## NOTICES OF NEW BOOKS.

COMMENTARIES ON THE COMMON LAW, DESIGNED AS INTRODUCTORY TO ITS STUDY. By HERBERT BROOM, M. A., Barrister-at-Law, Author of "Legal Maxims," &c. Philadelphia, T. & J. W. Johnson & Co., 1856. pp. 674.

In the July number of this periodical, page 517, we announced that our friends, the Messrs. Johnson, were about printing this really excellent treatise, and we now have the pleasure of seeing it in a regular book form. Our former notice has drawn forth some observations from an esteemed correspondent, and we present them for the consideration of our readers.

"In Broom's Commentaries, is a doctrine which, in my judgment, is unsound and untenable. I do not feel willing to see it apparently endorsed in an influential work like yours, the usefulness of which, consists in a great measure in presenting to the public, a correct view of the present state of the law, without entering a protest. The author says, p. 676, "Thirdly, a right of action *ex delicto* may be founded on the infraction of some private compact, &c." In several other passages, also, the same idea is advanced, that an action *in tort* can be sustained on the mere breach of a contract, attended with consequent damages. This proposition is untenable, and is calculated to lead practitioners into fatal mistakes in selecting forms of action.

First. It is in violation of the fundamental distinction between tort and contract, which runs through the whole system of the common law. That system imposes upon those who hold certain relations to their fellow men, a duty which is entirely independent of their own assumption, and from which in many instances, they cannot if they would, without changing their position, discharge themselves. The violation of this duty is a *tort;* the law indeed implies a provision to perform the duties, but the tort consists in the violation of the duty, not in the violation of the promise. The error has arisen from the common mistake of supposing that because a proposition is true, the converse must also be true; that because the duty is the basis of an implied promise, for the breach of which an action will lie, the promise must be the foundation of a duty, for a violation of which an action will lie. The reason of the distinction, is, that, where a duty is founded on the relation which a man holds to his fellow man, it is applicable to a large class of cases, and is, therefore, a matter of general interest; whereas contracts are infinitely diversified, and the degree of the obligation

to keep a promise depends on the circumstances of each particular case. The law, therefore, merely provides for the enforcement of a contract, without treating the breach of it as a tort.

Secondly. Such a rule would destroy the well settled distinction between assumpsit and case. If the breach of one contract, should be held to be of itself the foundation of an action on the case, no good reason can be given why the breach of every other contract should not sustain the same action. The result would be, that in every instance the practitioner would make his choice, either to bring assumpsit for the breach of a contract, or case for a violation of duty in not performing it. Yet no one can doubt that hundreds, and probably thousands of cases have been nonsuited on the ground that the action should have been assumpsit and not case.

Thirdly. This precise question has been decided by the Court of Common Pleas in England as late as the year 1850. In *Courtenay* vs. *Earle*, 1 Eng. L. & E. 333, the plaintiff had joined with a count in trover, two counts, charging the defendant with a breach of duty in neglecting and refusing to perform a certain contract. The court held unanimously, that there was a misjoinder; on the ground that these two counts alleged no violation of duty but what arose from the breach of a contract, and must, therefore, be regarded as counts in assumpsit. The plaintiff relied chiefly upon the case of *Boorman* vs. *Brown*, in which the Queen's Bench, 3 Q. B. 511, arrested the judgment on the ground that the declaration which was in case, did not contain any allegation of any common law duty, but which decision was afterwards reversed by the Court of Exchequer chamber and by the House of Lords. The suit was brought against a broker for violation of duty in not fulfilling a contract entered into, in the course of his business.

On the argument of the case of *Courtenay* vs. *Earle*, Maule, J., says, 'The House of Lords, (in the case of *Boorman* vs. *Brown*) appears to have proceeded upon the principle, that though a promise to perform a duty is alleged which would be the subject of an action of assumpsit, still if a man having undertaken to perform such a duty, commits *a breach of duty* by doing something arising out of such contract, that is the subject of a good count, I do not understand them to say, that you might bring an action on the case for the breach of a promise to go to York, on payment of ten pounds.' Jervis, Ch. J., added, 'all the cases cited in *Boorman* vs. *Brown*, are cases of a common law duty.'

