

THROUGH LITERATURE
TO
JURISPRUDENCE

A THESIS PRESENTED

BY

T. A. CULHAM, B.A.

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P R E F A C E .

Whenever an author undertakes to write a history of literature he usually commences by giving a definition of the word "literature". It will be understood that this is necessary in view of the many publications of modern times which are designated as literature. Fraternal organizations, secret associations, propaganda distributors, mail order firms and many others refer to their particular types of printed material as "literature".

Literature, as the word is popularly used, may include such topics as philosophy, medicine, music, art and architecture. It is not in this sense that I refer to the word in my thesis. It will include both prose and poetry inasmuch as these writings have the qualities of beauty of form combined with emotional effect or intellectual appeal. Used in this sense those forms of writing which have as their sole object the distribution of information are totally eliminated. Certain prose writings have the beauty and expression of poetry and these I shall include under the name of literature.

As to the other part of my subject which I intend to connect with literature I am well aware of the popular notion that the two can never be combined and that they are as far apart as the North and the South Pole. Yet, as with the Poles, they are very intimately connected and bear a closer relation to each other than at first sight appears possible.

Literature is classed with the arts; Jurisprudence is defined as a science; yet is it not based on philosophy and is there no philosophy in literature? It is with this in mind that I propose to venture into a field, hitherto untrodden, to show that literature can be made a basis for jurisprudence, and through this jurisprudence, founded on the philosophy of poets, laws have been and may be codified which will work to the betterment of the human race.

This work would not have been possible had it not been for the kindly advice of members of the Faculty of the University of Ottawa, to certain members of the legal profession of Ottawa, and to the assistance given to me by members of the R.C.M. Police, one, in particular, who has had practical experience in dealing with crime and who has aided me considerably in my classification of evidence. To these I owe a debt

of gratitude as without their advice it is quite possible that I would have fallen into many grievous technical errors, which, although of no particular concern to the average layman, would have offended, undoubtedly, the trained minds of the legal profession.

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THROUGH LITERATURE TO JURISPRUDENCE

CHAPTER 1.

POETS AS LEGISLATORS.

Shelley, in his "Defence of Poetry", has furnished the English-speaking world with as sound a defence of poets and poetry as can be found anywhere in the history of English Literature. It shows that not only had Shelley imagination but intellect as well and by his brilliant piece of philosophical discussion has proved that poetical geniuses are not only poets but that they are also philosophers. It shows, too, the essential value of poetry and conflicts with the popular notion that poetry is only for dreamers. It points a moral and intelligent men and women would do well to heed this moral and to seek in literature a philosophy which could be made a basis for the development of a society which would achieve, through legislation, the ideals for which all of us long and which would actually bring into being a world resembling very closely the "Utopia" of Sir Thomas More.

All mankind is imitative. The child learns to talk by listening to his parents and imitating the sounds which proceed from their lips. As a further step in his

progress he imitates the inflexion of the voice and begins to sense a certain rhythm of order in words. The more sensitive he is to this order the more refined in taste, or style, of language he becomes. It is by this sensitiveness to order in all things that culture is distinguished from coarseness and anarchy from government.

Those in whom an excess of sensitiveness exists are the poets and as Shelley says,¹ "the pleasures resulting from the manner in which they express the influence of society, or nature, upon their own minds, communicates itself to others, and gathers a sort of reduplication from that community."

Because of his exceedingly sensitive mind the poet is able to apprehend the true and the beautiful, to view it in its proper perspective and to express to others its true relationship to existence. It is to the poets, then, that we must look for a clear expression of this rhythmical order.

Shelley makes even more claims for the poet than that of an instrument of beautiful expression. He says,² "--they are not only the authors of language and of music, of the dance, and architecture, and statuary, and painting; they are the institutors of laws and the

1. Shelley's "Defence of Poetry" English Essays, Harvard Classics. (1910) Vol. 27. p. 347. 2. Ibid. p. 348

founders of civil society. Poets, according to the circumstances of the age and nation in which they appeared, were called, in the earlier epochs of the world, legislators, or prophets; a poet essentially comprises and unites both these characters. For he not only beholds intensely the present as it is, and discovers those laws according to which present things ought to be ordered, but he beholds the future in the present, and his thoughts are the germs of the flower and the fruit of latest time".

Spenser, too, is of the same opinion.^{3.} "For", says he, "the Methode of a Poet historical is not such, as of an Historiographer. For an Historiographer discourseth of affayres orderly as they were donne, accounting as well the times as the actions; but a Poet thrusteth into the middest, even where it most concerneth him, and there recouring to the things fore-paste, and divining of things to come maketh a pleasing Analysis of all".

Poetry does appeal both to the imagination and to the intellect and when social corruption has poisoned both these faculties the voice of poetry is no longer heard. While Rome was under the influence
3. "British Poetry and Prose" Lieder, Lovett & Root.P.167

of Greek learning the Empire was at its most glorious period in history. As the influence of Greek letters waned the Empire gradually became undermined with corruption.

"Learning and Rome alike in empire grew;
And arts still followed where her eagles
flew;
From the same foes, at last, both felt
their doom,
And the same age saw learning fall,
and Rome".

-Essay on Criticism - Pope.

Much later, when Constantinople fell to the Turks and Greek scholars fled to Rome, this capital of a once glorious Empire revived with the restoration of Greek literature and Rome became the source of the New Revival in Learning, the Renaissance. Those who have read Gibbon's voluminous account of the decline and fall of Rome will realize that the decay of the Empire was due to many causes. It is sufficient to point out here that the decline of literature accompanied the decline of a nation and that it was the revival of this same literature which restored Rome to prestige and to the enviable position of the Source, or Seat, of the New Learning.

The freedom of women produced the poetry of love and the poetry of love produced a greater respect for women and a furtherance of the equality of the sexes. The "Divina Commedia" of Dante perpet-

uated this high regard for women and Dante, in his turn, influenced his poetical successors, not only Italian but English as well. Chaucer was inspired by Dante, Petrarch and Boccaccio and it was upon the materials of Italian invention that the super-structure of English literature was based.

It is the tendency for the general public, and also those of the learned professions, to relegate poets and literature to the field of imagination. Literature may be enjoyed but poets and authors should not meddle with civic affairs. These should be left to the practical men, those who use their reason and not their imagination. Such a course could be approved if it is the purpose to pamper our animal requirements and to treat utility as something that will make provision for our physical needs only. If it is the intention, however, to raise mankind to a higher level by spiritual refinement, then those who follow the course of literature should be consulted and the philosophy which can be found in poetry should be sought after for the purpose of strengthening and purifying the affections, for enlarging the imagination and thereby adding spirit to sense. Poetry which does not measure up to this standard should be rejected. Much poetry was written in the sixteenth

and seventeenth centuries which is totally obscene and cannot be said to aid in any way the strengthening and purifying of the affections. On the contrary, such literature was written to pamper the animal requirements and met with a certain amount of success in fashionable circles. It is true that some of this poetry contained bright gems of thought and provided food for reflection. Such passages showed the true genius of the poet and proved that what Shelley said about poets in general was true. These exceptions did comprise the union of the characters of both legislators and prophets but they allowed their genius to be prostituted for the sake of public favour, or because of personal prejudice. It is not to them that we must look for inspiration and guidance but rather to the poets who allowed the voice of prophecy and wisdom to speak through the medium of their facile pens without fear or favour.

A test of literature, in which the true philosophy on which to base our laws is found, may be had by applying the method of Pope in his "Essay on Criticism".

"First follow Nature, and your judgment frame,
By her just standard, which is still the same
Unerring Nature, still divinely bright

One clear, unchanged and universal light
Life, force, and beauty, must to all impart
At once the source, and end, and test of art".

In this way literature will prove its usefulness and will provide a sound philosophy for law as well as many of the other sciences. Could not, for instance, the ever-present struggle between capital and labor be eliminated by introducing some small fraction of humanitarianism into the laws which govern both capital and labor. And is this human, imaginative element, at times almost suppressed in the social struggle, not to be found in the philosophy of poetry?

The following quotation from Shelley requires consideration.

4. "The functions of the poetical faculty are twofold: by one it creates new materials of knowledge, and power, and pleasure; by the other it engenders in the mind a desire to reproduce and arrange them according to a certain rhythm and order which may be called the beautiful and the good".

The first function is important. Poetry stimulates the imagination and widens the realm of thought thereby giving a new beauty to existence. Poets have expressed ideas which convey

4. "English Essays" 1910. Harvard Classics. Vol. 27. p. 370

to ordinary minds the truth and beauty in life which they could never have discovered for themselves.

It is to the second function, however, that I would direct the reader's attention. The mere fact that poetry engenders in the mind a desire to reproduce the materials and arrange them according to a certain rhythm and order is sufficient argument to convince us that poetry is utilitarian. The desire for order signifies intelligence and an intelligent nation will desire orderly government in preference to anarchy. If poetry can engender in the minds of a nation the desire for orderly arrangement of thought it is evident that order in all things will follow. It is "muddy" thinking that produces anarchy. Clear-thinking minds only are capable of developing a good government.

The desire to reproduce the beautiful and the good found in poetry is a natural one. It is in the very essence of nature to seek the beautiful and the good. The ultimate end for which man is ever seeking in all his actions is his perfection, something that will totally satisfy him. In every action to which our will impels us we aim at some good. Either we wish to secure something which attracts us or we seek to free ourselves from something which we consider

an evil. In both instances, the object of desire is apprehended as a good to be obtained. Our judgment may, of course, be erroneous. The suicide who purposely taking his own life and believing that thereby he will lose even existence itself does not view the result as an evil to be avoided. To him the sufferings which he is now enduring appear intolerable and he holds that their cessation must be a good even though it be purchased at the price of annihilation. The object of good government should be to attain the greatest good for the greatest number. To whom, then, should we turn but to the poets who are able to express this good so much better than their fellow-creatures.

The philosophy of poets cannot, however, be understood from the first gleaning of an author's meaning; great literature must be read again and again if one is to uncover the deepest veins of thought. It is only by reflecting on what is read, by recalling it from time to time, by discussing its import and by being critical that one can bring the ideas and emotions of writers to bear upon his problems and his life and thereby develop understanding and creative power.

If such powers are developed the mind is thoroughly awakened and ready to grapple with the problems of society and to apply the analytical reasoning

which such problems require. If the cultivation of the sciences included the poetical faculty, man, who has enslaved the elements through science, would not remain himself a slave. It is the lack of this poetical faculty which has caused the discoveries and inventions, made possible by science, to add to the burdens of mankind rather than to lessen them. It is this which has caused greater inequality among men rather than promoting equality. A little imagination in business might produce much happier results. Science has made possible mass production of goods. The philosophy of poetry could well be utilized in its management. This does not imply, however, that the control of management by wage-earners instead of capitalists would be more beneficial to society. It might, but also it might not. It would seem, however, that the creative element in poetry, if introduced into "big business", would cause more consideration to be given to human costs than to price costs. In order that fair competition would be assured this could be brought about only by legislation.

