

would in law be deemed a graft on the old one, and subject to all the defects that had arisen to the tenant's title under the old lease. The outstanding claimant, if he recovered the tenant's interest would recover at the same time the improvements of the tenant.

In the case of one of the houses that have recently fallen, I have ascertained that there is a serious defect of title, to which the Scotch law would be exactly applicable.

Under these circumstances, I would suggest that in every case where a house has fallen, or where the Town Council take proceedings, inquiry should be made as to whether the case falls within the circumstances that would be met by the Scotch Town Law; and that steps should be taken to have this wise law, so long in successful operation in Scotch burghs, extended to Irish towns.

IV.—*Essay on the Simplification effected by the Codes of Law prepared and adopted for British India, and the desirability of framing similar Codes for England, Ireland, and Scotland.* By Francis Nolan, B.A., T.C.D., Barrister-at-Law.*

[Selections from read, 15th February, 1876.]

“Owing to the growing bulk and intricacy of the English law (a bulk and intricacy which must go on increasing), it is most probable, nay, it is almost certain, that before many years shall have elapsed, attempts will be made to systematize it—to simplify its structure, to reduce its bulk—and so to render it more accessible. . . . And, owing to the rapidity with which the accumulation of law goes on, to the incompatibility of many of its provisions with the changed circumstances of society, and to the turn for legal reform which public opinion is taking, it is most probable, nay, it is almost certain, that the necessity for such changes will, in a few years, be felt or imagined, and that such changes will be attempted skilfully or unskilfully.” *Austin's Jurisprudence*, vol. iii., p. 376.

The formation of codes, or of consolidated statutes relating to portions of Indian law, has taken place within the last few years. The greater portion of this work was carried out in the year 1872. The first statute on this subject became law in 1859.

The public are still ignorant of the extent of this great legal reform—the difficulties encountered and the success achieved in this undertaking. In order to form a judgment as to whether what has been carried out in India can or ought to be attempted in England, it is necessary to consider precisely what has been done in the former country.

It is necessary to examine shortly, in the first place, the state of the Indian law, previous to the passing of these statutes; secondly, the form in which they have been passed; lastly, whether, tested by experience, they have proved successful.

I.—(a) *Origin of English Indian Law.*

It is not the object of this article to dwell on the circumstances

* This is one of the prize essays to carry out suggestion of Jonathan Pim, Esq., to have Essays on the Differences in the Laws in the several parts of the United Kingdom, and on the best means of effecting assimilation where desirable.

—apparently accidental—which placed the Indian Empire under English rule. But, in considering every matter in connection with India, it must never be forgotten that the English did not displace princes or rulers reigning by the will of the people. The history of India—from times the most remote—is a history of conquest. The English simply displaced a previous body of conquerors who had never cared for the education of the people, or the entrusting them with the administration of justice.

As the English dominion extended in India, the result was, few were found qualified to fill the higher government offices. Thus, the previous history of this country, much contributed from the first to the filling, pending the amelioration of the condition of the people, all important posts by Europeans, naturally but imperfectly acquainted with the language of the country.

From the first landing of the English in India, the government and the administration of the laws of that portion of the country which was occupied, were confided to Englishmen and Scotchmen. They were unacquainted with Indian laws and customs.

Probably, they took an exaggerated view of the perfection of their own.

They, however, determined that the only law concerning which they had any knowledge, should prevail throughout India. The result was, that English common and statute law, as it existed in 1726, were transferred to India.

At the same time, certain Hindoo and Mahomedan customs or laws were allowed to qualify and control the English law, when they came into conflict.

Since that period, however, no new law has come into operation which has not been enacted by the English Parliament, or by some subordinate legislature to whom they had delegated power for such purpose.

The Governor-General in council, was entrusted by the English Parliament with this great power. The Governors in council of the great Presidencies of Bengal, Bombay, and Madras, had, however, a similar power, limited in its operation to their respective presidencies.

The statutes passed by these different Governors were termed “regulations.” In India, they had the force of Acts of Parliament. Those passed since 1834 are termed “Acts.”

A full account of the different sources of Indian law, and the immense number of volumes in which it was contained, is given by Mr. Morley in his work on *The Administration of Justice in British India*.

Indian law had six distinct sources.

First: The common and the statute law, as it prevailed in England previous to the year 1726. Secondly: Statutes made by the English Parliament since 1726, extending to India. Thirdly: The civil law, as it prevails in ecclesiastical and admiralty courts in England. Fourthly: Regulations made by the Governor-General in council, and the Governors in council, previous to the 3 & 4 Wm. IV., c. 85, and registered in the supreme courts, and the acts of the Governor-General made under the 3 & 4 Wm. IV., c. 85. Fifthly:

Hindoo laws and usages in actions regulating inheritance, and succession to lands, rents, and goods, and all matters of dealing between party and party, in which a Hindoo was a defendant. Sixthly: The Mahommedan laws on the same subject, applicable, however, only where a Mahommedan was a defendant.*

(b) *Indian English Law, both written and unwritten.*

Thus, in India, as now in England, there was the written and the unwritten law.

The written law consisted of the English statutes, the regulations of the Governor in council, and of the subordinate Governors. The unwritten law consisted of the common law of England, as it prevailed previous to the year 1726, and certain Indian usages and customs.

These latter were to be learned from a large number of Indian text-books, written in a language with which those who administered the law were imperfectly acquainted.

(c) *Confusion of Indian English Law.*

This law, both written and unwritten, was arranged without order or classification.

In other words, all the statutes, regulations, and cases decided under them, were arranged in chronological order—that is, the order in which they were passed or decided. The law on any one subject was scattered thus through many volumes.

The extent of the confusion which prevailed in Indian law is best realised by referring to the evidence of Mr. Fitzjames Stephens, Q. C., before a Committee of the House of Commons, appointed during the past session “to consider the best means of improving the frame of English Acts of Parliament.” Mr. Stephens had special opportunities for forming a judgment on this question. He was five years legal member of the Indian Council, and in 1872, during his term of office, drafted several of these statutes. The following is his evidence:—

“Although the extent of Indian acts was nothing in comparison to the English Statute Book, their intricacy was something quite extraordinary. The acts had been passed by five or six legislative bodies, each of whom had been legislating upon their own topics, and under a different authority, and in different styles.” (S. C. on Acts of P., Ans. 250, p. 19.)

Mr. Fitzjames Stephens was further asked, whether, although the amount of the statute law in India might be less, the intricacy would be greater than in England. He replied:—

“I should be sorry to say that you would have a more intricate condition of things than exists in English law. English law was intricate in a different way. It was necessary to deal with six or seven different classes of law—for instance, before 1822, which were called the Regulations—the Bengal, Bombay, and Madras Regulations. Those were three sources of law. Then, again, there were the acts passed by the Governor-General, between 1834 and 1855, which were under a somewhat different system, and applied to the whole of India. Again, there were the acts passed between 1855 and 1861, when the Council was constituted in a somewhat different way. Then there were the acts passed since the

* See Mr. Morley's *British India*, p. 22.

Indian Council's Act in 1861. Besides those, there were all the acts of the legislative councils of Bengal, Bombay, and Madras, each of these presidencies having a separate legislative council. Besides these, again, there were a vast body of—I hardly know what to call them—orders, official rules, despatches, and, in some instances, what you might almost call letters, which formed part of the law of the Punjab." (S. C., Ans. 251, p. 19.)

Mr. Fitzjames Stephens estimated that the statutes and regulations in force in India were, in the year 1863, comprised in about 11 large volumes (S. C. on Acts of P., Ans. 255, p. 70). In this estimate, the regulations enacted by the subordinate Governors and councils of Bombay, Bengal, and Madras are not comprised.

The common and statute law of England in force in India, and the Indian customs, which had the force of law, in addition, occupied several hundred volumes.

