BOOK REVIEWS.

THE LAWS AND JURISPRUDENCE OF ENGLAND AND AMERICA: being a series of lectures delivered before Yale University. By JOHN F. DILLON, LL.D. Boston: Little, Brown & Co. 1894.

Yale University is doing her full share towards the advancement of American Jurisprudence. Of the judges now constituting the bench of the Supreme Court of the United States, three are sons of Yale, and, if the wishes of her alumni who are lawyers can prevail at Washington, she will soon have a fourth in the person of Judge Simeon E. Baldwin, of the Supreme Court of Errors of Connecticut, who has been, for many years, the great high priest of the Yale Law School. She was the first University in America to establish a graduate course leading to the higher degrees in law, and affording to students ambitious of becoming scholars an opportunity of studying law as a science, and of rounding out their legal acquirements with a knowledge of the more profound and philosophical principles of jurisprudence as set forth in the works of the great jurists of this and other countries. It is the work done in such professional schools which led Professor Brice to say in *The American Commonwealth:* "I do not know if there is anything in which America has advanced more beyond the mother country than in the provision she makes for legal education." To Judge DILLON and to Yale we owe the book now before us, which consists of a series of lectures delivered before the University by the author when he held the Storrs professorship, and will tend to establish still more firmly our title to such high praise from foreign scholars. It is a work which every educated man, whether lawyer or layman, will read with delight. The heavy paper the beautiful typography, the digest of each lecture in the table of contents, and of each paragraph on the broad margin of the page, the table of cases and of authors cited, and the

full index, combine to make the book one of which its publishers may be proud, and "The Laws and Jurisprudence of England and America" are treated by the learned author with that lucidity and grace of diction which always characterize his writings. The first four lectures deal with "Our Law in its Old Home—England." Beginning with definitions of law and of jurisprudence, our author expressly states that he does not mean to include in "our law" either the moral law, or the science of politics, but merely "the law of the land as it actually exists in distinction from what, in the view of the law reformer or of the legislator or of the jurist, it is conceived or believed it ought to be," but he leaves us in no doubt as to his own belief in the intimate relation of the two sciences of Ethics and Jurisprudence. "Ethical considerations can no more be excluded from the administration of justice, which is the end and purpose of all civil laws, than one can exclude the vital air from his room and live. Any man who in good faith obeys the dictates of a pure and honest heart, whose civil conduct towards his fellow men is guided by the sense of justice and right, which is graven on his heart by the Supreme Law-giver, will find such a course of conduct, except in the rarest instances, to be in perfect conformity with the requirements of the laws of his country. This is to me conclusive proof of the social and ethical nature and foundation of our laws."

The education and discipline of the English Bar, and the history, character and purposes of the Inns of Court, are treated at length, and a long and interesting note on their literary associations gives us fascinating details of the relations sustained to the Inns by such men as Beaumont, Bacon, Fielding, Smith, Lamb, Thackeray and others.

"Our Law in its New Home—America," is the subject of the next three lectures, and its expansion, development and characteristics in the political and judicial systems of our own country are given with a fulness of detail and a clearness of statement which leave nothing to be desired. Confessing that the English law lacks the artistic symmetry of its great rival of continental Europe, our author, nevertheless, is in no doubt

as to its superior adaptation to the institutions and character of the English and American people, because it is pervaded by a spirit of freedom which is essential to a self-governed people. He dwells with pardonable pride upon our written constitutions as the unique feature of American legal institutions, and says: "History affords many examples where the holders of political power have been forced to surrender or to curtail it for the general good; but the example of the people constituting the American political communities in limiting, by their own free will, the exercise of their own power, stood alone when this sublime sacrifice was made, and it has not been followed in any country in Europe, nor successfully put in operation elsewhere than in the United States."

No higher eulogium has ever been bestowed upon the Fourteenth Amendment to the Constitution of the United States than that given by this book, where our author says: "I believe it will hereafter, more fully than at present, be regarded as the American complement of the Great Charter, and be to us—as the Great Charter was and is to England—the source of perennial blessings." We are a little disappointed, however, in finding no expression of recognition of the great work done by Charles Sumner in the reconstruction legislation, and we look in vain, in the index of authors cited, for the name of that eminent American jurist.