5. Sumner H. Slichter, a professor of Business Economics at Harvard University, says, "To keep track of pecuniary costs, firms install elaborate accounting systems which require an ex-

5. Modern Economic Society-Slichter, pp.62 and 197.

pensive personnel to operate. When money costs increase, satisfactory explanations must be forthcoming or somebody's job is in jeopardy. But there are no elaborate systems and no expensive personnel for keeping track of human costs, and, when these increase, department heads are not called into the front office to explain. On the contrary, if money costs can be reduced by methods which increase human costs -- such as speeding up, longer hours, night work, failure to guard machinery properly or to protect workmen against heat, dust, fumes, or industrial poisons -- the money-saving method is usually adopted without hesitation."

Since Professor Slichter has made this statement the Workmens' Compensation Act has done a great deal towards mitigating human costs and who can say that the philosophy found in good literature has not played a vital part in the enactment of this very important piece of legislation.

The influence of literature on human conduct cannot be over-estimated. The memory gems and fables learned in childhood have influenced future conduct of the citizens to a remarkable degree. Writers are responsible for this. Again the Church has utilized

the works of writers, - Mystery Plays, etc. - to educate the people in the proper way of life.

^{6.} Dumas, through his historical romances, has made his readers light-hearted and is credited with sometimes curing a person suffering from homesickness because of the mental vigour which he imparted in his stories. "The Three Musketeers" is only one example which contains a great deal of wit and gaiety.

Victor Hugo in his "Les Miserables" is capable of arousing pity in the hardest of hearts.

Jules Verne has inspired many inventors to achieve what at one time was considered impossible. His "Twenty Thousand Leagues under the Sea" was written long before submarines were made.

John Bunyan by his "Pilgrim's Progress" has inspired some of his readers to a meditation of religion. Edmund Burke taught principles of government which have helped to bring about the organization of British Government as it is to-day.

Rousseau's writings, "The Social Contract" and "Emile" preached the doctrine of equality of men, the sovereignty of the people and more equal division of property, a return to nature and a new

society. Rousseau died in 1778 and the French Re-
6. See Willison - "Golden Treasury of Famous Works" for mention
of Dumas, Hugo, Verne, Burke.

volutionaries, who embrace his doctrine, witnessed the beginning of a new society in the Fall of the Bastille in 1789.

Other writers who played no small part in bringing on the French Revolution were Voltaire with his views of freer and more just views of men's relations to each other and Montesquieu with his doctrine of political liberty and freedom of thought and speech as expounded in "The Spirit of the Laws".

⁷ Napoleon was influenced by the books he had read in his childhood. Included in his favourite authors were Corneille, Racine, Voltaire, Montaigne, Montesquieu and Raynal.

His private secretary Bourrienne says of him that he regarded with an evil eye political economists, juris-consults, in short, all writers who meddled in any manner with legislation, institutions or moral improvements yet we know that in his collection of books he had some by Montesquieu who wrote on jurisprudence, politics and sociology.

Montesquieu advocated political liberty, freedom of thought and speech, religious toleration, reform but not revolution.

Napoleon was also a reformer but although he admired Montesquieu he was if anything more con-

7. "Life of Napoleon" by Bourrienne.

servative in thought. He believed that a republic would eventually lead to the despotism of an individual. His interpretation of political liberty was to rule men according to the will of the great majority. The religious toleration of Montesquieu was manifest in Napoleon who said, "In order to end the war in La Vendee, I made myself a Catholic, as a Mussulman I managed to establish myself in Egypt, and as an Ultramontanist I won all hearts in Italy. If I were ruling a Jewish people I would restore the temple of Solomon".

As for religion, from what we know of Napoleon's character and policy, he must have been wholly influenced by Voltaire. Voltaire believed in God but he was a bitter enemy of the Church.

His opinions were revived in Napoleon who says, "Everything points to the presence of a God, that much is certain; but all our religions are obviously the creations of men. The Pope is the Supreme Head of this religion in Heaven, but he occupies himself only with the earth".

In the matter of government Voltaire's influence was felt by Napoleon, who when he was First Consul with visions of greater power looming ahead recalled the ideas of Voltaire and banished those of

Rousseau's. A strong monarchy ready to reform abuses was advocated by Voltaire. It was a firm belief of Napoleon's. He, himself, says, "Up to the age of sixteen I would have fought for Rousseau against all the friends of Voltaire. To-day it is the opposite."

Rousseau was an emotional writer who assailed reason, science and believed in individualism. Napoleon read Rousseau's "New Heloise" at the age of nine. Rousseau left Napoleon attached to a sort of Deism, an admirer of Christ, a stranger to all religious practices. "Napoleon's energetic mind" says Bourrienne, sought its own likeness in the strong delineations of Corneille's lofty thoughts."

Racine and Boileau were enjoyed by Napoleon but he believed that they became famous only because Corneille preceded them. And not only did this apply to literature. Genius, to become of value, had to be favoured by the manners and customs of an epoch. Napoleon himself was an opportunist and, although a military genius, could only have become great under given conditions and these conditions were most assuredly present.

Napoleon, with the exception of the authors named was not very enthusiastic over literature. Geometry, science, history, military tactics were his

favourite subjects. Had he not read Voltaire, Rousseau and others it is difficult to say whether Napoleon's policies would have followed a different channel. The fact that Voltaire's and Rousseau's influence could be traced in his policy toward government and religion and social relations is indisputable, and it is not to be wondered at. A boy, studiously inclined, alone with himself and his books could not be otherwise than influenced by what he read.

In closing this chapter, before proceeding to the analysis of Jurisprudence, I shall quote the words of Shelley, the poet who, it is said, looked forward to the brotherhood of man in a world of freedom, beauty, and love.

8. "It is impossible", says Shelley, "to read the compositions of the most celebrated writers of the present day without being startled with the electric life which burns within their words. They measure the circumference and sound the depths of human nature with a comprehensive and all-penetrating spirit, and they are themselves perhaps the most sincerely astonished at its manifestations; for it is less their spirit than the spirit of the age. Poets are the hierophants of an unapprehended inspiration; the mirrors of the gigantic shadows which futurity casts upon the present; the words which express what they understand not; the trumpets which sing to battle, and feel not what they inspire; the influence which is moved not, but moves. Poets are the unacknowledged legislators of the world".

8. "English Essays" Vol. 27. p.376.

CHAPTER II.

THE NATURE OF LAW.

1. "Builder of yon starry dome
Thou that whirllest, throned eternal,
Heaven's swift globe, and, as they roam
Guids't the stars by laws supernal.

Thou dost rule the changing year;
When rude Boreas oppresses
Fall the leaves; they reappear,
Woody by Zephyr's soft caresses

Fields that Sirius burns deep-grown
By Arcturus' watch were shown;
Each the reign of law confesses
Keeps the place that is his own

Look, oh look upon this earth
Thou who on law's sure foundation
Framedst all! Have we no worth
We poor men of all creation?"

Boethius' Prayer.

We are indebted to the Romans both for the beginnings of the science which reduces legal phenomena to order and coherence and to the name applied to this science. "Iurisprudentia" signified a knowledge of the law and from this word we get the English term "Jurisprudence."

Cicero informs us that the study of law must be derived from the depths of philosophy and Ulpian's definition of jurisprudence as 'the knowledge
of the law' Boethius-"Consolation of Philosophy" tr. James, 1897. p. 27.

of things human and divine, the science of the just and unjust' corroborates the famous orator's statement.

Jurisprudence is not national but international in its scope. It is not a system of laws but does embrace the study of various systems of laws. It is closely allied to Ethics and Metaphysics and intimately connected with History. It is a science of human positive law. It is through the winding, and sometimes obscure, paths of literature that I intend to proceed to this point in the evolution of a science from which many branches of the study of law have emanated.

Sir Walter Raleigh began a dissertation upon Law, by stating that laws are of three kinds - the eternal or internal; and those which are imposed, or of addition.

The laws of God, the laws of nature, and the laws of morality are so closely connected with the topics proper to Jurisprudence that it will be necessary to show briefly the relationship existing between Divine Law, Natural Law, and human Positive Law before plunging into the discussion of laws popularly so called.

Divine Law includes in its scope all

created things. It is the order of the universe. It is that law by which the Creator determines for all creatures, both those which are and those which will be, their proper ends and the most appropriate means for attaining those ends.

2. "All things have their needful order," says Philosophy and proceeds to illustrate to Boethius by means of the following song:

"He who to th' unwilling furrows
Gives the generous grain,
When the crab with baleful fervours
Scorches all the plain;
He shall find his garner bare,
Acorns for his scanty fare.

Go not forth to cull sweet violets
From the purpled steep,
While the furious blasts of winter
Through the valleys sweep;
Nor the grape o'erhasty bring
To the press in days of spring

For to each thing God hath given
Its appointed time;
No perplexing change permits He
In His plan sublime.
So who quits the order due
Shall a luckless issue rue."

It is true that the Divine order of the universe is marvellous to behold and beyond our limited understanding. The infinitude, the solidity and the swift motion of the heavens should arouse our admiration and inspire us to a due hatred of all that is mean and

2. Boethius "Consolation of Philosophy" p.33

worthless. And if our spirits should be moved by the vastness and the order of the universe how much more should they be moved by the fact that behind this vast solar system is a Reason which guides it and directs it.

The law of nature is inexorable. It is an unchanging law because it has been determined by an all-wise Providence. "The Bent of Nature" is described in "The Consolations of Philosophy" with more force and precision than I can ever hope to illustrate it and, therefore, I turn again to the poets for help in formulating a principle of Nature's Law.

"How the might of Nature sways
All the world in ordered ways,
How resistless laws control
Each least portion of the whole--
Fain would I in sounding verse
On my pliant strings rehearse.
Lo, the lion captive ta'en
Meekly wears his gilded chain;
Yet though he by hand be fed,
Though a master's whip he dread,
If but once the taste of gore
Whet his cruel lips once more,
Straight his slumbering fierceness wakes
With one roar his bonds he breaks,
And first wreaks his vengeful force
On his trainer's mangled corse.
And the woodland songster, pent
In forlorn imprisonment,
Through a mistress' lavish care
Store of honeyed sweets prepare;
Yet, if in his narrow cage,

As he hops from bar to bar,
He should spy the woods afar,
Cool with sheltering foliage,
All these dainties he will spurn,
To the woods his heart will turn;
Only for the woods he longs,
Pipes the woods in all his songs.
To rude force the sapling bends,
While the hand its pressure lends;
If the hand its pressure slack,
Straight the supple wood springs back,
Phoebus in the western main
Sinks; but swift his car again
By a secret path is borne
To the wonted gates of morn,
Thus are all things seen to yearn
In due time for due return;
And no order fixed may stay,
Save which in the appointed way
Joins the end to the beginning
In a steady cycle spinning."