The large number of volumes in which English Indian law was contained, rendered it impossible that the people should have any knowledge of the law under which they lived. This is more readily realised when it is remembered that the greater portion of this law was written in the English language. Indeed, from its bulk, those who administered it must have been imperfectly acquainted with it. In England, Ireland, and Scotland, the law is admitted to be in a similar confused state. The difference of language, which is such an important element in India, exists, however, but to a small extent in the former countries.

(d) *Remedies adopted in England and Ireland for confused state of Law.*

In England, Ireland, and Scotland, however, two remedies have been adopted, which have mitigated, if not prevented, the natural consequence of this state of the law. These are text-books, and a bar in the capital of each country, with members of the legal profession in every town.

In a text-book, the law on any one subject is stated.

All the statutes, or at least the important sections of them affecting such portion of the law, are classified and collected. Immediately following the different sections of such statutes, are to be found references to the different cases decided under them.

In stating the unwritten law, more difficulty is found. The unwritten law is always to be gathered from the innumerable reported cases on the subject. Such cases are supposed to have established, or to illustrate "some law or order as to the matter to which they relate. But such law or rule exists nowhere in definite shape; it is to be gathered each time by the inquirer from an examination of those different cases each time he is interested in a matter which it affects. To deduce such a law and rule, and to embody it in an authoritative shape, would be to convert our judiciary and unwritten law into statute law." (*Austin's Jurisprudence*, vol. ii., p. 100.)

The text writer states such rule as he believes it to be determined by such cases, either in his own words or in those of some distinguished judge who may have happened to have declared it. Such rule derives its authority only from the cases from which it is deduced. This has rendered it customary after such to give an

epitome of the leading cases on the subject. The volumes in which such cases are to be found are stated.

Reference to any of our leading text-books, such as *Jarman on Wills*, or *Sugden on Powers*, will show that it is on this principle they are framed.

No doubt, time and successful rivalry have produced text-books of great accuracy on the principal subjects of English law; but, on the minor subjects, they are indifferent. On mere local subjects, there are, as a rule, none.

It is to be remembered that, save in a few exceptional cases, mere text-books are of no authority, unless the statements in them are warranted by the cases to which they refer.

Thus their utility rests on the power of verifying such matters. To do so, requires a library, and one of no ordinary dimensions. Practically, the facilities for doing so are confined to members of the bar.

Thus, in England, if the public do not know the law, great opportunities on an emergency are afforded of ascertaining it. The great wealth of the country has caused but little attention to be directed to the cost which the doing so necessitates.

But in India, no such remedies existed, or were possible.

The class of persons who have leisure to write text-books did not exist. The number of the members of the legal profession were limited: outside the capitals of the presidencies they were seldom to be found.

Again, an additional difficulty existed, viz., except in the capitals of the three presidencies, the judges—although admittedly men of education—were untrained lawyers.

(e) *Remedy adopted in India for the confused state of the English Indian Law.*

For the state of Indian law it was necessary that some remedy should be discovered.

The result has been the enacting of consolidated statutes or codes.

The former is the term usually employed by Mr. Fitzjames Stephens. The proposal was to take all the statutes or regulations on any one subject, group them together, and enact them in a single statute.

For instance, on a subject such as the criminal law, where there existed over three hundred statutes and regulations, all were combined into one. In doing so, the condensed language of the modern draftsman was substituted for the verbiage and repetition of past times. Whenever a legal decision had determined the effect of any clause, such interpretation, when approved of, was incorporated into the new enactment.

No doubt in India, in carrying out this plan, the unwritten law on each subject was authoritatively reduced to writing. This was done to a much greater extent than Mr. Fitzjames Stephens seemed anxious to admit before the Select Committee before referred to. Again, where it was believed that the existing law required amendment, such amendment was made.

Thus, each subject of the law was set forth within the limits of

a single statute. Practically, the result has been to substitute a single statute for a large text-book.

II.—(a) *Form of Indian Consolidated Statutes.*

The form in which these statutes have been drafted differs from that heretofore used in England.

The method usually followed in a good text-book has been adopted as that most calculated to convey a knowledge of the law.

First of all, the rule governing cases of a certain class is stated. Then, immediately following it, are stated certain hypothetical cases which act as illustrations of it. These correspond to the epitome of leading cases usually referred to in a text-book. Following such illustrations and explanations are what are termed exceptions. Exceptions are the special occasions on which such rule does not apply. They would, in a text-book, be classed under the head of defences.

This novel form of drafting statutes owes its origin to Lord Macaulay—no bad judge of the best manner to convey information or knowledge by words.

The manner in which these statutes are drawn, is best understood by examining a section taken from one of them. Section 499 of the Indian Penal Code is a good example of this novel method of drafting statutes. It is, no doubt, long; but it is to be remembered that the English text-book on the subject occupies over 250 pages. The following is s. 499 of the Penal Code, Act No. 11, of 1860 :—

“Whoever, by words either spoken or intended to be used, or by signs, or by visible representations, makes or publishes any imputation concerning any person, intending to harm, or knowing or having reason to believe that such imputation will harm the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person.

“Explanation I. It may amount to defamation, to impute anything to a deceased person, if the imputation would harm the reputation of that person if living; and is intended to be hurtful to the feelings of his family or other near relatives.

“Explanation II. It may amount to defamation, to make an imputation concerning a company, or an association, or collection of persons as such.

“Explanation III. An imputation in the form of an alternative, or expressed ironically, may amount to defamation.

“Explanation IV. No imputation is said to harm a person's reputation, unless that imputation, directly or indirectly, in the estimation of others, lowers the character of that person, in respect of his caste or calling, or lowers the credit of that person, or causes it to be believed that the body of that person was in a loathsome state, or in a state generally considered as disgraceful.

“*Illustrations.*”

“(a) A says: ‘Z is an honest man; he never stole B's watch’—intending to cause it to be believed that Z did steal B's watch. This is defamation, unless it falls within one of the exceptions.

“(b) A is asked, Who stole B's watch? A points to Z, intending to cause it to be believed that Z stole B's watch. This is defamation, unless it falls within one of the exceptions.

“(c) A draws a picture of Z running away with B's watch. This is defamation, unless it falls within one of the exceptions.

“First Exception. It is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published; whether or not it is for the public good, is a question of fact.”

This section contains other exceptions, which assert the right of criticism—in good faith—on public servants—on the public conduct of any person—on a public performance—on decided cases—as also the right to publish reports of courts of justice—and to make certain communications which are known to English lawyers as privileged.

It is not to be supposed that every section of these consolidated statutes contains explanations, illustrations, and exceptions. Some contain none; others but one. The above section has been selected, not for its own intrinsic merit, but as one well calculated to draw attention to the Indian mode of drafting statutes.

The following two sections, taken from the Indian Evidence Act of 1872, assert two well-known rules of English law, and contain each only one illustration:—

“When language used in a document is plain in itself, and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts.

“Illustration.

“A sells to B, by deed, an estate at Rampur, containing 100 bighas. A has an estate at Rampur, containing 100 bighas. Evidence may not be given of the fact that the estate meant to be sold was one situated in a different place, and of a different size.” (S. 94, Act No. 1, 1872.)

“When language used in a document is plain in itself, but is unmeaning in reference to existing facts, evidence may be given to show it was used in a peculiar sense.

“Illustration.

“A sells to B, by title, a house at Calcutta. A had no house at Calcutta; but it appears that he had a house at Hownah, of which B had been in possession since the execution of the deed. These facts may be proved to show that the deed related to the house at Hownah.” (S. 95, Act No. 1, 1872.)

Some people have objected to these illustrations as useless. Mr. Fitzjames Stephens states that in practice they have been found beneficial. Their adoption is in no way necessary for the enacting of a consolidated statute.

(b) Indian Penal Code.

The entire of the Indian Penal Code is comprised in one hundred and thirty-three pages.* The principal English text-book on the same subject, which contains only a small portion of the English criminal statutes,† occupies three thousand two hundred and sixteen pages. A portion of this work, however, relates to criminal procedure, for which, in India, there is a separate statute.

