take all the evidence, or that he did not properly determine its value.

If he did not take the evidence properly, by a failure either in assembling the sources of it, or in extracting it from them when assembled, the proper remedy is to send back the cause to him, with an order to supply the omission; or, if he be suspected of having failed wilfully, to send it to the judge of one of the neighbouring districts, to retake the evidence and decide.

If the complaint relates to a wrong estimate of the evidence, the statement of it, transmitted to the court of appeal, with the reasons assigned by the judge for the value affixed to every portion of it, will enable the appellate court to decide.

With regard to the third stage, the only complaint there can be is, that the judge has not taken measures to execute his own sentence. If any inquiry is in this case to be made, the proper course is, that the appellate court refer it to one of the neighbouring judges. When a simple act is to be done, the proper order is to be dispatched, and the proper penalties for non-performance exacted.

It thus appears, that for every thing which is required to be done by the appellate judicature, nothing whatsoever is required, as a foundation, but certain papers. The presence is not required, either of parties or of witnesses.

As it is of no great consequence, in a country in which the means of communication are tolerably provided, whether papers have to be transmitted 50 or 500 miles, the distance, even though considerable, of the seat of the appellate jurisdiction is a matter of very little importance. The object, then, is to get the best seat; that is, the best public. The best public, generally speaking, is in the capital. The capital, then, is the proper seat of all appellate jurisdiction. And that there should be one judge, and one judge only, in each court of appeal, is proved by exactly the same reasons, as those which apply to the courts of primary jurisdiction.

The question how many courts there should be, as well of primary as of appellate jurisdiction, is to be determined by one thing, and one thing only; namely, the need there is for them. The number of the courts of primary jurisdiction must be determined, in some instances, by the number of suits; in some, by local extent. To render justice sufficiently accessible, the distance from the seat of judicature must not be great, though the number of accruing suits, either from the paucity or from the good conduct of the people, should be ever so small.

As the judgment seat should never be empty, for the need of staying injustice is not confined to times and seasons, and as one judge may be sometimes ill, sometimes called to a distance even by the duties of his office, provision ought to be made for supplying his place. For this purpose the proper expedient is a deputy. That the deputy

should well perform his duty, the best security is, that he should be chosen and employed by the judge, the judge being responsible for the acts of the deputy, as his own. Whatever it be, which the judge cannot do, or cannot conveniently do, in that he may employ his deputy. If there is a great influx of causes, the deputy may be employed in some of the least complex and difficult. If there is any business, not of first-rate importance, requiring the presence of the judge at a distance, the delegation of the deputy or deputies is the proper resource.

Besides the judge and his deputy, there are two adjuncts to every tribunal, which are of the utmost importance; indispensable, indeed, to the due administration of justice. These are, a *pursuer-general,* and a *defender-general.* The business of both pursuer-general, and defender-general is, to reclaim the execution of all laws in the execution of which the nation has a peculiar interest, though individuals may not. The peculiar business of the pursuer-general is, to act on behalf of the administrative authority, in its character of plaintiff, and on behalf of every plaintiff who is without the means of engaging another advocate; to obviate any prejudice he sees likely to arise to justice from the conduct of plaintiffs, whether in civil matters or penal; and to perform, in the case of all offences, where no private prosecutor appears, the office of prosecutor. The peculiar duty of the defender-general is, to act on behalf of the administrative authority in its capacity of defendant, and on behalf of every defendant who has not the means of engaging another advocate, and to obviate any prejudice he sees likely to result to justice from want of skill or other causes on the part of a defendant who pleads his own cause, or on the part of the advocate who pleads it for him.

The courts of appeal, though all seated in the metropolis, ought to be as numerous as the speedy hearing of all the appeals which come to them requires. The judges of appeal ought all to be chosen from the judges of primary jurisdiction, not only on account of the education and the experience received, but as a step of promotion, and a proper motive to acquire the requisite education, and to merit approbation in the inferior employment. There is the same propriety, and for the same reason, in choosing the judges of primary jurisdiction from the deputies.

(F. F.)

J. Innes, Printer, 61, Wells-st. Oxford-st. London.

[*]See the writings of Kant and his followers, *passim;* see also Degerando, and others of his school, in various parts of their works.

[*]Nothing which can in any degree interfere with the rights of conscience, including whatever interpretation any man may put upon the words of Scripture, is here understood. It is the object of the legislator to encourage acts which are useful, prevent acts which are hurtful, to society. But religious hopes and fears are often applied, not to promote acts which are useful, prevent acts which are hurtful, to society; in which way, alone, they are capable of conducing to the views of the legislator; but to mere ceremonies. And cases are not wanting in which they are applied to produce acts that are hurtful, prevent those that are useful, to society. As far as religious motives are attached to the useful, instead of the useless or hurtful objects,

society is benefited. It is this benefit which it is recommended to the legislator to pursue.

[*]This part of Mr. Bentham's writings has been presented to the public by M. Dumont, the first of translators and redacteurs, in that happy form which he has given to other portions of that philosopher's manuscripts.