Revelations of the will of a supernatural power, or such direct intimations of that will as in the conscience, have frequently been referred to as "Laws of God." Infractions of God's laws are believed to result in punishment either now or in a future state of existence. Chaucer in his "Parliament of Fowles" gives an indication of this belief.

3. "But brekers of the lawe, soth to seyne,
And lecherous folk, after that they be dede,
Shul alwey whirle aboute th'erthe in peyne,
Til many a world be passed, out of drede,
And than, for-yeven alle hir wikked dede,
Than shul they come unto that blisful place,
To which to comen god thee send his grace!-"

Conscience, as we have stated, is spoken of as the direct intimation of the Divine Will and is an attribute of man but not of beasts. For this reason beasts

3. "British Poetry and Prose" Lieder, Lovett & Root p.92

cannot be held responsible for their actions. They follow the Divine Law by which the Creator determines for them the appropriate means of attaining their proper ends. If lower animals possessed intellect they would be held morally responsible for their actions. They display an intelligence not their own. They cannot form universal concepts, nor reflect upon themselves. Neither can they communicate their thoughts to others or apprehend moral relations. If a horse kicked a man to death the universal judgment of mankind would prevent a court from holding the horse morally responsible and would discriminate most clearly between this action and the action of a man who murders another. Tennyson recognized this fact in his "In Memoriam."

4. "I envy not the beast that takes
His license in the field of time,
Unfettered by the sense of crime
To whom a conscience never wakes."

Natural Law is our perception of the Divine Law and positive law is that which concerns matters left undetermined by nature but in accordance with it. The law of Nature is the foundation upon which the modern science of International Law was built up by Gentili and Grotius. For a lawyer and moralist, the "laws of nature" are not matters of law but pure facts.

The average layman regards laws as merely those

4. "British Prose and Poetry" Lieder, Lovett & Root. P. 1079

which the State commands. This is the mistake of one who has not considered the difference between modern and archaic societies, or the political and social foundations of law. It is natural that this should be so for the layman has no urgent need to consult the facts concerning the foundations upon which state laws were built. Enough for him that he learn and know what rules the State undertakes to enforce and administer. Why should he concern himself with the reasons underlying these rules? He does evince an unusual interest in criminal law because this branch of the law appeals most to the popular imagination and does play a large part in the courts of any country.

Positive laws have reference only to the natural law and are supplementary to it. Human positive laws, with which we are to deal here, are rules of human action. They are "positive" in the sense that they are enforced by sovereign political authority.

From the scholastic viewpoint, positive laws are invalid when they contradict the natural law. Hooker says, "Human laws are measures in respect of men whose motions they must direct. Howbeit such measures they are as have also their higher rules to be measured by; which rules are two, the law of God, and the law of nature. So that laws must be made according to the general law of nature, and without any contradiction to any positive

law of scripture; otherwise they are ill made."

5. Blackstone, also, adds his remarks: "This law of nature, being co-eval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding all over the globe in all countries and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately from their original."

Some confusion exists in regard to the interpretation of Nature's Laws as, for instance, in theft. It is true that self-preservation is the first law of Nature and that on superficial observation a person is considered justified in stealing food in order to keep himself alive. On the other hand, the rights of others must be considered and he against whom the crime has been committed is likewise entitled to the fruit of his labor and no man has the right to wrest it from him.

Every person has inherent rights but man has been given reason whereby he is enabled to interpret the laws of nature in the light of rational thought and to apply these laws to human actions. Man is selfish by nature but he is also a social creature and in

5.T. E. Holland- "Jurisprudence" p. 36

order to live peaceably with his fellowman the law of nature in this instance must be interpreted as the highest good of both the individual and of society as a whole. The individual, therefore, must be restrained in order to prevent injustice to others.

If the ordinary layman is unable to discover those laws according to which present things ought to be ordered he should have recourse to the poets who as Shelley says unites the characters of both legislators and prophets.

(Following from Warne, "The Poetical Works of Alexander Pope" Pope's Essay on Man. P.214)

"To copy instinct then was reason's part;
Thus then to man the voice of nature spake-
'Go, from the creatures thy instructions take,
Learn from the birds what food the thickets
yield,
Learn from the beasts the physic of the field,
The arts of building from the bee receive;
Learn of the mole to plough, the worm to weave;
Learn of the little nautilus to sail,
Spread the thin oar, and catch the driving gale.
Here too all forms of social union find,
And hence let reason, late, instruct mankind:
Here subterranean works and cities see;
There towns aerial on the waving tree
Learn each small people's genius, policies,
The ant's republic, and the realm of bees;
How those in common all their wealth bestow,
And anarchy without confusion know;
And these for ever, though a monarch reign,
Their separate cells and properties maintain.
Mark what unvaried laws preserve each state,
Laws wise as nature, and as fixed as fate.
In vain they reason finer webs shall draw,
Entangle justice in her net of law.
And right, too, rigid, harden into wrong;
Still for the strong too weak, the weak too strong.
Yet go! and thus o'erall the creatures sway,
Thus let the wiser make the rest obey;
And, for those arts mere instinct could afford,
Be crowned as monarchs, or as gods adored'".

CHAPTER III.

THE OBJECT OF LAW

AS CONCEIVED BY THE POETS.

It is in the Divine order of things that there should be law and order. If it were otherwise, there would be chaos. It is to the natural order and, therefore, to the Divine order that we owe out institution of laws. The more intelligent the people the more orderly will be the state.

We have seen that order of the highest kind is expressed in poetry. It will not be amiss then to reproduce here the object and the effect of law as expressed in poetry. Nor will the rhythmical and orderly diction of the poets be marred by supplementing their words with those of a well-known modern statesman.

Arthur Meighen made a "profession of faith" as follows: 1.

"I am an individualist. I believe in freedom under law; and I believe in that prized and precious inheritance in all its fulness and with all its implications. Law means, of course, law made by the people's representatives freely chosen. It must have for its objects:

"1. Equality of opportunity for all without
1. Ottawa Evening Journal. Jan. 16, 1942.

distinction - for all ready to do useful work with hand and brain;

"2. Control and restraint of the citizen to the full extent required to prevent injustice to others;

"3. Subject to such restraint, the right to self-expression for every man and woman -- self-expression in word and act and life."

It is not necessary to introduce state control to have good laws. Those who aim at achieving Sir Thomas More's Utopia may consider it so. To those I would point out that the fundamental secret of that happy and ideal land was good laws. More makes this clear. He states, "We did not question Hythlodoy about the monsters which he might have seen, because there is nothing more common -- but to meet citizens governed by good and wise laws, that is the truly rare and marvellous thing."

A code of laws is one means of making a mighty people thrive. The children of Israel enjoyed prosperity when they were obedient to the laws of God as delivered to them by Moses. Moreover, their laws were codified. They had no reason to be ignorant of them. It was only when they disobeyed these laws that they lost their freedom.

Without laws one cannot be free and although individualism implies freedom it does not signify freedom from laws. An individualist may have freedom of action and yet be bound by the laws of the country in which he lives. They are his protection, his guarantee to freedom of action. "Control and restraint of the citizen to the full extent required to prevent injustice to others."

James Thomson, in addressing the Earl of Wilmington through his "Seasons", gives a true picture of individualism as the word is employed here.

2. "But equal goodness, sound integrity
A firm, unshaken, uncorrupted soul
Amid a sliding age, and burning strong,
Not vainly blazing, for thy country's weal,
A steady spirit, regularly free --
These, each exalting each, the states-
man's light
Into the patriot; these the public hope."

Spenser presents us with an image of a society which was not governed by laws but by self-interest. "Pride disguised as Lucifera, a self-appointed Queen who rules not by lawes but by policy, advised by six wizards whose counsels were all bad. These counsellors were Idleness, Gluttony, Lechery, Avarice, Envy, Wrath."

Individualism does not mean self-interest to the exclusion of everything else. Freedom of the individual is in accordance with the natural law but such

freedom must be restrained if it does not contribute the greatest happiness to the greatest number. For this reason there must be laws which must not be sanctioned only, but enforced as well.

3. "So drives self-love, through just and unjust,
To one man's pow'r, ambition, lucre, lust;
The same self-love, in all, becomes the cause
Of what restrains him, government and laws.
For, what one likes if others like as well,
What serves one will, when many wills rebel?
How shall he keep, what, sleeping or awake,
A weaker may surprise, a stronger take?
His safety must his liberty restrain".

"Law was brought into the world", says Hobbs, "for nothing else, but to limit the natural liberty of particular men, in such manner, as they might not hurt, but assist one another, and joyn together against a common enemy".

And in Pope's "Essay on Man" we find these lines:

4. "All join to guard what each desires to gain.
Forced into virtue thus by self-defence,
Even kings learned justice and benevolence:
Self-love forsook the path it first pursued,
And found the private in the public good".

5. Locke, too, says that the end of the law is, not to abolish or restrain, but to preserve or enlarge freedom.

A law which aims at the highest good of the individual and of society is in accordance with the

Divine order and should be obeyed. This is the true

purpose of Law. It needs, however, an organization for the application of its control. This is a sovereign power, usually the State, or in medieval and primitive times a King invested with the powers of the State.

The underlying principle of legislation should be justice. We know, however, that all laws are not just. The exercise of merely capricious power does not satisfy the true end of law.

A despot who acts in his own interest without giving consideration to the welfare of his people does not administer justice nor does he act according to the natural law. He does not receive such authority from God's Eternal Laws in spite of his claim to the contrary. "No oath or promise," declared Knox, "can bind the people to obey and maintain tyrants against God; and if they have chosen such as after declare themselves unworthy, most justly may they depose and punish them."

James I held that kings were accountable to God alone. "As it is atheism and blasphemy," he declared, "to dispute what God can do, so it is presumption and high contempt in a subject to dispute what a king can do or to say that a king cannot do this or that."

Sibthorpe, too, in the time of Charles I, expressed his belief in the Divine Right of Kings. "If

princes command anything which subjects may not perform because it is contrary to the laws of God or nature or impossible, subjects are bound to undergo punishment without either resistance or reviling, and so yield a passive obedience where they cannot exhibit an active one."

6.

Bacon held more advanced views on this subject and believed that the monarch was not to break the law but to rise above it in the interest of the commonwealth.

Andrew Marvell, who was a member of Parliament as well as a poet, wrote a "Horation Ode upon Cromwell's Return from Ireland." Whatever his politics he has given us a picture of a true leader of men, an ideal of what any one holding sovereign power should be.

7.

"They can affirm his praises best
And have, though overcome, confessed
How good he is, how just
And fit for highest trust.

Nor yet grown stiffer with command,
But still in the republic's hand--
How fit he is to sway
That can so well obey!

He to the Commons' feet presents
A kingdom for his first year's rents,
And (what he may) forbears
His fame, to make it theirs.