The Indian Penal Code has been in practical operation for fifteen years. During that time, many cases have been decided under it; and it was during such period several times amended.

(c) Amendment of Indian Statutes.

The manner of amending statutes in India, is an improvement on that existing in England.

* The French Penal Code is comprised in sixty-eight pages, and four hundred and eighty-four sections.

† *Russell on Crimes.*

When the law, as declared by any one section, is wished to be changed, wholly or in part, such section is entirely repealed, and a new one enacted, bearing the number of the old. When it is not wished to repeal any section, a new section is re-enacted, in such form as it is capable of being inserted in the original statute, by re-printing it. Thus, if s. 26 was wished to be qualified, a new section, bearing that number, would be enacted, and the old section repealed.

Again, if it was not wished to repeal any portion of the statute, but simply to add something which would have found its fitting place in such statute, after s. 30, a new section, entitled s. 30A, would be enacted. A new Government edition of the statute would then be issued, in which the repealed section would be omitted, and s. 27 and s. 30A inserted in their proper place.

Another improvement in the form of such statutes is, the entitling them in the year of the calendar, in place of that of the reign of the sovereign. For instance, an act which, in England, would be referred to as 38 & 39 Vic., c. 10, in India would be termed, Act 10, 1875.

The statutes themselves are divided into parts, which are subdivided into chapters. In England in many recent instances, statutes have been divided into parts.

(d) *Subjects on which Law has been Consolidated in India.*

Since the year 1860, Indian Consolidated Statutes have been passed on the following subjects :—

Act xxi. 1861.—Enacting a code of Criminal Procedure. This statute substituted one Act for 267 then in existence. From 1861 to 1872 about two hundred cases were enacted under it, and it was thirty-two times amended. In the latter year a new consolidated statute, embodying the original and the amendment statutes, was passed.

Act x. 1865.—The Indian Succession Act. This statute consolidated 332 acts and regulations.

Act ix. 1871.—The Indian Limitation Act.

Act ix. 1872.—The Indian Contract Act. This Act now contains the entire law of contract in force in India. The English text-book on this subject, *Addison on Contracts*, occupies 1,222 pages.

Act i. 1872.—The Indian Evidence Act. The law of evidence in India, both statute and what formerly was unwritten, is comprised within 167 sections, occupying 87 pages. The chief and almost the only used English text-book on this subject, occupies 1,794 pages.

An examination of these statutes, particularly that relating to the law of evidence, shows that not only an immense quantity of the written law has been consolidated, but also a great portion of the unwritten authoritatively reduced to writing.

The result is, that in India, on each of the above subjects, the entire law is comprised within the limit of a few pages. The above statutes are those which are termed the Indian Codes.

However, on nearly every subject in India, on which there were several regulations or acts, consolidation statutes, containing only

the previously existing written law on such subjects, have also been passed.*

The simplicity introduced is most easily appreciated by actually comparing the bulk occupied by the present statutes on the above subjects, with that occupied by the law which they have supplanted. But of course if "bulk" is the only test by which the success of this legal reform is to be judged of it, there can be no doubt. It is a mathematical certainty.

III.—*Benefit derived from Consolidation of Statutes in India.*

The real question is, Have these consolidated statutes in practice been found beneficial? Have they contributed to aid the due administration of the law? Have they caused a greater knowledge of that law to be diffused amongst the people?

No doubt the English lawyer feels confident, that, notwithstanding the vast bulk of the English law, he could, in the majority of instances, declare its application to any state of facts, at present with greater certainty, than he could if it was supplanted by consolidated statutes similar to those now in India.

The interpretation that will be put by the judges on the language used in the old statutes is generally decided by many reported cases, whilst that which will be put upon the substituted language is a matter of speculation. This is true to a certain extent, and with reference to some subjects, always assuming that leisure is afforded to consult the reported cases.

No doubt the passing of consolidated statutes, particularly at first, enlarges the discretion of the judge. This is in reality the principal, if not the only objection to consolidated statutes. It ignores, however, that the ultimate effect of the consolidation of the statutes must be to authoritatively reduce the unwritten law to a statutable form, which in itself must limit such discretion. This objection can, however, be almost altogether removed by expressly incorporating the effect of decided cases into such statutes so as to leave no room for doubt as to the law which they have interpreted.

But it is idle to suppose laws can be good which the people are incapable both of remembering or understanding. Laws which require, in the ordinary cases of life, application to third parties to ascertain their meaning, are to be deplored.

The testimony of all who have had experience of the Indian statutes is in their favour.

Mr. FitzJames Stephens gave the following evidence on this subject—being asked by the chairman of the "committee" whether the consolidation of English statutes would facilitate the legislation of England :—

A.—"My belief is that both legislation and the administration of justice would be simplified to an extent of which you can hardly have an idea until you have seen it done. * * * The Penal Code consolidated a vast mass of matter of one sort and another. It has its defects, and might be improved in various particulars; but, speaking practically, it is in everybody's hands, and

* See Paper read by Mr. Fitzjames Stephens before Social Science Association November, 1872.

gives in a small volume the whole criminal law of India. It is in daily use, and is thoroughly well known to all officers who have to administer it. The code of Criminal Procedure consolidated, I think, together with the code of Civil Procedure, certainly 300, I am not sure that the number ought not to be 400, Acts into one; and you may imagine what a relief that has given. * * * I do not exaggerate when I say that I think that the process of consolidation in India—partly in the time of my predecessor, partly in my own time, and partly in the time of my successor—must have reduced the bulk of the statute law of the country to much less than a third of what it was a few years ago."

Thus in India simplicity has been introduced into a system of law, whose bulk and intricacy rivalled that of England.

IV.—(a) *Bulk and Confusion of English Law.*

Can the remedy thus adopted in India be applied to England? The intricacy and bulk of English law is a matter which hardly any person but a barrister can realise. Few Englishmen—apart from trained lawyers—care to admit that the complexity of their law is so great that it is impossible for any person who does not devote his entire time to it, to possess of it even an elementary knowledge. To those who think otherwise we would recommend the perusal of the evidence of the present English Master of the Rolls before the "Committee," where he described the terms in which Acts of Parliament are drawn as "a Chinese puzzle."

English law is, as is well known, divided into the written and unwritten.

The former comprises all law which proceeds from its source in writing. It is all but co-extensive with the statutes of the realm. The unwritten law consists of the common law, which is supposed to have existed previous to the passing of the statutes. It in reality includes a large portion of law which is popularly termed judge-made law.

No doubt, particularly in more remote times, when under the cloak of law it was perceived some wrong was about to be, or had been committed, for which no remedy appeared to be provided, the judges refused to sanction such a course—declaring it was against either the fundamental principles of the constitution or the common law.

This has been termed judiciary law. Its extent and operation is very large.

The unwritten law is supposed to be handed down by tradition. Practically a knowledge of it is to be derived from the reported cases declaring its limits. These cases are said, without exaggeration, to occupy over 1,500 volumes. Such cases are arranged in the order in which they were delivered. The only attempt at classification is their division into cases decided by law and by equity judges.

The best way of realising the complexity of the law is by enumerating the number of volumes in which it is contained, unless an opportunity be afforded of contemplating the space which they occupy.

The following enumeration omits the large number of text-books which have been written, it is to be remembered, for the legal profession. The English statute law, until within the last two years, occupied about 70 volumes.

Within the last two years its bulk has been reduced by about one-

half. The Irish ante-Union statutes occupy 20 volumes in addition.

The English reports, which contain the unwritten law, occupy over 1,600 volumes. These reports also contain the decisions under the statute law.

It is apparent that no lawyer can have an accurate knowledge of the contents of all these volumes. His knowledge of them is to a great extent derived, as before shown, from text-books.

That the public are acquainted with the law under which they live is never even asserted. On the other hand, one of the most elementary principles in connection with it is, that whoever violates it is assumed to have known it.

(b) *Recent Efforts to Simplify English Law.*

This deplorable state of English law has been openly acknowledged since the time of Lord Bacon.