The concluding lectures of the book are occupied with a discussion of the excellence and defects of our law, and a critical review of the nature and influence of the labors of Blackstone and Bantham as types of the conservative and radical forces to whose free play it owes its progress and character. Commenting upon the complexity of the problems with which American lawyers have to deal—a complexity arising from our dual governments—our author, in a passage of great beauty (too long to quote; see pages 218–19), shows how the States from an effective bulwark against centralization; he considers at length the scope and consequences of the doctrine of the authoritative force of judicial precedent, and the uneven development of case law; he predicts that the near future will see the union of legal and equitable rights and

remedies now unfortunately separated; and he earnestly appeals for a deliverance from the present chaotic condition of our law of real property, which, although much improved by many important changes in this country, yet remains full of complex subtleties and refinements.

The views of an author of such wide experience and profound scholarship on the live legal questions of the day are of deep interest to the profession. Judge DILLON thinks the disfavor with which many of our best lawyers look upon trial by jury in civil causes is deeply to be regretted, as he considers it an essential part of our judicial system, tending to support and perpetuate our free institutions. He has observed how readily Supreme Court Judges agree upon questions of law and how often they disagree upon questions of fact, and in this connection he denounces the *scintilla* doctrine, which prevails in some of our States, and approves the position taken by the Supreme Court of the United States that no case ought to be submitted to a jury where the evidence in favor of the party asking the submission is so weak that a verdict in his favor ought to be set aside by the court. The English judges, he tells us, are selected from the most eminent of the profession, and have a permanent tenure and ample salaries. Here in Pennsylvania, where we have an elective judiciary, where judicial salaries are oftentimes inadequate, and where it is the exception rather than the rule to find our greatest lawyers on the Bench, we may well envy our more fortunate professional brethren across the sea. Pennsylvania lawyers will also read, with an approval born of suffering, the strong denunciation, by this experienced judge, of the refusal, by appellate courts, to allow full argument at the Bar, and the haste with which such courts dispose of important cases, as if their highest duty was not to do justice but to clear the docket.[1] The practice of assigning the record

[1] Fortunately, the appellate courts in many of our sister Commonwealths are not so crowded with causes as in Pennsylvania. A justice of the Supreme Court of Errors of Connecticut has said that his duties on that Bench leave to him much leisure for study, and Mr. James C. Carter, of New York, recently expressed his surprise at and disapproval of the Pennsylvania rule limiting counsel to a half-hour argument on each side in terms which led the writer to believe that the "hour list" was unknown in the appellate courts of the Empire State.

of causes submitted on printed briefs to one of the judges to write an opinion, without a previous examination of the record and arguments by the judges in consultation, ought, our author thinks, to be peremptorily forbidden by statute. "With an enlightened Bar and an intelligent people," says Lord Brougham, "the mere authority of the Bench will cease to have any weight at all, if it be unaccompanied with argument and explanation."

Liberty, one of the great fundamental rights guaranteed by our National and State Constitutions and respected and protected by our legislatures and courts, our author finds, has been violated by the decision of the Supreme Court of Pennsylvania, affirmed by the Supreme Court of the United States, that the legislature could constitutionally prevent a man from pursuing what ought to be, when carried out without deception, a lawful business, the manufacture and sale of oleomargarine.

Perhaps no part of this book will be read with more interest by the profession than that relating to codification. With the judicial reports in England now numbering three thousand volumes, and in this country not less, and increasing in both countries at the rate of one hundred and fifty volumes a year, it becomes an important question whether this multiplication of books is to go on indefinitely and, if not, how it can best be checked. Moreover, our condition in this respect being worse than that of England, the question is of paramount importance here. American lawyers may as well admit among themselves that there is much truth in the report of the American Bar Association Committee when it says, "A single word expresses the present condition of the law—chaos. Every law suit is an adventure, more or less, into this chaos." Our author does not hesitate to dwell upon the want of certainty, the want of publicity, and the want of convenience of our law, and says that Tennyson has "drawn with the sober pencil of a judge" the picture of

> "The lawless science of our law,
> The codeless myriad of precedent,
> That wilderness of single instances."