And has his sword and spoils ungirt
To lay them at the public's skirt.--"

Whatever one's opinion may be about Cromwell's conquest of Ireland; whether he was justified in his action or not; we are bound to admit that the portrait painted in the verses by Marvell could apply to any ideal ruler. It is the picture of a ruler who is doing what he considers best for the common weal.

8. Hallam summarizes briefly Locke's philosophy of government. "Locke, in his Treatise on Civil Government in which he explains what he considers the true principles upon which society is founded, says, that a state of nature is a state of perfect freedom and equality, but within the bounds of the law of nature, which obliges every one, and renders a state of liberty no state of license. And the execution of this law, in such a state, is put into every one's hands, so that he may punish transgressors against it, not merely by way of reparation for his own wrongs, but for those of others.

As it is not good that man should live alone the primary society of a family was produced. Such a family may resemble a little commonwealth by its numbers, but is essentially distinct from one, because its chief has no imperial power of life and death though all men have a right to punish breaches of the law of nature in others according to the offence. But this natural

8. Hallam, "Literature of Europe" Vol.IV. pp.194-197.

power they quit and resign into the hands of the community, when civil society is instituted; and it is in this union of the several rights of its members that the legislative right of the commonwealth consists. At this stage man has passed from a state of nature to one of political society."

He goes on to say that the majority having, in the just constitution of a state, the whole power, may retain it themselves, or delegate it to one or more persons. And the supreme power is, in other words, the legislature, sacred and unalterable in the hands where the community have once placed it, without which no law can exist, and in which all obedience terminates. Yet this legislative authority itself is not absolute or arbitrary over the lives and fortunes of its subjects. It is the joint power of individuals surrendered to the state; but no man has power over his own life or his neighbour's property. The laws enacted by the legislature must be conformable to the will of God, or natural justice.

Extracts from Pope's "Essay on Man" justify this argument.

"Remember, man, 'the Universal Cause
Acts not by partial, but by general laws';

And makes what happiness we justly call
Subsists not in the good of one, but all.
There's not a blessing individuals find,
But some way leans and hearkens to the kind;
No bandit fierce, no tyrant mad with pride
No cavern hermit, rests self-satisfied;
Who most to shun or hate mankind pretend,
Seek an admirer, who would fix a friend;
Abstract what others feel, what others think,
All pleasures sicken, and all glories sink;
Each has its share; and who would more obtain,
Shall find, the pleasure pays not half the pain."
Great Nature spoke; observant man obeyed;
Cities were built, societies were made;
Here rose one little state; another near
Grew by like means, and joined, through
love or fear.
Did here the trees with ruddier burdens bend,
And there the streams in purer rills descend?
What war could ravish, commerce could bestow,
And he returned a friend, who came a foe.
Converse and love mankind might strongly draw,
When love was liberty, and nature law.
Thus states were formed; the name of king
unknown
Till common interest placed the sway in one." 9.

Whatever be the form of government
employed to enact and to enforce the laws of a State
the principle of Justice should motivate all its actions.
Thus will it accomplish the primary object of its ex-
istence -- the welfare of the people who have invested
in it their natural power and authority. Whether this
government takes the form of an absolute monarchy, a
limited monarchy, or a republic, the object of its legis-
lation should be the same, and if it does not endeavour
to accomplish this object it loses its right to exist.

8. Warne, "The Poetical Works of Alexander Pope" P.215
"Essay on Man".

10. "For forms of government let fools
contest;
What e'er is best administered is
best."

10. Warne " The Poetical Works of Alexander Pope" p.217.
#Essay on Man"

CHAPTER IV.

ADMINISTRATION OF JUSTICE.

In the present chapter my design is to collect such particulars as may help to complete the idea of a political society in its formal aspect; the authority of kings, states, and heads of families; the origin of commonwealths, the privileges of citizens the nature of sovereign power; and the different forms of government and the divisions of law. It is no part of my plan to treat each of these subjects fully, as they should be treated in a legal treatise, but where in the earlier forms the germs of such later developments are discoverable it will be sufficient to indicate them. After having recapitulated the points of interest I shall close the survey with a brief notice of municipal government.

1.

John Poynt, or Ponnet, Bishop of Winchester under Edward VI asked several very pointed questions and then proceeded to answer them, both questions and answers being contained in his "Short Treatise of Politique Power".

To the questions of whether kings, princes, and other governors have an absolute power
Hallam, "Literature of Europe" Vol.11, p. 139.

and authority over their subjects; whether they be subject to God's laws, or the positive laws of their country; in what things and how far subjects are bound to obey their princes and governors; whether it be doubtful to depose an evil governor or kill a tyrant, he replies, "the manifold and continual examples that have been, from time to time, of the deposing and killing of tyrants, do most certainly confirm it to be most true, just, and consonant to God's judgment. The history of kings in the Old Testament is full of it; and, as Cardinal Pole truly citeth, England lacketh not the practice and experience of the same; for they deprived King Edward II, because, without law, he killed the subjects, spoiled them of their goods, and wasted the treasures of the realm. And upon what just causes Richard II was thrust out, and Henry IV put in his place, I refer it to their own judgment. Denmark also now, in our days, did nobly the like act, when they deprived Christiern the tyrant, and committed him to perpetual prison.

"The reasons, arguments, and laws, that serve for the deposing and displacing of an evil governor, will do as much for the proof that it is lawful to kill a tyrant, if they may be indifferently heard. As God hath ordained magistrates to hear and determine private mens' matters, and to punish their vices, so

also willeth he, that the magistrates' doings be called to account and reckoning, and their vices corrected and punished by the body of the whole congregation or commonwealth: as it is manifest by the memory of the ancient office of the High Constable of England, unto whose authority it pertained, not only to summon the king personally before the Parliament, or other courts of judgment, to answer and receive according to justice, but also upon just occasion to commit him into ward. Kings, princes, and governors have their authority of the people, as all laws, usages, and policies do declare and testify."

The last thoughts of deposed and executed kings, it is human to assume, would be those expressed by King Richard II, as found in Shakespeare's play of the same name.

"Let's talk of graves, of worms, and epitaphs;
Make dust our paper, and with rainy eyes
Write sorrow on the bosom of the earth;
Let's choose executors and talk of wills;
And yet not so for what can we bequeath
Save our deposed bodies to the ground?
Our lands, our lives, and all are Bolingbroke's
And nothing can we call our own but death,,
And that small model of the barren earth
Which serves as paste and cover to our bones.
For God's sake, let us sit upon the ground
And tell sad stories of the death of kings:
How some have been depos'd, some slain in war,
Some haunted by the ghosts they have depos'd
Some poison'd by their wives, some sleeping kill'd;
All murder'd: for within the hollow crown
That rounds the mortal temples of a king

Keeps Death his court, and there the antick
sits,
Scoffing his state and grinning at his pomp;
Allowing him a breath, a little scene,
To monarchize, be fear'd, and kill with looks,
Infusing him with self and vain conceit,
As if this flesh which walls about our life
Were brass impregnable; and humour'd thus
Commes at the last, and with a little pin
Bores through his castle wall, and farewell king!.
Cover your heads, and mock not flesh and blood
With solemn reverence: throw away respect,
Tradition, form, and ceremonious duty,
For you have but mistook me all this while:
I live with bread like you, feel want,
Taste grief, need friends: subjected thus,
How can you say to me I am a king"?

2. Rose, or Rossaeus, Bishop of Senlis,
in his book, "De Justa Reipublicae Christianae in
Reges Potestate" published in 1590, says that the
different forms and limitations of government have
sprung from the choice of the people, except where
they have been imposed by conquest. He deploues
excess in the view that people take of kings. There
is danger in limiting too much the power of kings and,
also, in ascribing a sort of divinity to kings. He
says, too, that the subject's oath of allegiance does
not bind him, unless the king observe what is stipu-
lated from him; and this right of withdrawing obed-
ience from wicked kings is at the bottom of all the
public law of Europe. He describes a tyrant as one
who despoils his subjects of their possessions, or
offends public decency, by immoral life, but, above,
2. Hallam, "Literature of Europe" Vol.11 p. 142

all, who assails the Christian faith, and uses his authority to render his subjects heretical.

3.

Hooker, in his "Ecclesiastical Polity" stresses the necessity of popular consent to the due exercise of any government.

John Bodin distinguishes the family from the commonwealth by stating that a family is the right government of many persons under one head, as a commonwealth is that of many families. Force and violence gave rise to commonwealths. Fathers of families became citizens, that is, free men under the supreme government of another. "It is the acknowledgment of the sovereign by his free subject, and the protection of the sovereign towards him, that makes the citizen."

Bodin classifies the forms of government as follows:

- (1) A democracy - a government where the majority of the citizens possess the sovereignty.
- (2) Despotism - Subjects are truly slaves, without a right over their properties.
- (3) Monarchy - the **rule** of one man according to the law of nature, who maintains the liberties and properties of others as much as his own.
- (4) An Aristocracy - where a smaller body of the citizens governs the greater.

The election of a king by the people has its origin in early history and a good account of

3. Hallam. "Literature of Europe" Vol.11, pp.147 & 150.

the method adopted is given in Layamon's "Brut."

5. "But alas! That their father might live no longer!-- for he had good laws the while he lived."

This reference was made to Constantin, King of Britain and the following to his three sons, Constance, Aurelius and Uther.

"Then came to London all this land-folk, to the husting, and to advise them of a king, what wise they might do, and how they might take on, and which one of these children they might have for king. Then chose this people Aurelie Ambrosie, to have for king over them."

6. It is not customary to-day to choose a king of Britain by popular vote. Parliaments of to-day are more powerful than kings and the members thereof are chosen by the people. Until about half a century ago voting was by show of hands at a public meeting of the electors. We need very little imagination to visualize exactly what that meant. Beer flowed freely; bribes were openly offered and accepted; organized "gangs" intimidated voters and heads were broken. Timid men would vote with their superiors. Tennyson's "Northern Farmer, Old Style" might enlighten us on this point.

7. "Thaw a knaws I hallus voated wi Squoire
an' church an' staate,

And i' the woost o' toimes I wur niver
agin the raate."

The rate or "raate" in this instance
was the poor-tax.

As there are several forms of govern-
ment in the world so there are and have been many
systems of law. ^{8.} One scholar has computed no less
than sixteen, of which half are now extant, the re-
mainder having wholly disappeared. Among those in
operation are the Anglican or law of England; the
Romanesque, or the law of Rome elaborated and re-
adapted; and the Mohammedan.

In England "law" means all rules, of
whatever origin or character, which the courts will
recognize and enforce. It embraces two main principles,
namely: (1) that no person may be deprived of life,
liberty, or property except in consequence of an in-
fraction of the law proved in open court, and (2) that
no man (save only the king) stands above the law, and
that therefore every one is liable, in case of such
infraction, to punishment or exaction of reparation
on lines laid down by law, regardless of his station
or connections.