No serious attempt to remedy or prevent the increase of this evil was made until the year 1853. In that year a commission was appointed for the revision of the statute law.

This commission was superseded, in the year 1857, by another appointed for "the consolidation of the statute law."

Last session a Parliamentary Committee was appointed to consider the means to be adopted to improve the language and manner of current legislation. This committee received a great deal of evidence on the subject of consolidation.

As soon as the first commission was appointed, it was at once seen that it was hopeless to attempt authoritatively to reduce the unwritten law to writing, until the statute law was simplified.

It was found that English law might be divided into about 400 distinct branches: but that the portion of the law more generally in use might be classified under about 100. It was found that a portion of each branch of the law was declared by statute, whilst the remainder consisted of the unwritten law.

The statutable portion of it was not comprised in one statute.

On most subjects there were many statutes. In one instance the number of such statutes reached 200. There are 140 statutes relating to the election of members for the House of Commons. There are 120 statutes relating to the poor. There are 50 statutes relating to masters and workmen. These statutes had been passed in different years, and generally were to be found in different volumes.

In the Appendix to the Second Report of the Commissioners of 1853, the number of statutes relating to 183 distinct subjects is given.

The average number is 27.

It being admitted that it was hopeless to simplify the unwritten law until the written was brought within a manageable bulk, it was proposed to endeavour to set forth the entire statute law on each subject within the limits of one statute.

Once, however, attention was directed to this subject a new difficulty was discovered, viz.: to determine what statutes related to any matter. Statutes had been passed so heedlessly that portions, or the entire of former statutes were found to have been repealed, without any notice having been taken of such repeal. An example

was given by Mr. Wright before the committee of last year of this uncertainty. It appeared that the Court of Queen's Bench in England had taken time to consider a case "upon the ground of a direction in the Public Health Act of 1848," that certain matters about the appointment and removal of servants should be approved by the General Board of Health. At the time no notice was taken of the fact that this portion of the Act had been repealed by the Public Health Act of 1858. (Evidence of Mr. Wright, S.C. on Acts of P.; ans. 1,247, p. 92.)

This uncertainty as to what Acts were in existence, rendered it necessary that prior to the consolidation of statute law there should be some authoritative declaration as to what statutes were in force. This could only be done by Parliament. It was determined that the authority of that body should be resorted to.

(c) *Revision Statutes.*

The proposal was that the entire of the statutes of the realm should be carefully examined, in order to determine which of them were in force, and which directly or virtually repealed; and as soon as such work was accomplished, that the necessary sanction to it should be obtained by a declaratory Act on the subject.

This has now been done. The entire of the statutes have been examined from the Great Charter to the year 1868. All these statutes which were supposed to be repealed were carefully tabulated.

A series of Revision Acts have been passed declaring such acts to be repealed. The last of these acts, carrying the revision down to the year 1868, was passed last session. Notwithstanding the enormous number of statutes thus disposed of, the number unrepealed are sufficient to occupy 18,000 pages.*

* In the Appendix No. 1 to the Report of the Committee of last year will be found a table giving, in detail, the subjects to which such statutes relate.

Statutes styled "Public General" in force at the end of 1874 (reduced to		
PART I.—		pages of the ordinary quarto edition).
Acts exclusively Scotch, Irish, Indian, or Colonial ...	5,800	
Acts nearly Local and Personal in England ...	3,300	
PART II.—		9,100
Revenue Acts, including Excise, Customs, National		
Debt, Crown Property, etc. ...	1,600	
Military Acts—Army, Navy, Militia, Volunteer,		
and the two Mutiny Acts ...	700	
Clauses Acts—Land, Railways, Gas, Water, etc. ...	300	
Public Departments ...	800	
PART III.—		3,400
Local Government and Administration, including		
Poor Laws ...	500	
Procedure, Civil and Criminal—including Procedure		
and Copyhold and Inclosure Commissioners, etc. ...	900	
Trades, Employments, and Professions—including		
Merchant Shipping ...	1,200	
Other English Acts, being those of the most general		
importance, including the Criminal Acts ...	2,900	
		5,500
		18,000
		4*

(d) New Edition of Statutes.

Together with the passing of these Revision Statutes, it was determined to issue a new edition of the statutes, containing such only as were in force. This has been now done down to the 5 & 6 Victoria.

The entire of the statutes in existence, to that period, have now been published in 8 volumes. It is estimated that 3 volumes more will contain all down to the year 1868.

The publication of this work, although by authority, is a matter of private enterprise. The result will be, that the statutes of the realm which formerly occupied over 60 volumes, to that date, will be contained in 11.

It is to be regretted that, in preparing these Revision Statutes, no notice has been taken of the Ante-Union Irish Statutes. They occupy 20 volumes.*

(e) Register of Statutes.

An effort has been also made to prevent the statute law lapsing into its old state of confusion by the legislation of each year. The number of statutes affected by the current legislation of each year is very great. Last session the number amended or repealed were 250.

To prevent the old confusion arising, an authoritative index, down to the period at which the revision has ceased, has been published. Each year, at the end of the government edition of the statutes of that year, is now published an index showing how the legislation of the session has affected the former statutes. It acts as a register. Such an index is not binding in courts of law. It is assumed, however, that it is intended to give to this register a Parliamentary sanction, by enacting it at periodic intervals, in the form of a revision statute. Such periods would seem to be fitting opportunities to publish a fresh edition of the statutes, expurgated in accordance with such register. The cost of such a publication would be small, particularly if Mr. Wright's suggestion be adopted—of omitting from it all statutes which related to colonial and mere local matters.

Such, in short, is the work towards the simplification of the law, which has been accomplished in the last few years. It has been done without attracting notice, and at a very small expense.

Not only has the bulk of the statute law been reduced to a fifth of its former dimensions, but an authoritative index and register of the statute law has been formed. At the close of last session, for the first time, the statute law had been brought to a state which admits of consolidation. It is to be hoped some effort will be made in that direction, before time adds to the difficulty.

* All the English statutes passed from the 20th Hen. III. to the 7th Hen. VII., which had been extended to Ireland by an old Irish Act of the Irish Parliament, were revised by a Revision Statute passed in the session of 1872. It was a mere re-enactment of a portion of the Revision Statute of 1866.

V.—(a) *Different forms of Consolidation.*

Is consolidation, however, possible? In order to determine this question, it is necessary to determine what we understand by the term “consolidation.”

It has been already shown that in nearly every branch of our law, there are many statutes. In several instances, their number exceeds a hundred.

Now, the reducing or condensing all these statutes, on any subject, into one statute, is what is termed consolidation. It will be found, however, that it is possible to do so in three distinct ways. In other words, there are three kinds of consolidation.

(b) *First form of Consolidation.*

The first kind of consolidation is the re-enacting the old statutes, on any one subject, in the form of a single statute, preserving, however, the language of the ancient statutes. By it, the existing law is represented with servile fidelity.

This has been termed paste-and-scissors consolidation. Of this form of consolidation, Mr. Fitzjames Stephens does not approve. His evidence with respect to it was to the following effect:—

“I have seen a great deal of it, and I do not attach very much importance to what I may call purely mechanical consolidation—that is to say, a consolidation which represents the existing law with servile fidelity.” (S. C. on Acts of P., p. 22, Ans. 269)

It is, indeed, little more than the grouping together or classifying all the statutes on one subject, which, in itself, is an informal consolidation. The utility of this latter proceeding has been much underrated. Yet, the doing so removes one great objection against the present state of the statute law, viz., the having to consult many volumes to determine the law relating to any subject on which there are several statutes. If any draftsman was to receive instructions to draft a bill on any subject, preparatory to doing so, for his own convenience, it is the first thing he would do. Mr. Reilly, one of the most eminent of English draftsmen, stated that the following is the course which he would pursue if asked to draw a bill on any subject:—

“The first thing that I should do would be to send to the office where Acts of Parliament are sold, and collect all that related to that subject; put them in a cover; strike out the sections which were repealed; make cross notes upon them in any way, so as to learn everything I could upon the subject.” (S. C. on Acts of P., p. 47, Ans. 601.)