Jervis, Ch. J., in giving his opinion in the case, says, 'If *Boorman* vs.

*Brown* were an authority to the full extent of all the expressions used in the judgment of the Exchequer Chamber, and by some of the Lords, there is no doubt that the third and fourth counts might possibly be joined with counts in tort. But the distinction on which these counts proceed, is that whenever there is a duty arising from a general employment, then an action may be brought *in tort*, although the breach of such duty may consist in doing something contrary to an agreement made in the course of such duty, by the party on whom such general duty was the subject of an action in tort. It had been supposed that the violation of a bare promise was the subject of an action in tort. But that is not so.' *Boorman* vs. *Brown* can be supported only on the ground the defendant was a broker, and that it appeared in the declaration, though not explicitly averred, that he had violated the obligation resting upon him in that capacity. The true rule is, that an action in tort in the declaration in which a breach of contract is alleged, as the basis of the suit, cannot be sustained, unless it is also expressly or impliedly alleged, that the act or omission charged was in violation of the common law duty imposed upon the defendant as a common carrier, broker, mechanic, attorney, officer, &c., and not merely a breach of contract."

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A Treatise on the Lien of Mechanics and Material Men in Pennsylvania, with the Acts of Assembly relating thereto, and various Forms. By Henry J. Sergeant, Esq. Second edition, by E. Spencer Miller. Philadelphia: Kay & Brother, 1856. pp. 394.

If ever the professional man needed any book to lead him in his practice, surely the Lien Law of Pennsylvania is a most fit subject for the exercise of an author's powers. Perhaps no branch of law has ever been so utterly and hopelessly confused "The desire so often and so clearly expressed by the courts to encourage the mechanic to file his own claims, by protecting him from his blunders, has led to such loose and discordant judgments, that we are almost without law upon many of its most important topics," says Mr. Miller, in his Preface; and we wonder not a little that he should have succeeded so well in bringing the discordant, diverse multitudinous cases into such order and such harmony as this book exhibits. In the author's desire to be "clear and accurate," it seems to us that he has been remarkably successful. Now, for the first time, has the

practitioner a really good guide to the practice under the later acts and judgments; we trust this treatise may "lead to some harmony in the decisions."

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TOPICS OF JURISPRUDENCE CONNECTED WITH CONDITIONS OF FREEDOM AND BONDAGE. By JOHN C. HURD, Counsellor at Law. New York: D. Van Nostrand, 192 Broadway. 1856. pp. 113.

"It is not probable," says the author of this book, "that readers will be found for these pages, unless among two classes of persons: one being those who by constitution of mind, and previous studies, are inclined to that branch of speculation which D'Aguesseau calls 'the metaphysics of jurisprudence,' and recommends as a preliminary study to the practical lawyer; and the other, those who wish to examine the legal questions, arising out of the existence of domestic slavery in some of the States of the American Union, which may affect the rights and obligations of the inhabitants of the other States." And the author is perfectly right; but to those who will pursue "the metaphysics of law," there is a great deal of *marrow* in the two chapters which is all that Mr. Hurd has yet given us. The views here taken are simply and purely *legal* ones, wholly technical and scientific, and are not embarrassed in any way by ethical or political considerations. The chapters are learned, containing the pith and substance of all preceding recognized laborers in the same field, with very copious references to their works, both ancient and modern. These two chapters are intended to state general principles, and deduce rules and to be simply and purely an abstract discussion. As such they are abundantly successful, and we trust that Mr. Hurd will finish his labors in the same spirit and with the like ability as he has now displayed in these preliminary dissertations. We would suggest, that in a book dealing so much in principles, and constructed somewhat in its mechanical details, on the continental plan of subdivisions into sections, &c., that a running head, or a side note at the most important points of inquiry and the more essential divisions, would greatly aid both the eye and the mind of the reader. A compact printed page is repulsive, even to the closest and hardest student; and in a review of a book, or a search for a particular part, such mechanical aids are greatly to be desired.