In Germany, France, and other Continental
countries, jurists and other philosophers long ago de-

8. Ogg. "European Governments and Politics" p.359.

veloped the idea of natural law as a system of principles, lying back of and superior to man-made rules, and deducible by reason from the inherent nature of man and things. This was John Locke's theory also but England gave positive law as expounded by Hobbs and Austin a substantial victory over natural law. This meant, then, that the will of the people, as interpreted by the law-makers, would be translated into statutes. We can see, then, that English law has possibilities for many changes and intricate labyrinths. Roman law, on the other hand, has polish, balance and immobility. In "Doctor and Student" it is said that the "law of England is grounded on six principal grounds: first, on the law of reason; secondly, on the law of God; thirdly, on divers general customs of the realm; fourthly, on divers principles that be called maxims, fifthly, on divers particular customs; sixthly, on divers statutes made in Parliament."

Summing up, therefore, we could say the the law, as it stands to-day, consists of two main elements, common law and statute, the common law being that derived from custom. To these two should be added a third - equity.

Common law originated from custom and was a body of judge-made rules, neither ordained by the king or enacted by a legislature. It originated in feudal and other local courts, then in kings' courts, conducted by royal judges who went out from London to all parts of the realm and dispensed justice in the king's name. Thus common law grew up and differed from statute law inasmuch as the latter was "made." The greater part of the law in Britain and America is the Common Law. This, of course, is particularly applicable to civil law, as distinguished from criminal law. Common law is given its legal character by the existence of an express or tacit law of the State.

Equity goes back to Norman times when people who were dissatisfied with injustice resulting from common law appealed to the king for remedy. As the king in those days had absolute power he swept aside the rulings of the regular courts and rendered new decisions whenever it pleased him. As the practice increased, however, he found need to turn these matters over to his Chancellor who became known as the "Keeper of the king's conscience." He, in his turn, appointed assistants and from this institution emerged a court of chancery.

The rules built up by this court expanded until they were amalgamated into a huge body of living law and its subject filled volumes. In fact, equity has developed to such an extent that it has become the chosen domain of many a specialist in legal practice.

Law has been classified by various authors into several divisions. Two main divisions are Private Law and Public Law. Private Law regulates the rights between subject and subject. Public Law governs those between State and subject. Adjective Law, though it concerns primarily the rights and acts of private litigants, touches closely on the organization of courts and the duties of judges and sheriffs, which belong to public law. Public Law includes constitutional law, administrative law and criminal law, all of which will be dealt with more fully in subsequent chapters of this thesis.

Other classifications have been given to law and for the purpose of the courts we may take two divisions, namely, Civil and Criminal.

A civil action is a proceeding brought by a private citizen, or by an official in his private capacity, to obtain redress from another person,

official or private, for a wrong - slander, trespass, breach of contract, infringement of patents, and the like. The dispute, in such cases, is not between the crown and its subjects, as in a criminal action, but between one subject and another. The case may, indeed, be settled out of court, a procedure which can not be followed in criminal cases.

Between 1873 and 1876 the entire English judicial system was reconstructed and the courts centralized. Tribunals, hitherto separate, became branches or sub-divisions of a single Supreme Court of Judicature under the administrative direction of the Lord Chancellor. Beneath this Supreme Court, county courts are assigned the duty of taking care of civil actions and "assize", courts the task of hearing and deciding criminal cases. The House of Lords is the court of last resort for the hearing of appeals on questions of law from the highest tribunals of both civil and criminal jurisdiction.

In Canada, where British institutions are closely followed, the Supreme Court Act gives the following definitions:

9. "The court of common law and equity in and for Canada now existing under the name of the

9. Statutes of Canada, 1927. Chap. 35.

Supreme Court of Canada is hereby continued under that name, as a general court of appeal for Canada, and as an additional court for the better administration of the laws of Canada, and shall continue to be a court of record.

"The Supreme Court shall consist of a Chief Justice to be called the Chief Justice of Canada and six puisne judges who shall be appointed by the Governor in Council by letters patent under the Great Seal.

"The judgment of the Court shall, in all cases, be final and conclusive.

"The judges shall hold office during good behaviour but shall be removable by the Governor General on address of the Senate and House of Commons".

The Supreme Court is not a modern institution. It dates back many years and is mentioned in Asser's "Life of Alfred" as existing in a primitive form.

10.

"He inquired into almost all the judgments which were given in his own absence, throughout all his dominion, whether they were just or unjust. If he perceived there was iniquity in those judgments, he summoned the judges, either through his own agency, or through others of his faithful servants, and asked

them mildly, why they had judged so unjustly whether through ignorance or malevolence, i.e. whether for the love or fear of any one, or hatred of others, or also for the desire of money. At length if the judges acknowledged they had given judgment because they knew no better, he discreetly and moderately reproved their inexperience and folly."

Before closing this chapter I would like to touch briefly on municipal government to which our system of laws has extended and under which authority certain local laws are promulgated and enforced.¹² In layamon's "Brut" we are told that "full seven nights the king lay there still, and there he gan proceed into London, to gladden the burgh-folk, who oft were busy. He caused walls to be strengthened, he caused halls to be built, and all the works to be righted that ere were broken; and gave them all the laws that stood in their elders' days; and he made there reves, to rule the folk".

Secular law includes other branches of the law which have not been mentioned here, but in the main, all divisions have been briefly outlined with the exception of International Law and this subject is considered too large in its scope to be hastily dealt with. It will, therefore, be made the subject of

another chapter.

CHAPTER V.

LITERATURE A BASIS FOR PRIVATE LAW.

In the previous chapter Private Law was described as regulating the rights between subject and subject.^{1.} Professor Holland divides this branch of the law into two further classifications, namely, substantive and adjective. The former defines the rights of individuals, the latter indicates the procedure by which they are to be enforced. In this chapter substantive law is to be our main consideration.

The rights dealt with by substantive law are either "antecedent" or "remedial". An antecedent right is one which exists irrespectively of any wrong having been committed. When this right has been violated a remedy is provided, thus the name "remedial".

Antecedent rights are either "in rem" or "in personam". The latter consist in a claim of one certain person upon another, the former of rights, which, irrespectively of any wrong having been committed, are available for the benefit of the person of inherence against a person of incidence so unlimited as to comprise the whole world.

According to Roman law, in the eye of the law all Roman citizens were equal and all subjects of the

1. Holland, "Jurisprudence" Chap. lX p.139.

empire were citizens of Rome. This equality before the law is a fundamental principle of justice and is a principle closely followed in British law. Respect of persons is incompatible with justice. The law cannot make all men equal but it can give equal protection to all men.

Marital rights fall under the classification of rights "in rem" and sound philosophy on these rights may be gleaned from the poets. These apostles of rhythm and order should be consulted to-day for the views they have expressed on marriage, particularly so in view of the doubt and confusion which seems to be prevalent in our legislative chambers on a subject which is so vital to our nation's welfare.

In Spenser's "Faerie Queene" we have, as the name suggests, a fairyland, in which chivalry is the order of the day. Knights and fair ladies venture together into deep forests where hidden dangers lurk and, after many narrow escapes, come forth unscathed into beautiful lands studded with castles. The adventures and dangers through which they have passed have bound them together in bonds of mutual admiration and respect which usually terminate in marriage. Such was the case of the Redcrosse Knight and the Lady Una, of royal lineage, whose parents were imprisoned in their

divorced, married again while his first wife was living, he would be committing bigamy in which event both women would be wronged.

The lawfully wedded wife has an antecedent right and would have a remedial right when the first right was violated. On the other hand, an antecedent right should be protected and if a violation of this right can be prevented it is only in accordance with the fundamental principle of justice that proper action should be taken to prevent it. Publication of banns is a means to this end and is justified for that reason if for no other.

2. In England in the early part of the eighteenth century many weddings were performed by sham clergymen. This evil existed in the heart of London and both parties to the wedding were victims of this malicious system, the woman who was victimized by her suitor and the suitor himself who became the prey of the sham clergyman and had to pay heavily for the illegal ceremony. It was not until the Marriage Act of Lord Hardwicke in 1753, which required the publication of banns, that these ill-conceived marriages ceased.

To revert to Spenser, we are told that when the falsehood was proven and the guilty

2. Dennis, "The Age of Pope" Preface.

messenger punished the "late forbidden banns" were renewed -

"And to the knight his daughter deare
he tyde
With sacred rites and vows for ever to
abyde.
His owne two hands the holy knotts did
knitt,
That none but death for ever can divide".

Two thoughts are contained in these lines. The first is that a king performed the marriage ceremony. The second is the indissolubility of marriage. The latter is in accordance with canon law, the first is contrary to it. The decrees of the Council of Trent demand that the ceremony must take place in the presence of a priest. It is useless to discuss either the religious or the legal view point on this marriage in fairyland as Spenser has left us no detailed account of the customs of Eden. In primitive times in many countries, as for instance, in the heroic age of Greece, the king was the high priest of the state religion and in that capacity could officiate at a marriage. Whatever our religious beliefs, therefore, no point can be gained by discussing the legality of this particular marriage, nor does it provide a basis for argument that as the king had a right to perform a marriage ceremony he

was, therefore, entitled to delegate his power to a local government and from thence to a secular body, such as the magistrate or justice of the peace. We cannot appeal to Spenser as a poet, then, to enlighten us on the manner in which a marriage should be performed. From his poem, however, we can absorb two fundamental principles which could well be embodied in jurisprudence, namely, the publication of banns and the indissolubility of marriage.

3. The Marriage Act of Ontario specifies who may solemnize marriages and also requires that proclamation be made of the intention to do so. In the United States of America marriages of North American Indians in accordance with their own laws and customs are recognized by the Government. To quote Justice Harlan of the Supreme Court of the United States,^{4.} "In the law 'marriage' may mean either the acts, agreements, or ceremony by which two persons enter into wedlock or their subsequent relations created thereby".

In the evolution of marriage we can trace many methods. Marriage by capture is a primitive method and occurs even now among the Brazilian tribes and in other parts of the world. Tennyson

speaks of this method in "The Princess".

3. Statutes of Ontario. Chap. 148. Sec. 4. Vol. 1. 1914

4. Harlan "Marriage"

"Look you, Sir!

Man is the hunter; woman is his game:

The sleek and shining creatures of the chase,

We hunt them for the beauty of their skins;

They love us for it, and we ride them down.

Wheedling and siding with them! Out! for shame!

Boy, there's no rose that's half so dear to them

As he that does the thing they dare not do,

Breathing and sounding beauteous battle, comes

With the air of the trumpet round him, and leaps in

Among the women, snares them by the score

Flatter'd and fluster'd, wins, tho' dash'd with
death

He reddens what he kisses: thus I won

Your mother -- "

In certain countries, all that is required is the consent of the parents; the consent of the bride or bridegroom, or both, may be dispensed with. In civilized countries the consent of both parties concerned is necessary for a valid marriage.