Sir H. Thring strongly recommended that groups of Acts of Parliament, on the different subjects, should be separately sold by the government. The following was his advice, which is to be found in the third appendix to the Report of this Committee:—

“Such a group of statutes, with a good index, is a nearer approach to consolidation than is generally thought; for one of the great difficulties in considering Acts of Parliament is the physical one, it may be called, of knowing what statutes are in force, and the grouping them together in a completely accessible form.” (Ap. 3, S. C. on Acts of P., p. 160.)

Any person who ever has had occasion to consider the law on any local subject, on which there are many Acts of Parliament, but no text-book, will readily appreciate this physical difficulty. We know few better examples of the labour which has to be undergone in such a process, than that afforded by the Irish Drainage Acts.

But we wish to call special attention to the evidence of Mr. Wright on the subject. It is not that his opinion is entitled to more weight than that of Sir H. Thring and Mr. Reilly, but that it accurately represents the impulse that grouping is calculated to give to the simplification of the law :—

“Q. ‘I think you stated that you considered this mode (grouping) of reprinting the statutes would very much facilitate consolidation.’ A. (Mr. Wright) ‘No doubt; as a number of Acts of Parliament upon the same subject were reprinted together, they would be, so to speak, upon the very brink of consolidation, and anyone who saw them could hardly resist the temptation of pushing them over.’” (S. P., Acts of P., p. 160.)

(c) *Second Form of Consolidation.*

The second kind of consolidation is the representing the existing law on any subject on which there are many statutes, in a reasonable shape, within the limits of one. This involves the substituting the English of a modern draftsman for the technical and verbose language in which at one time Acts of Parliament were drawn.

Many clauses of ancient Acts of Parliament seem to be drawn as if the forms of conveyances were there most calculated to convey information and produce accuracy. This form of consolidation involves the incorporating the effect of legal decisions with the new statute, as also amendments on small matters.

(d) *Third Form of Consolidation.*

The third form of Consolidation consists in representing the law on any one subject within the limit of a single statute, as it is conceived it ought to be.

This is really codification.

It involves not only the introduction of very considerable amendments into the new statute, but also a much more difficult matter—the reduction of the unwritten law to writing. It is no doubt the mode which has been adopted in India, and to a much greater extent than Mr. Fitzjames Stephens seems willing to admit.

We at once agree that if the carrying it out in this country is at present practicable, it is by far the best way that this work can be done. But it must be remembered, in determining this matter, that men differ, as a rule, as to the advantage of proposed amendments; and that there is great difficulty in reducing at once our unwritten law authoritatively to that shape in which all must wish to see it, viz., the written form.

VI.—(a) *Two Chief Difficulties encountered in Consolidating English Statutes.*

In considering the possibility of consolidating English law last year, two difficulties were prominently put forward by the witnesses

examined before the select committee on the subject. The one was the difficulty of the draftsman—in other words, that of framing a consolidated statute in any of the above forms. The second was the difficulty of getting Parliament to pass such a measure.

It is evident from the evidence given before that committee, and the questions asked by its members, that both the witnesses and members of Parliament who composed it considered the latter much the most formidable.

(b) *Referential Legislation.*

It was to the difficulty of passing such a measure, when opposed, that the present admittedly objectionable mode of drawing amendment statutes was openly attributed. At present when an amendment statute is introduced, only the proposed change of the law is, as a rule, set forth. The old law on the subject is not set forth, and is to be gathered from the probably many statutes already in existence on the subject.

It is evident that in order to be able to consider the propriety of a proposed amendment, a knowledge of the law to be changed should exist. However, it is found that when amendment statutes are drawn in their present form, opposition is, or proposed changes are, limited in committee, as a rule, to the amendment of the law contained in the new bill.

On the other hand, when the entire law is set forth, amendments are proposed both with respect to the proposed change, and also that portion of the law which it was wished to leave untouched.

Thus, the wish to carry measures through Parliament has led purposely to the drafting of bills in an obscure way.

This appears a strong statement, and, until lately, has always been denied.

But the witnesses before the late Parliamentary Committee—men of immense experience—spoke out their opinions in an open manner not often met with.

It is impossible, reading their evidence, to resist the conclusion that amendment bills are purposely drawn in this obscure way. The following is the evidence of the English Master of the Rolls, at one time a law officer of the late Government, on this subject:—

Q.—“In your practise at the bar have you noticed that there are obscurities constantly to be found in Acts of Parliament, owing to the practice of reference?”

A.—“Yes; the fact is that a Chinese puzzle is the only expression I can make use of as describing the mode in which Acts of Parliament are enacted as regards amendment. I do not say anyone is to blame for it, because, having been in the House myself, I know the difficulties which there are in getting an Act of Parliament through. I believe the real explanation is this. If you want to amend an Act, it is desirable to bring in a short bill. If you bring in a bill with an enormous number of clauses, it is difficult to get the bill through committee; and the draftsman is compelled therefore, with a view of passing the bill at all, to make it a short bill. Making a short bill involves simply as much reference as possible to former enactments. If you want a striking example of that, there is a bill now pending in the house—namely, the Peace Preservation Bill.”

With reference to the proper mode of drawing bills, the Master of the Rolls gave the further remarkable evidence:—

“I think the proper way to do it would be to redraw your Act, and have an entirely new bill every time you had an amendment in your Act; but the practical difficulty is, you cannot get your bill through the House of Commons. I recollect one striking instance—namely, the Merchant Shipping Acts’ Amendment Bill, in which case the late Government attempted to adopt that plan. What was the result? As several members here know, the paper was covered with amendments upon the existing law, not having reference to the proposed amendment of the Acts to which the amendments should have been restricted, but members took the opportunity of endeavouring to improve the existing law, and the result was that the bill had to be abandoned—it was so long that it was impossible to get it through. This is the real reason of it. It is not the choice of the draftsman; his instructions are, as I know very often, that he should draw a bill which can be got through.” (S. C. on Acts of P., p. 84, Ans. 1, 166.)

(c) *Difficulty of Drafting a Consolidated Statute.*

Whilst the difficulty of getting Parliament to pass consolidation bills containing important amendments was considered most formidable, that of the drafting or the preparation of the bill itself was considered comparatively small. It was clearly shown that a draftsman could set forth the law on any one subject in one statute. The work no doubt is one which requires much skill and labour, but which can be successfully accomplished.

The following was the evidence of Mr. Wright:—

Q.—“Does your knowledge of the statute book suggest that there is any subject matter upon which it is not possible to consolidate the statute law, if you had time to do it?”

A.—“Certainly not. There must be less difficulty in consolidating than in drawing.” (S. C. on Acts of P.)

That consolidated statutes could be drawn, and properly drawn, is also the opinion of Sir H. Thring. It is a task, no doubt, which requires, as he stated, “exceedingly skilled and rare labour, and the labour of months.” (S. C. on Acts of P., p. 132, Answers 1759–63.)

Mr. Austin, the great English jurist, has stated that “the practicability of codifying statute law does not admit of a doubt.” (*Austin Juris.*, vol. iii., p. 277.)

(d) *Chief Subjects on which Consolidated Statutes have already been passed in England and Ireland.*

But the practicability of successfully carrying out this great reform no longer rests on the theoretical opinions of either jurists or draftsmen, no matter how eminent. Twenty years ago such a question might have been discussed. In too many instances has it now been done to admit any longer of doubt.

It has been carried out in the United States, where the law, having for its foundation the English common and statute law at the time of the declaration of American Independence, possessed all the elements of confusion and obscurity now existing in English law.

It has been already shown how well it has been done in India. Both in England and Ireland there are now many instances where it has been done. In England, amongst the best known are:—

1. The Merchant Shipping Act of 1854. This statute consolidated at least 48 statutes.*

* The Merchant Shipping Act (17 and 18 Vic., c. 104) does not declare what five Acts were repealed. Another Act (17 and 18 Vic., c. 120) was passed same session, repealing 48 Acts rendered useless by the former.