Under these circumstances it is no wonder that men of broad culture are very apt to find the details of practice repugnant to their mental habits, and easily become disheartened at the delay and uncertainty in the administration of American law. We venture to assert that it requires no depth of learning to enable one successfully to practice law, and, on the other hand, that it is no sign of a lack of intellectual vigor that a man fails as a practitioner. Both Blackstone and Austin were saved from successful practice for the more enviable and more lasting, because more unattainable, fame of great jurists, and their renown will be as immortal as the principles of English jurisprudence. To one who witnessed that long-fought battle of Saratoga (not that of 1777 but that of 1886) when the advocates of codification, under the leadership of those giants in debate, Daniel Dudley Field and our author, after earnest conflict, at last won a victory—to such a one the position taken in this book seems very conservative, and we presume that few students of the subject will read, without at least a certain measure of approval, Judge DILLON'S careful conclusions on this subject, where, after defining a code, he expresses the opinion that codification *en bloc* is not feasible, says that his idea of law amendment is that of Lord Bacon, and quotes, as expressing his own idea of a code, these views of Mr. Justice Stephen: "A code ought to be based upon the principle that it aims at nothing more than the reduction to a definite and systematic shape of the results obtained and sanctioned by the experience of many centuries." "In this practical sense, within these conservative limits, a code in England and a code in each of the United States is," our author thinks, "manifest destiny." For such a scholarly restatement of the law the American Bar will have need of the learned jurist and the profound legal philosopher. While we agree with our author in his approval of Bentham's views as to the inestimable value of the English law reports, and in his judgment that our code must not presuppose that the Roman law is superior in matter, substance or value, to our own, we question whether he estimates as highly as he ought the need of a careful study of the Civil law by those on whom may possibly

fall the duty of doing for their own age what the great Roman codifiers did for their time. Such men cannot afford to neglect the study of the greatest code known to the world, that *Corpus Juris Civilis*, which Maine revered because "our law once will be like it."

The last lecture of this most interesting work contains a rapid review of the progress and development of our law during the past century and of the important contributions thereto made by the United States. In this review the author quotes largely from an address of Judge Baldwin, and the paper of Mr. David Dudley Field on "American Progress in Jurisprudence," prepared for the Columbian Exposition. In the statement of recent specific changes in our laws upon subjects of great and permanent concern, it is interesting to note that the Pennsylvania Constitution of 1776 began to open the prison doors of insolvent debtors in America more than sixty years before the first act on the subject was passed by the English Parliament.

"In the august counting of nations," Judge DILLON thinks, "America is rapidly discharging, in law and literature, her great indebtness to Europe," and of this work, we might add, our author is doing a noble part. Having completed his retrospect of a century's progress, he ventures upon a forecast of the century to come, and we close the volume filled with a grand hope for that future when "the Old World may become the acknowledged debtor of the New"—inspired by a feeling akin to that awakened by Whittier's noble lines:

> "I hear the tread of pioneers
> Of nations yet to be;
> The first low wash of waves, where soon
> Shall roll a human sea."

G. G. M.

THE RISE AND GROWTH OF ELEVATED RAILROAD LAW. By THEODORE F. C. DEMAREST. New York: Baker, Voorhis & Co. 1894.

This is a New York book, and particularly a New York

City book. In a table of over two hundred cases, only two cases are cited other than New York cases. The book is really a history of the growth of an elaborate system of law, relating to elevated railroads in New York City. The most interesting chapters in it are those devoted to an explanation of the aerial property right in the streets in New York City by abutting property owners who have no fee in the surface of the streets. The great difficulty in the way of the land owners in their heroic struggle for damages lay in the fact that, under the Constitution of New York, damages could only be recovered for a "taking" of private property, and as the municipality and not the abutting owners had the fee in the street, it was difficult for the court to establish an actual taking. The courts seem to have solved the difficulty by making a distinction between a street, use of a street, and a non-street use. A railroad constructed upon the surface was considered a street use, and for this no damages could be recovered, but when the railroad was elevated above the surface it was considered a non-street use, and it was held that there could be no lawful obstruction to the access of light and air to the detriment of the abutting owner. The property right in the abutting owner was then found to consist substantially of a right to have the street used exclusively as such, and for no other purpose. It must be confessed that, to the candid observer, there was a very serious stretching of logic in establishing the existence of this peculiar kind of property; but the end justified the means, for it secured compensation to thousands of persons who had been grievously wronged by the oppression of powerful corporations.

As the question of rapid transit, by means of elevated railroads, is one which will no doubt become important in many of our large cities, Mr. Demarest's interesting account of the law relating to such roads in New York, will have a large number of appreciative readers. The book is well printed, and contains an index which, though brief, seems adequate, and an appendix containing a short account of the elevated railroads in Chicago, and their legal status.

A. B. WEIMER.