Whatever the method, or whatever the rites performed, the principle of indissolubility remains true from a social standpoint. The human positive laws should be based on the laws of nature and, looking at the question from this point of view, we assert that the first law of nature is self-preservation. In order then to safeguard the lives of the progeny - and in making laws we must assume the natural result of marriage - laws must be made whereby both parties are responsible for their offspring.

Milton, using the Bible as his justi-

fication, considered the primary object of marriage was to overcome the evil of solitary life. He overlooked the fact that this object became only secondary after the fall of man. When children became the natural result of marriage individual rights had to be sacrificed for the good of others. Milton admits this in the same argument when he states that the laws ought to be made for "the common lump of men".

Pope agrees that self-love should give way to social love.

"The strength he gains is from the embrace
 he gives,
On their own axis as the planets run,
Yet make once their circle round the sun;
So two consistent motions act the soul;
And one regards itself, and one the whole.
Thus God and Nature linked the general frame
And bade Self-Love and Social be the same".

And again his views on the responsibility of man and wife:

"Thus beast and bird their common charge
 attend,
The mothers nurse it, and the sires defend;
The young dismissed to wander earth or air,
There stops the instinct, and there ends the care;
The link dissolves, each seek a fresh embrace,
Another love succeeds, another race
A longer care man's helpless kind demands;
That longer care contracts more lasting bands:

"Essay on Man" - Pope.

Modern civilization is based on the family and the family is founded on the marriage institution. If

we are to protect our modern society and prevent the decay of civilization the family must be safe-guarded. Only by indissolubility of the marriage tie can this be accomplished. A man and a woman has his and her place in nature. They belong together, side by side, bearing tribulation together, sharing each other's happiness. It is this sharing of sorrows and joys alike that bind them together and, consequently, builds up a firm foundation for a solid, well-ordered society.

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"When the man wants weight, the woman takes
it up,
And topples down the scales; but this is
fixt
As are the roots of earth and base of all;
Man for the field and woman for the hearth;
Man for the sword and for the needle she:
Man with the head and woman with the heart:
Man to command and woman to obey;
All else confusion-----"

From a legal point of view many arguments might be advanced for divorce but from a social and ethical point of view it may be argued also that the very fact that divorce is possible breaks down the morale of a society. If divorce were impossible man and wife would bear their trials together and ultimately triumph over them. When divorce may be obtained on such grounds as incompatibility either party is inclined to yield to the line of least resistance and, rather than face hardship or privation, unloose the

marriage knot. Again, I turn to Tennyson whose lines contain a philosophy which modern society would do well to heed.

" 'Blame not thyself too much,' I said,
 'nor blame
Too much the sons of men and barbarous laws;
These were the rough ways of the world till now.
Henceforth thou hast a helper, me, that know
The woman's cause is man's: they rise or sink
Together, dwarf'd or godlike, bond or free:
For she that out of Lethe scales with man
The shining steps of Nature; shares with man
His nights, his days, moves with him to one
 goal,
Stays all the fair young planet in her hands --
If she be small, slight-natured, miserable,
How shall men grow? but work no more alone!
Our place is much: as far as in us lies
We two will serve them both in aiding her--
Will clear away the parasitic forms
That seem to keep her up but drag her down--
Will leave her space to burgeon out of all
Within her - let her make herself her own
To give or keep, to live and learn and be
All that not harms distinctive womanhood.
For woman is not undeveloped man.
But diverse: could we make her as the man,
Sweet love were slain: his dearest bond is this,
Not like to like, but like in difference.
Yet in the long years liker must they grow;
The man be more of woman, she of man;
He gain in sweetness and in moral height,
Nor lose the wrestling thews that throw the
 world;
She mental breadth, nor fail in childward care,
Nor lose the childlike in the larger mind;
Till at the last she set herself to man,
Like perfect music unto noble words;
And so these twain, upon the skirts of Time,
Sit side by side, full-summ'd in all their powers,
Dispensing harvest, sowing the To-be,
Self-reverent each and reverencing each,
Distinct in individualities,
But like each other ev'n as those who love.
Then comes the statelier Eden back to men:
Then reign the world's great bridals, chaste
 and calm:

Then springs the crowning race of mankind.
May these things be!"

and again,

"Dear, but let us type them now
In our own lives, and this proud watchword rest
Of equal; seeing either sex alone
Is half itself, and in true marriage lies
Nor equal, nor unequal; each fulfils
Defect in each, and always thought in thought,
Purpose in purpose, will in will, they grow,
The single pure and perfect animal,
The two-cell'd heart beating, with one full
stroke,
Life."

Up to the present we have seen
that idealistic marriage should be one of equality
but with obedience due to the male. Chaucer, inspired
by chivalry, pictures the male as showing willing
obedience to his wife while the wife promises fidelity.

"But atte laste, she for his worthinesse,
And namely for his meke obeysaunce,
Hath swich a pitee caught of his penaunce,
That prively she fil of his accord
To take him for hir housbonde and hir lord,
Of swich lordshipe as men han over hir wyves,
And for to lede the more in blisse hir lyves,
Of his free wil he swoor hir as a knight,
That never in al his lyf he, day ne night,
Ne sholde up-on him take no maistrye
Agayn her wil, ne kythe hir jalousye,
But hir obeye, and folwe her wil in al
As any lovere to his lady shal;
Save that the name of soveraynetee,
That wolde he have for shame of his degree.
She thanked him, and with ful greet humblesse
She seyde, 'sire, sith of your gentillesse
Ye profre me to have so large a reyne,
Ne wolde never god bitwixte us tweyne
As in my gilt, were outhere werre or stryf.

Sir, I wol be your humble trewe wyf,
Have heer my trouthe, til that myn
herte breste.'
Thus been they bothe in quiete and
in reste
For o thing, sires, saufly dar I seye,
That frendes everich other moot obeye,
If they wol longe holden companye.
Love wol nat ben constreyned by maistrye
When maistrie comth, the god of love anon
Beteth his wings, and farewell! he is gon!"

These last few lines are Chaucer's
own comments. The following is his recipe for a happy
married life:

"Love is a thing as any spirit free;
Women of kind desiren libertee,
And nat to ben constreyned as a thral;
And so don men, if I soth seyen shal."

The relative positions of man and
wife should not be ignored.

"Thus hath she take hir servant and
hir lord,
Servant in love, and lord in mariage
Then was he bothe in lordship and
servage;
Servage? nay, but in lordshipe above,
Sith he hath bothe his lady and his
love,
His lady, certes, and his wyf also,
The which that lawe of love accordeth
to."

Tennyson, too, visualizes the
sanctity and indissolubility of marriage in his
"Idylls of the King." King Arthur is the embodiment

of all the virtues and it is to him, above all the heroes in literature, that we should look for an ideal. In the following lines the marriage ceremony of King Arthur to Guinevere is being enacted.

"The Sun of May descended on their King,
They gazed on all earth's beauty in their
Queen,
Roll'd incense and there past along the
hymns
A voice as of the waters, while the two
Swore at the shrine of Christ a deathless
love:
And Arthur said, "Behold, thy doom is mine.
Let chance what will, I love thee to the
death!"
To whom the Queen replied with drooping
eyes
'King and my lord, I love thee to the
death!"

Milton considers marriage a covenant. This is true from one point of view, that of the law - but in such an agreement where, in many instances, the heart rules the head, a sacrament would be a more apt term. It is in the nature of things that a man should love a woman and this instinctive law was part of the Divine order. Why, then, should it be considered only in its formal aspect and treated as merely a business agreement or a business partnership? To do so is to violate the law of nature.

Nevertheless because of the re-

cognition of marriage by the law as a contract certain rights are acquired. The husband gains the right that no other man shall, by force or persuasion, deprive him of his wife's society, still less be criminally intimate with her. Literature confirms this right.

Each violation of a right carries its own penalty. In English law adultery on the part of the wife provides the "remedial" right of divorce. Professor Holland says that the husband might formerly have chastised her for levity of conduct, and in quite recent times was allowed to restrain her personal liberty, but his right so to do has been negatived by a recent decision of the Court of Appeal. A wife may also petition against her husband for "restitution of conjugal rights" or for a divorce.

Milton did not carry out in practice what he advocated in theory. As with all his prose works, Milton wrote his doctrine on Divorce, under the stress of the times and in this particular instance he was led to do so because of his desertion by his first wife. Milton did not obtain a divorce, however, and his wife returned to him after an absence of two years. She bore him three daughters.

Hyacinthe Ringrose, D.C.L., has studied the many varied laws of marriage and divorce in practically every country of the world and has written a book on this subject. He says, "A study of the marriage laws of the world has also brought the happy conviction that the wholesome view of marriage as the union of one man and one woman for life, to the exclusion of all others, is the one triumphant fact of human history which can never lose its prestige."

Although adultery seems to be the primary ground for divorce, the divorce laws in many countries have been extended to include the most trivial causes. In old Roman law adultery was punishable by death. The crime itself, therefore, has always been treated seriously. In Browning's "The Ring and the Book" we have an instance of a case which involved both Private and Public Law, rights "in rem" and rights "in personam", civil and criminal procedure.

Although no one might question the right of the state to levy penalty for adultery, the right of the husband to administer the death penalty is debateable. In this particular Roman murder case the husband "with certain Four cutthroats in his pay"

undertook to kill his wife for the crime of adultery.

"Word for word,
So ran the title-page: murder, or else
Legitimate punishment of the other crime
Accounted murder by mistake ---
----O' the color of a crime, inform us
first!
Reward him rather! Recognize, we say,
In the deed done, a righteous judgment
dealt!
All conscience and all courage, --
---From earth's four corners, all authority
And precedent for putting wives to death,
Or letting wives live, sinful as they seem.
How legislated, now, in this respect,
Solon and his Athenians? Quote the code
Of Romulus and Rome! Justinian speak!"

6. And, indeed, the Roman court did not
lack precedent for the laws of Solon did allow anyone
who caught an adulterer in the act to kill him there
and then.

Many countries disallow certain marriages
on the grounds of relationship within prohibited
degrees, as for instance, brother and sister, or
first cousins. Ford protests against the arbitrary
laws of man.

"Shall a peevish sound,
A customary form from man to man
Of brother and sister, be a bar
'Twixt my perpetual happiness and me?

However let us love still, I entreat:
That, neighbour-hood and breeding will
allow;
So much the lawes divine and humaine both,
Twixt brother and a sister will approve;
Heaven forbid, that they should limit us."

Among the private rights "in rem" is that of freedom from defamation or scandal. To defame or to scandalize a person is to speak maliciously of his character. When this is put in the form of writing, printing, or suggested by pictures, it becomes libel. The majority of countries have enacted legislation against libel. Under the Justinian Code the penalty was death. This penalty has been mitigated in modern days and, generally speaking, allows the plaintiff to collect damages. Under the Statutes of Ontario, Chapter 71, Sec. 19, dealing with Slander of Women, the plaintiff may recover nominal damages without having to prove that any special damage was incurred.