2. The Stamp Act of 1870. This statute must have consolidated 130 statutes.

3. The Public Health Act of 1875. This statute consolidated about 21 statutes. It is contained in 152 pages.

In Ireland the best known instance is the Landlord and Tenant (Ireland) Act, 1860. This is a most successful instance of consolidation, in the most difficult form—the third.

By it almost the entire law of landlord and tenant was embodied in one statute. This was done with reference to a subject which, even in India, has hitherto been considered too difficult to attempt. By that statute 39 statutes were consolidated, either entirely or in part, the earliest dating from the reign of Edward the Fourth (15 Ed. IV., c. i.). It consists of 105 sections. By it, no doubt, a very large portion of the unwritten law relating to landlord and tenant was consolidated.

With the political aspect of thus simplifying this branch of the law this article has nothing to do. Any person who has had, however, an opportunity of judging the effect of that consolidated Act in Ireland must admit that it has caused a wonderfully clear knowledge of the precise legal rights of landlord and tenant to be diffused throughout the community. On the other hand, the amount of litigation which the substituting one statute for 39, and comparatively modern English for the more technical language of a past time, has disappointed the prophets of evil. The entire number of reported cases on the subject in 15 years probably does not exceed 200. A very large percentage of these refer to two sections—the ninth and tenth.

(e) *Expediency of Consolidating Statutes.*

Thus the feasibility of consolidating the statute law appears clear. The desirability of doing so cannot be questioned.

“The expediency of codification follows from a notion of the law; from a statement of the respective natures of statute and of judiciary law; from the bulk and incognoscibility of unsystematised law.” *Austin's Jur.*, vol. iii., p. 277.)

No doubt, consolidation of the statute law is but a step in the direction of codification. Still it is a step which must be traversed in England to arrive at the desired goal; and, moreover, the immediate advantages resulting from it are immense.

VII.—*Manner in which Statutes should be Consolidated.*

The real question is, How is this admittedly useful work to be carried into execution?

This question resolves itself into that of—In what form will Parliament pass such bills without discussion? It is at once evident that if bills of this class are to be discussed clause after clause, that the time thus occupied would prove fatal to their chance of becoming law.

The work done each year by Parliament is increasing, whilst the time which the members of that body are willing to devote to such purpose, remains a constant quantity. Now, if each clause be considered separately, the result necessarily would be, that a large por-

tion of time would be consumed, with the direct result of preventing other necessary measures from being passed, to which the public, probably erroneously attach greater importance. Unless these consolidated statutes can be drawn in some form that will enable them to pass without discussion, practical considerations render it apparent that it is useless to hope that any considerable number of them will become law.

Can, however, such consolidated bills be drawn in a useful form which Parliament will pass without discussion?

If the different branches of the law be examined with respect to which consolidation is desirable, it will be found that some few admit of consolidation being carried out in the first form advantageously, whilst, with respect to the majority, it can be so carried out only either in the second or third form. The number of subjects which admit of consolidation in the first form, is small, and does not relate to matters of general interest.

Now, accordingly as such measures are drawn in the first, second, or third of these forms, their chance of passing without discussion is determined. If amendments of importance are introduced—which is the necessary result of these bills being drawn in the third mode—it is hopeless, in the majority of instances, to expect that the different members of a representative body will agree as to their desirability. It is the duty of those who disapprove of such amendments to resist them, and to seek to make their own views prevail, if they can.

A member of a representative body who does not approve of a law as it exists, would, in ordinary cases, seem justified in agreeing to its enactment in simpler terms. For the harder a law, the greater is the necessity of its limits being defined. Again, there is the hope that the more its real character is known, the sooner will a demand be made for its change. But to allow existing law to be amended in a wrong direction, without some form of protest, is not wise.

So strong was this objection felt by the select committee before referred to, that, in their report, they recommend that “amendments in the existing law should precede consolidation, or such amendment should be included in the consolidation bill, in a different type.” If the amendments were contained in a separate bill, it was proposed that, together with it, another bill should be introduced, consolidating the existing law. Both bills would then be advanced stage by stage together until the final hearing, when they would be incorporated into one.

The great objection to this plan is, it hazards the passing of a consolidation bill of the existing law, on that of the amendment bill.

This suggestion is of great importance in another way.

It shows that a distinguished Parliamentary Committee considered that a bill drawn in the third mode would not pass without discussion—that such bill could not pass if a discussion was to be raised on it, both the Committee and the witnesses examined before them rightly assumed.

It is well known that a large portion of the business of Parlia-

ment—probably the larger portion—is carried on without any discussion being raised during its progress. The Revision Statutes' Bills, before referred to, were measures of a most important character. They authoritatively declared many enactments to be repealed which otherwise would have been assumed to have been in force. They, however, passed without discussion, on the statement of a member of the Government, that certain work had been confided to competent persons to perform, and that it was believed that it had been properly done.

In fact, the evidence given before the Committee of last year, as well as their report, shows conclusively that consolidation bills drawn in the first or second mode would pass. Sir H. Thring being asked, whether, if a consolidation bill was drawn in the first mode, there was any ministerial responsibility in connection with it, answered :—

“None; the minister would accept bill on statement of draftsman, saying—‘Yes, it was a mere re-enactment of existing law.’”

“Q. Have you any doubt that the House of Commons, upon your saying yes, would accept your view, and that the measure would pass?”

“A. I have no doubt of it.”

“Q. Suppose the House was upon your second class of consolidation bills, and you were to say this is a paraphrase of the existing law; do you think the House would hesitate to accept the statement?”

“A. It is extremely difficult to say that one bill is an exact reproduction of law which had previously existed in another form, and there might be opposition to it; but I do not think that there would be any practical opposition to consolidation bills of the second class.” (S. C. on Acts of P., p. 131, Ans. 1768.)

A practical illustration of how the House of Commons will pass measures of importance, on the statement of competent persons that certain work has been properly performed, was afforded last session, with reference to the Public Health Consolidation Act. This was a bill relating to a subject of much general interest. Yet, the following is the statement of the Marquis of Hartington, as to how that measure became law :—

“I have already referred to the Public Health Bill. That bill contained 240 clauses: although it contained no new provision of importance, it did contain some new matter. What was the unusual course taken by the right hon. Member for Halifax? He went through that bill, and gave it his most careful consideration. He found that it had been admirably drafted, and was an excellent piece of workmanship, but that it would be impossible to pass it if it was gone through clause after clause; and he entreated the House to pass the bill almost without any discussion. The bill was accordingly passed at two sittings of this House. (Speech of Marquis of Hartington, *Times*, August 8th, 1875.)

Thus it is the opinion of those most competent to judge, that Parliament could be induced to pass a consolidation bill drawn in the first or second mode, “upon trust of placing confidence in those by whom, or under whose auspices, it has been prepared”

Practical considerations thus lead to the conclusion, that consolidation bills should be drawn in such form.

The passing such measures would be useful, even in the cases where it is believed that the law requires substantial amendments; for the knowledge of the law thus attained would enable its defects to be more easily appreciated.

This would facilitate the passing of an amendment statute. Once such a statute had passed, a new consolidation bill, embodying the amendments, would be passed without difficulty. In many cases, however, the amendment bills could be drawn, as in India, so that no new statute would be necessary. The incorporating the amendments in the existing statute would only necessitate the reprinting of it.

There are certain portions of the law which, however, could not be incorporated without discussion in the second form. Any bills involving political or class interests, would, indubitably, be considered clause by clause. Bills involving such matters, could only be passed by the portions of them involving such interests being drawn in the first form.

VIII.—*Statutes which ought to be first Consolidated.*

There are so many portions of the statute law which require consolidation, that the carrying out of this work must be one of time. It should, however, be at once commenced.