7.

Sheridan in his "School for Scandal" satirizes the malicious pastime of slander and those who, under the pretext of belonging to some exclusive "set", bit by bit undermine a person's reputation in the same quiet, stealthy manner that the termite crumbles a wooden structure until it collapses from pure rottenness.

"Attend, all ye who boast, - or old
or young, --
The living libel of a slanderous
tongue!"

The Prologue, written by Mr. Garrick,

comments on the futility of the poet's effort.
7. "Plays of Sheridan" ed. by Dircks.

"Is our young bard so young, to think that he
Can stop the full spring-tide of calumny?
Knows he the world so little, and its trade?
Alas! the devil's sooner raised than laid.
So strong, so swift, the monster there's no
gagging:
Cut Scandal's head off, still the tongue
is wagging."

The following dialogue takes place in
Lady Sneerwell's Dressing-Room.

" Lady Sneer. - Nay, but we should make allowance;
Sir Benjamin is a wit and a poet.

Maria - For my part, I own, madam, wit loses its
respect with me, when I see it in company with malice.
What do you think, Mr. Surface?

Jos. Surface. - Certainly, madam; to smile at
the jest which plants a thorn in another's breast is
to become a principal in the mischief.

Lady Sneer.- Psha! there's no possibility of
being witty without a little ill-nature: the malice of
a good thing is the barb that makes it stick.
What's your opinion, Mr. Surface?

Jos. Surface.- To be sure, madam; that con-
versation, where the spirit of raillery is suppressed,
will ever appear tedious and insipid.

Maria.- Well, I'll not debate how far scandal
may be allowable; but in a man, I am sure, it is
always contemptible. We have pride, envy, rivalry,
and a thousand motives to depreciate each other; but
the male slanderer must have the cowardice of a woman
before he can traduce one.

An example of libel without incurring
the risk of punishment is found in the following con-
versation:

"Lady Sneer. - I wonder, Sir Benjamin, you never publish anything.

Sir Benjamin Backbite.- To say truth, ma'am, 'tis very vulgar to print; and as my little productions are mostly satires and lampoons on particular people, I find they circulate more by giving copies in confidence to the friends of the parties."

Lady Teazle, the young wife of old Sir Peter, prides herself on being a member of the elect. She claims this little group of scandal-mongers to be people of rank and fortune and remarkably tenacious of reputation. Sir Peter says, "Yes, egad, they are tenacious of reputation with a vengeance; for they don't choose anybody should have a reputation but themselves! Such a crew! Ah! many a wretch has rid on a hurdle who has done less mischief than these utterers of forged tales, coiners of scandal, and clippers of reputation."

Sir Peter, always a hater of scandal, suggests certain legislative measures for its suppression.

"Fore heaven, madam, if they were to consider the sporting with reputation of as much importance as poaching on manors, and pass an act for the preservation of fame, as well as game, I believe many would thank them for the bill. And then no person should be permitted to kill characters and run down reputations, but qualified old maids and disappointed widows.

Mrs. Candour: But, surely, you would not be quite so severe on those who only report what they hear?

Sir Peter: Yes, madam, I would have law merchant for them too; and in all cases of slander currency, whenever the drawer of the lie was not to be found, the injured parties should have a right to come on any of the endorsers."

Tennyson sums up the character of a slanderer in his "Idylls of the King."

"Face-flatterer and backbiter are the same.
And they, sweet soul, that most impute a crime
Are pronest to it, and impute themselves,
Wanting the mental range; or low desire
Not to feel lowest makes them level all;
Yea, they would pare the mountain to the plain,
To leave an equal baseness; and in this
Are harlots like the crowd, that if they find
Some stain or blemish in a name of note,
Not grieving that their greatest are so small,
Inflate themselves with some insane delight,
And judge all nature from her feet of clay,
Without the will to lift their eyes, and see
Her godlike head crown'd with spiritual fire,
And touching other worlds."

CHAPTER VI.

LAW OF PROCEDURE AS EXPRESSED IN POETRY.

In the previous chapter we learned that Law defines rights and is called 'Substantive Law.' So far as it provides a method of aiding and protecting, it is "Adjective Law" or Law of Procedure. It deals with the steps to be taken in order to set the machinery of the law-courts in motion for the benefit of either the plaintiff or the defendant. Both civil and criminal procedure are defined quite clearly in the statute books of most countries. The explanation to be found for the inherent excellence of British justice is to be found, according to 1. Frederick A. Ogg, LL.D. in three main phases or aspects of the system. The first has to do with the broad principles upon which justice is based, the second with the rules of procedure observed in the courts and the third with the quality of bench and bar. It is important, then, that the law of procedure and the value of counsel be dealt with in these chapters.

The fundamental rules of procedure consist of the choice of the proper court, and in 1. Ogg. "European Governments and Politics" p. 379.

criminal procedure, the summons, the preliminary investigation, the measures taken to secure the accused, the pleadings, the trial, the verdict and the execution of the judgment.

In the law-courts of Periclean Athens trial by jury was the final accomplishment of democracy. At times there were as many as three hundred jurors sitting at a trial. On first thought this number appears superfluous but it had one decided advantage. It was not an easy matter to bribe three hundred men. When a case was accepted for trial the plea was entered or sworn to, the witnesses made their depositions and swore to them, and all these statements were presented to the court in written form. They were sealed in a special box and at a later date they were opened and examined and judgment given by a panel chosen by lot. There was no public prosecutor; the government relied upon private citizens to accuse before the courts anyone guilty of serious offenses against morals, religion or the state. Plaintiffs who failed to substantiate their charges were fined. Each party in a trial acted as his own lawyer and had to make in person the first presentation of his case. As the complexity of procedure increased, however, and litigants detected a

certain sensitivity to eloquence in the jurors, the practice grew of engaging a rhetor or orator, versed in the law, to support the complaint or defense. From these special rhetor - pleaders come the lawyers.

Rome followed closely the procedure of Athens as may be gathered from Browning's "The Ring and the Book."

"So, in this book lay absolutely truth,
Fanciless fact, the documents indeed,
Primary lawyer-pleadings for, against,
The aforesaid Five; real summed-up
 circumstance
Adduced in proof of these on either side,
Put forth and printed, as the practice was,
At Rome, in the Apostolic Chamber's type.
And so submitted to the eye o' the Court
Presided over by His Reverence
Rome's Governor and Criminal Judge, - the
 trial
Itself, to all intents, being then as now
Here in the book and nowise out of it;
Seeing, there properly was no judgment-bar,
No bringing of accuser and accused,
And whoso judged both parties, face to face
Before some court, as we conceive of courts.
There was a Hall of Justice; that came last:
For Justice had a chamber by the hall
Where she took evidence first, summed up the
 same,
Then sent accuser and accused alike,
In person of the advocate of each,
To weigh its worth, thereby arrange, array
The battle. 'T was the so-styled Fisco began,
Pleaded (and since he only spoke in print
The printed voice of him lives now as then)
The Public Prosecutor - 'Murder's proved;
With five what we call qualities of bad,
Worse, worst, and yet worse still, and still
 worse yet;

Crest over crest crowning the cockatrice,
That beggar hell's regalia to enrich
Count Guido Franceschini: punish him!
Thus was the paper put before the court
In the next stage, (no noisy work at all,)
To study at ease. In due time like reply
Came from the so-styled Patron of the Poor,
Official mouthpiece of the five accused
Too poor to fee a better - "

When the defence was made and after they had "wrangled, brangled, jangled" for a month, the verdict of murder was given. Count Guido Franceschini, the accused, was then claimed by the advocate for the defence to "boast the clerkly privilege" and to have had in the past taken minor orders. On these grounds he was entitled to appeal to the Church, or, in other words, to Canon Law.

The basic principle of Law is, or should be, justice. We know from experience, however, that there is often a miscarriage of justice, due times without number, to the skilful pleadings of a clever lawyer. This influence of rhetoric on the judge, or jury, was recognized by Browning who gives expression to the power of oratory in the following lines:

"Then since a Trial ensued, a touch o' the same
To sober us, flustered with frothy talk,
And teach our common sense its helplessness.
For why deal simply with divining-rod,
Scrape where we fancy secret sources flow,
And ignore law, the recognized machine,

Elaborate display of pipe and wheel
Framed to unchoke, pump up and pour apace
Truth till a flowery foam shall wash the
world?

The patent truth-extracting process - ha?
'Let us make that grave mystery turn one wheel,
Give you a single grind of law at least!
One orator, of two on either side,
Shall teach us the puissance of the tongue
- That is, o' the pen which simulated tongue
On paper and saved all except the sound
Which never was. Law's speech beside law's
thought?

That were too stunning, too immense an odds:
That point of vantage law lets nobly pass.
One lawyer shall admit us to behold
The manner of the making out a case,
First fashion of a speech; the chick in egg,
The masterpiece law's bosom incubates.
How Don Giacinto of the Arcangeli,
Called Procurator of the Poor at Rome,
Now advocate for Guido, and his mates,-
The jolly learned man of middle age,
Cheek and jowl all in laps with fat and law,
Mirthful as mighty, yet, as great hearts use,
Despite the name and fame that tempt the flesh,
Constant to that devotion of the hearth.
Still captive in those dear domestic ties!---
How he, - having a cause to triumph with,
All kind of interests to keep intact,
More than one efficacious personage,
To tranquillize, conciliate and secure,
And above all, public anxiety
To quiet, show its Guido in good hands, -
Also, as if such burdens were too light,
A certain family-feast to claim his care,
The birthday-banquet for the only son--
Paternity at smiling strife with law--
How he brings both to buckle in one bond;
And thick at throat, with waterish under-eye,
Turns to his task and settles in his seat
And puts his utmost means in practice now:
Wheezes out law-phrase, whiffles Latin forth,
And, just as though roast lamb would never be,
Makes logic levigate the big crime small;
Rubs palm on palm, rakes foot with itchy foot,
Conceives and inchoates the argument,
Sprinkling each flower appropriate to the time,
--Ovidian quip or Ciceronian crank,
A-bubble in the larynx while he laughs,

As he had fritters deep down frying there.
How he turns, twists, and tries the oily thing
Shall be - first speech for Guido 'gainst the
Fisc."

The advice and pleading of an advocate for his client is recognized as being so important that the Statutes of Canada contain legislation on this point. Sec. 942 of Chapter 36 reads as follows:

"Every person tried for any indictable offence shall be admitted, after the close of the case for the prosecution, to make full answer and defence thereto by counsel learned in the law."