The subjects with reference to which it should be first attempted, are those which affect the poor, and those which it is necessary the public should be familiar with. All portions of the law which are administered by untrained lawyers—as magistrates or local bodies—would seem to be the matters most urgently calling for this reform. Sir H. Thring, in his evidence before the Committee, stated :

“I should propose to consolidate all the laws which are usually administered by magistrates—as, for example, the poor laws—the highway acts—the highway laws—and the master and servant law—in fact, any laws which concern the poorer classes. I should recommend that to be done before proceeding to consolidate laws, which, however desirable it is to consolidate in a scientific point of view, do not much concern any of the poorer classes. The criminal law ought also, in my opinion, to be consolidated.” (S. C. on Acts of P., p. 133, Ans. 1793. Sir H. Thring.)

Mr. Fitzjames Stephens recommended that the law should be consolidated, wherever it was not in a state of flux.

“The part of the law which I would like to consolidate, would be the law which is, comparatively speaking, well settled and acquiesced in, and well suited to the purpose which it is designed to serve. If you find you have a dozen Acts of Parliament upon a certain subject, which are found to work very well, and do not require any material alterations—you have there a case for consolidation.”

IX.—(a) *Subjects first Consolidated in India, not those most suitable for Consolidation in England and Ireland.*

In India, consolidation bills were first passed on the larger and more important subjects—criminal law, succession, contract, evidence, and procedure.

But, in contrasting the facility of passing measures in India and in England, the different forms of government existing in such countries must be remembered.

The form of government in India is practically that of a despotism. There a few men, whose number does not exceed twelve, practically have the power of making their views prevail amongst the entire community. In England it is different.

It is always in the power of a very small minority in Parliament to delay, for a considerable period, the passing of any measure which is not vital to the welfare of the country.

The consolidating the law as regards procedure in England at present, would be attended with great difficulty. It was impossible to attempt until law and equity were fused. This has now been done, and the law consolidated already to an extent which, a few years ago, would have appeared visionary. Still the law on this subject is admittedly in a state of flux. It would not be prudent further to amend it until the Judiciary Act has been tested for some time. It is, no doubt, a subject, the consolidation of which would admit but of little difficulty. Any bill, however, on that subject could be drawn in the third form. It is a subject which would not lead to much discussion.

(b) *Criminal Law.*

Almost the first subject in India on which consolidation was attempted, was the criminal law. In England, very many of the statutes on that subject were consolidated in 1860; still the number of statutes still regulating that branch of law is enormous. Moreover, the manner in which the consolidated statutes were drafted, is too technical and minute. The leading text-book on this subject in England is contained in three volumes, occupying 3,216 pages. Those who are most affected by its provisions are the poor—in other words, those who have least opportunity of becoming acquainted with its provisions.

It is administered, to a great extent, by untrained lawyers.

As the greater portion of the unwritten law on this subject has gradually been supplanted by statute, the declaring the entire of it within the limits of one statute, as in India, would at once be practicable.

The fact that criminal law in nearly all countries—apart from the procedure—is the same, would much facilitate this task. It would seem to be a subject on which consolidation ought to be at once undertaken.

Criminal law, in its political aspect, and so far as it affects class interests—as the regulations of trades' unions—would have to be consolidated in the third form.

(c) *Law of Contract in England.*

In England, the law of contract, as is well known, rests on statute—the famous Statute of Frauds.

This act has been amended several times. There are, however, many decisions in it which have been so much discussed, and so long acquiesced in, that they have all but the force of statutes. How much the entire law on this subject requires being set forth in one statute, as in India, is realised in examining the best English text-book on the subject—that of Mr. Addison, which contains 1,222 pages.

But in England at present great difficulty would be experienced in consolidating this branch of the law, so deeply are the mercantile classes—who have power and wealth to seek legal advice—interested

in its provisions. It could, no doubt, be consolidated in the second form, except in its criminal aspect. It is wiser, however, not to attempt to do so until the public have attained a greater confidence in the utility of consolidated statutes, by seeing them successfully worked with respect to other subjects.

(d) *Law of Succession.*

A very large portion of the law of succession is composed of the unwritten law. Until that law is authoritatively reduced to writing, it would be difficult to pass a consolidation bill on this subject.

(e) *Law of Evidence.*

One of the last subjects on which consolidation has been attempted in India, is with respect to the law of evidence.

In England, the larger portion of this law consists of the unwritten law; but still there are no less than 45 statutes affecting it. The only text-book almost ever now quoted on this subject is *Taylor on Evidence*, which consists of 1,794 pages.

This law is required to be accurately known by all magistrates, arbitrators, and every person in any way concerned with the administration of justice or the settlement of disputes. Moreover, it is the essential characteristic of the law of evidence, that, as a rule, decisions respecting it have to be delivered without any opportunity of consulting the authorities regulating it.

A wrong decision on the subject is often of vital consequence in a case. Suddenly a litigant finds that he is unable to prove some fact essential to his case, by being informed that the proof which he is prepared to offer—although conclusive as to the matter—is not legal evidence. On the other hand, he may unexpectedly be called to disprove or explain some fact, which he is not at the moment prepared to meet, having believed it could not be adduced in proof in his case.

The peculiarities of the laws of English evidence have become proverbial. Most have read the famous caricature of one of its best known rules in the *Pickwick Papers*.

Probably, however, they were never put forward in a more unfavourable aspect than in a late criminal prosecution before the magistrates in the city of Cork. An election had taken place in that city. It was alleged that the agents of one of the candidates had violated his oath of secrecy taken under the Ballot Act.

A prosecution was commenced, under the Ballot Act, for its violation, which came on to be heard immediately after the declaration of the poll. On the same day it was to be heard, the sheriff—as he was bound to do—forwarded his return to the writ, declaring the prosecutor the Member, to the proper office.

The prosecution completely broke down, because, according to the rules of English evidence, the sheriff who had held the election, the Member who was returned, or none of the innumerable voters in court, could prove that an election had actually taken place. Every magistrate on the bench must have had the same knowledge of the

subject, as of his own presence in the court. The case was adjourned for a week.

At the end of that time, the rule of English evidence again carried the day, and the fact of the election could not be proved. The case was again adjourned, and on the third occasion, this important fact, which every person was aware of, was either proved or admitted.

There is no branch of the law more requiring consolidation than this. There are fewer also which more require the unwritten law to be reduced authoritatively to writing. The principal rules relating to it are established by decided cases. It would seem that some effort ought at once to be made, not only to consolidate the statute law on the subject, but incorporate the entire law, as in India, within the limits of one statute. If, however, it is wished to pass such a measure as a mere consolidation bill, the consolidation of the statute law on this, as on all other subjects, must precede the authoritative declaration of what the unwritten law is.

X.—(a) *How far could Statutes be Consolidated at same time in England, Ireland, and Scotland.*

A very important matter is—how far the proposed consolidated statutes can be applied to Ireland and Scotland?

The differences in the laws of England and Scotland are both important and extended. On no branch of the law would it at present be possible to pass a statute which would be accepted in both countries. These differences are carefully pointed out in *Patterson's English and Scotch Law*.

The most cursory examination of that work shews that these differences are not merely technical, but involve substantial matters apart from mere procedure.

In Ireland the law on all general matters is almost the same as in England. On local matters there are considerable differences. This arises from the fact of the management of county matters not being the same in both countries. But in the great subjects of contract, evidence, criminal law, and equity law, the law and procedure in both countries are all but the same. In Irish and English courts, as a rule, the same text-books and reports have authority. The English Judiciary Act has not been yet extended to Ireland, but an exactly similar measure is to be introduced this year.

It would thus seem that in England and in Ireland one statute on each subject would be sufficient. Wherever there are differences they should be contained in the final chapter of each statute. This is what has been done in continental countries, where distinct kingdoms, possessing even distinct legislative assemblies, are united under one sovereign.

(b) *Ante-Union Irish Statutes.*

In carrying out this work, a difficulty will occur from the fact that in the revised statutes no notice has been taken of the ante-Union statutes now in force in Ireland.

They now occupy twenty volumes. But a very large number of

such statutes are now either virtually or expressly repealed. No reason seems to exist why there should not at once be an authoritative declaration as to which of them are repealed. Such statutes as are still in force should then be separately published. They would probably be contained in one volume.

There are many branches of the law in which no valid reason exists why the law should be different in one country from another. The assimilation of the laws of different countries tends to develop their international relations. Probably it is still visionary to hope that a time may come when in all countries where the English language prevails, whether united under one sovereign or not, on such great subjects as the criminal law and that of contract, its provisions may be set forth in the same terms; yet the influence which the Code of Napoleon has exercised on the legislation of many countries makes the possibility of such a hope being realized not altogether improbable.

XI.—*By whom should Consolidated Statutes be Framed*

A question much discussed before the committee of last session was, by whom this great work of consolidation should be carried out?

A proposal which seemed to find favour with many was—that a Select Parliamentary Committee, composed of Members of high standing, should be appointed to superintend the execution of this work. This committee was to employ draftsmen to draw the different bills. These bills were to be introduced by the committee.

There is a great objection to this plan.

Such a plan ignores the system of party government. No person would be answerable for such measures, for none could gain or lose credit by their passing or negation.

It is idle to suppose that Government would delay their own measures to advance those of a body whom they would come to consider as their rivals in exercising control over Parliament.

If consolidation is to be effected, the bills for that purpose must be introduced by the government of the day. It must be known that their passing will reflect credit on the administration who have introduced them. They should be proposed by the Government department, where all ministerial measures are now drafted.

But although such measures be introduced as Government measures, care must be taken that they be not considered party ones. They being so considered would render their success hopeless.

The Government officer who introduced them should be able to declare that, as far as the Government were aware, they were consolidation bills, fairly and honourably drafted in the first, second, or third mode, as the case might be. If drafted in the latter form, the proposed amendments should be carefully distinguished. If such a course was adopted, and it was found by experience that honour was faithfully kept both with the House and the country as to the manner in which they were drafted, they would pass without discussion or difficulty. Such, at least, is the opinion of the committee of last year, expressed in their report:—

“ In the opinion of witnesses of great experience it is confidently anticipated that, provided the measures were brought in upon such authority as that referred to, the House would acquiesce in the work so done, and consent to abstain from a discussion of the old law as to all those parts upon which no amendments are intended to be made. When such bills become usual and familiar, the tendency to discuss them would be greatly diminished, and they would probably be accepted not less readily than the bills for expurgating the Statute Book have already been accepted, year after year, by both Houses of Parliament.” (Report S. C. on Acts of P., 1875, p. 8.)

The statement of the Marquis of Hartington, before alluded to, shows that they would readily be accepted by a liberal opposition.

XII.—*The Consolidation of Unwritten Law.*

It has thus been shown that in the opinion of those most competent to judge, there is no difficulty within the limits of one statute of expressing the entire statute law on each subject.

Until the end of last session, when the last revision bill was passed, it was impossible to do so. But at last the time has come when it is possible to convince the public of the expediency of the labour and expense incurred in the revision and expurgation of the statutes.

If the present opportunity be not taken advantage of, the legislation of each year will increase the difficulty of the undertaking ; for each year’s legislation repeals virtually and expressly a large number of statutes.

But even when the statute law on each subject be so condensed, much will remain to be done before the result arrived at in India be accomplished, for the unwritten law will remain in its present state of chaos ; but, fortunately, it is the tendency of the legislation of each year to supplant this law by statute law.

Thus, on the one hand, whilst the number of cases each year reported adds to the bulk of the unwritten law, on the other hand, a large number of cases decided respecting it are overruled by statute law. It is well known that it was the hope and belief of Lord Westbury, that once the statute law was simplified, that then—but not till then—an effort could be made to include within its limits the unwritten law. To do so, the plan followed with respect to the simplification of the statute law will have to be imitated.

First, The vast number of reported cases which have been overruled, either virtually by other cases or on appeal, or which have lost their value on account of statutes having been passed on the subjects to which they relate, should be authoritatively removed from the reports.

This process would correspond to the passing of the statute law revision acts.

The second step would be the publishing a revised edition of the entire of the reports—each case classified under its proper head. Such edition would contain only such cases as had not been removed by the process of revision.

At present, each important case is reported in several distinct reports. This has been now done for a very long period. The Government edition of the reports would, of course, have only one

report of each case. The publication of such a work would have to be done by Government, and not, as the revised edition of the statutes, by private speculation.

The third step would be the authoritatively reducing the unwritten law to writing, on each subject, once the law had been simplified by such a publication.

This, no doubt, would be the difficult portion of the undertaking; it would correspond to the passing of consolidated statutes in the statute law.

Once that was done, it would be possible to have the entire law on each subject comprised within the limits of one statute.

XIII.—*Conclusion.*

But although this wished-for end may be distant, it is idle to seek to underrate the immense utility of what has been already done towards simplifying the statute law.

The remaining volumes of the expurgated statutes may be expected to be published in a year. The entire of the statute law will then have been reduced to one-fifth its former bulk.

It has been declared what statutes are now in force. Again, the very price of the statutes has been reduced to about a fifth of their former price, and thus brought within the power of procurement of a much larger number.*

If those statutes were properly consolidated, all those which would be of interest to the general public would be contained in two volumes. Their number would not exceed one hundred.

All the statutes relating exclusively to either England, Ireland, or Scotland should be similarly consolidated. The statutes relating to each country should then be published in a separate volume. No doubt, amendment statutes would be passed. But care could be taken to prevent the re-occurrence of the old confusion by attention to the form of the amendment statutes, and the re-consolidating the entire statute law at periodic intervals.

The carrying out this work is, no doubt, one of time. It would seem, however, that it might be hoped to be accomplished in five years.

Probably the same time would be required for the publication of a government edition of the expurgated reports. But no reason exists why this work should not be carried on coterminously with the simplification of the statute law.

No doubt, in India this work has been done much more rapidly. In that country, the preliminary processes of revision and expurgation were dispensed with. In many instances, by the same act, both the statute law has been consolidated, and the unwritten law authoritatively reduced to writing.

But it has been shown that in England this cannot be done. This arises from the fact that such measures in England have to pass an independent legislative assembly. Moreover, the great assistance afforded by the existence of valuable text-books, and the wealth of

* The price of the new edition of the statutes will be under £12.

the community, has rendered the speedy carrying out of this reform not so essential as in India. It has been shown to be feasible and desirable.

Unfortunately, however, the class most interested in this great legal reform are precisely the class which appear to take least interest in the matter.

To the poor, who have but little means to obtain legal advice, it is a matter of vital moment. Yet hardly ever do they appear to realize its necessity.

Amongst the public, there is complete apathy on the subject. As, however, education becomes more generally diffused, and the working classes realize the absurdity of being called upon to obey laws which they have no opportunity of reading, this question of the simplification of the law will pass out of the region of discussion.

The immediate passing of consolidation bills, whether well or badly drawn, will then be a simple Government necessity.

But in the present state of public feeling on the subject, whatever has to be done can only be done gradually.

The public must be educated to understand both the desirability and the practicability of this reform. This renders it the more necessary that the first measures on this matter should be a success.

They should be confined to matters required to be known to all. The adopting this course is less ambitious than seeking to realize the dreams of doctrinaires who, either unacquainted with or refusing to recognize the complexity of the interests involved in the changes of English law, propose that in these countries an attempt should immediately be made to form "codes" similar to those existing in Germany and in France.

It has, however, the advantage of being capable of success. The experience gained in the first portion of the work ought to render the remainder the more valuable.

It is to be hoped that, if the form of the English constitution necessitates that England should proceed slower than other countries in simplifying the law, that still this in itself may contribute to the formation of a system of jurisprudence, rivalling that of other nations, both by the character and the excellence of its provisions.

FRANCIS NOLAN.