In Spenser's "Faerie Queen", Canto VII, Una meets a Knight, the great magician Merlin, famous in the stories of the Round Table, who persuades her, much against her will, to confide her grief in him. She depairs of any comfort that he may be able to give her but he tells her that counsel mitigates the greatest smart. The value of advice or counsel may be gleaned from the following:

'"O, but,' (quoth she) ' great grieve will
not be tould,
And can more easily be thought then said.'
'Right so' (quoth he) ' but he that never
would
Could never: will to might gives greatest
aid.'
"But grieve,' (Quoth she) ' does greater grow
displaid,
If then it find not helpe, and breeds despaire.'
"Despair breeds not, ' (quoth he) 'where faith
is staid.

'No faith so fast,' (quoth she) 'but flesh
does paire.'
'Flesh may empaire,' (quoth he) 'but reason
can repaire.'
His goodly reason, and well-guided speech,
So deepe did settle in her gracious thought,
That her perswaded to disclose the breach
Which love and fortune in her heart had
wrought."

The counsel of the knight was unprejudiced and unaffected by personal emotion. An advocate, pleading for his client, is unaffected by personal participation in the charge. He is not torn by personal emotions as would be the case of the prisoner conducting his own defence.

As mentioned before, justice may miscarry because of the eloquence of a clever lawyer. We have dispensed with the notion that any real personal emotion animates the advocate. He may be pleading in a good cause but his motives may be one of many. 'Piers the Plowman' seems to think that financial remuneration is the chief motive.

"Sergeants, it seems, to serve at the bar;
Plead at the law for pence and for pounds,
Not for love of our Lord unloose their lips
once,
Thou mightest better measure the mist on
Malvern Hills
Than get a mum of their mouth till money
be shown."

Sir Walter Raleigh appears to have no higher opinion of lawyers than did Piers the Plowman.

"No conscience molten into gold,
No forged accuser bought or sold,
No cause deferred, no vain-spent
journey,
For there Christ is the King's
attorney,
Who pleads for all, without degrees,
And He hath angels, but no fees.
And when the grand twelve-million jury
Of our sins, with direful fury,
Against our souls black verdicts give,
Christ pleads his death; and then we live.
Be thou my speaker, taintless pleader,
Unblotted lawyer, true proceeder!
Thou giv'st salvation, even for alms,
Not with a bribed lawyer's palms."

2.

Erasmus in his "Praise of Folly" is not altogether complimentary to the legal profession.

"What need of Rhetorick, where there were no
Law-suits?

Or to what purpose Laws, where there were no ill manners from which without doubt good Laws first came.

Among the Sciences comes Divines, Naturalists, Astrologers, Logicians, Physicians, then Law-Drivers.

Next them (Physick) the second place is given to our Law-Drivers, if not the first; whose Profession, though I say it myself, most men laugh at as the Ass of Philosophy; yet there's scarce any business, either so great or small, but is managed by these Asses.

While yet those Learned men, though they laugh their fill and reap the benefit of t'others, Folly, cannot without ingratitude, denie but that even they too are not a little beholding to me themselves. And amongst them our Advocates challenge the first place, nor is there anie sort of people that please themselves like them: for while they dailie roul Sisphus his stone; and quote ye a thousand cases, as it were in a breath, no matter how little to the purpose; and heap Glosses upon Glosses, and Opinions on the neck of Opinions; they bring it at last to this pass,

that that studie of all other seems the most difficult."

Boethius in his "Consolation of Philosophy" does not overlook the law-courts nor the lawyers.

"It is plain that a wrong involves the misery of the doer, not of the sufferer."
"And yet," says he," the practice of the law-courts is just the opposite; advocates try to arouse the commiseration of the judges for those who have endured some grievous and cruel wrong; whereas pity is rather due to the criminal, who ought to be brought to the judgment-seat by his accusers in a spirit, not of anger, but of compassion and kindness, as a sick man to the physicians, to have the ulcer of his fault cut away by punishment. For if vicious propensity is, as it were, a disease of the soul like bodily sickness even as we account the sick in body by no means deserving of hate, but rather of pity, so, and much more, should they be pitied whose minds are assailed by wickedness, which is more frightful than any sickness.

The prison, the law, and the other pains of legal punishment are properly due only to mischievous citizens on whose account they were originally instituted.

As to the afflictions, of course, no one marvels, because all hold the wicked to be ill-deserving. The truth is, their punishments both frighten others from crime and amend those on whom they are inflicted."

The Law of Procedure, as adopted in the courts of to-day, follow the most logical method and the poets appear to offer no better plan. As a matter of fact, they acquiesce in principle as is seen

by the works of two leading English literary geniuses namely, Chaucer in his "Parliament of Fowls" and Shakespeare in "The Merchant of Venice."

The Court or Parliament of Fowls is called to order. They have arranged themselves in order of rank.

"This noble emperesse, full of grace,
Bad every fowl to take his owne place,
As they were wont alwey fro yeer to yere,
Seynt Valentynes day, to stonden there.
That is to sey, the foules of ravyne
Were hyst set; and than the foules smale.

But water-foul sat lowest in the dale;
And fowl that liveth by seed sat on the grene,
And that so fele, that wonder was to sene.

Ther mighte men the royal egle finde,
That with his sharpe look perceth the sonne;
And other egles of a lower kinde,
Of which that clerkes wel devysen conne.
Ther was the tyraunt with his fethres donne
And greye, I mene the goshawk, that doth pyne,
To briddes for his outrageous ravyne."

The first speaker, pleading his own cause, is the male eagle.

"The tercel egle, as that ye knowen wel,
The fowl royal above youw in degree,
The wyse and worthy, secree, trewe as stel,
The which I formed have, as ye may see,
In every part as hit best lyketh me,
Hit nedeth nocht his shap you to devyse,
He shall first chese and speken in his gyse."

Nature, the presiding Judge, outlines the conditions to be observed.

"But natheles, in this condicioun
Mot be the choys of everich that is here,
Who-so he be that shulde been hir fere;
This is our usage alwey, fro yeer to yere;
And who so may at this time have his grace,
In blisful tyme he com into this place."

The formel eagle, for whose
"hand" the birds were pleading, listened in silence.
Another tercel eagle, lower in rank than the first,
began to speak. His speech was lengthy and lasted
'til downward drow the sonne wonder faste," and
elicited a cry from the audience. "Whan shal your
cursed pleding have an ende?"

Nature called for order and
promised a verdict within a short time. The water-
fowls, the lowest in order, now began to cackle out
their reasonings. The pleadings ended, the case was
adjourned for a year until the eagle could make her
choice.

"The Merchant of Venice" has a
more conclusive ending, possibly due to the fact that
learned counsel was present. Antonio, the merchant,
had given as security for a loan from the Jew, Shylock,
a bond. The condition was that on such a day if the
loan were not repaid the forfeit would be a pound of
Antonio's flesh, to be cut off and taken in what part
of the body that pleased the Jew.

The Duke of Venice presided at the trial. Antonio, who was unable to repay the loan on the stated day, was the defendant, Shylock the plaintiff. The procedure, judged by modern court procedure, was a trifle irregular. On the other hand, this was civil, not criminal procedure. The Duke opened the trial by pleading with the Jew for mercy. The Jew refused and Bassanio offered to repay the loan by double the amount. This generour offer was refused by Shylock. The Duke stated that he had power to dismiss the court if Bellario, a doctor of law, and chosen by the Duke to determine the case, did not appear. At this moment, however, another doctor, sent by Bellario as his representative, appeared. After much cross-examination of both plaintiff and defendant the learned doctor proceeded to pronounce judgment. Antonio must yield to the knife of Shylock. It is at this point, however, that learned counsel proves its value. The learned doctor, who is none other than the very clever young lady, Portia, speaks in this manner to the Jew.

Portia: "A pound of that same merchant's flesh is thine:
The court awards it, and the law doth give it!"

Shylock: Most rightful judge!

Portia: And you must cut this flesh from off his breast:
The law allows it, and the court awards it.

Shylock: Most learned judge! A sentence! Come,
prepare.

Portia: Tarry a little: there is something else.
This bond doth give thee here no jot of
blood;
The words expressly are 'a pound of flesh':
Take then thy bond, take thou thy pound
of flesh;
But, in the cutting it, if thou dost shed
One drop of Christian blood, thy lands and
goods
Are, by the laws of Venice, confiscate
Unto the state of Venice."

Needless to say, Shylock refused
to take the pound of flesh but Portia mercilessly con-
tinued:

"Tarry, Jew:
The law hath yet another hold on you.
It is enacted in the laws of Venice,
If it be prov'd against an alien
That by direct or indirect attempts
He seek the life of any citizen,
The party 'gainst the which he doth
contrive
Shall seize one half his goods; the
other half
Comes to the privy coffer of the state;
And the offender's life lies in the mercy
Of the duke only, 'gainst all other voice.
In which predicament, I say, thou stand'st;
For it appears by manifest proceeding,
That indirectly and directly too
Thou hast contriv'd against the very life
Of the defendant; and thou hast incurr'd
The danger formerly by me rehears'd.
Down therefore and beg mercy of the duke."

The point to be emphasized is
that the defendant, Antonio, pleading his own case,
would have been entirely at the mercy of the Jew.

With counsel learned in the law, and undoubtedly either Portia was learned in the law or else had obtained advice from Bellario, the result of the trial was totally in favour of the defendant and, instead of Antonio losing his life, Shylock lost one-half of his entire fortune.



CHAPTER VII.

FALLACY OF EVIDENCE AS
PROVED FROM LITERATURE.

In the previous chapter we discussed, in particular, one phase of the law of procedure, namely, that of the value of counsel. The object of a trial is to obtain justice for the parties concerned, and the services of counsel, learned in the law, is essential to achieve this purpose.

Another phase of procedure, however, is equally essential, that of evidence. Without evidence there could be no just trial. At a trial each party endeavours to convince the Court of the truth of his view. If the question is one of law authorities must be cited, if of fact, proofs must be adduced. To the warden of the law, that is the policeman, and to the judge or jury, the difficulties in determining questions of fact are greater and more common than those encountered in determining questions of law. In judicial proceedings the weight

of evidence is determined by certain rules and thus we get the term 'the law of evidence'.

1.

Evidence may be either direct or indirect. Direct evidence is limited to cases where the principal fact is attested directly by witnesses, things or documents. Indirect evidence is commonly known as **circumstantial evidence** and is either **conclusive** or **presumptive**.

Evidence is either real or personal. By real evidence is meant evidence of which any object belonging to the class of things is the source in respect of such properties as belong to them in common with things. As an example, an arm may bear the wound of a knife. If the offence has been committed in the presence of a tribunal it has direct real evidence of the fact. If the offence was not witnessed but the wound was determined by doctors and experts to bear the characteristics of a knife wound the evidence would be real yet indirect.

Personal evidence is that which is narrated by a human agent and is known as testimony.

Another division of evidence is pre-

constituted and casual. The first includes written evidence, such as documents, wills, deeds, etc., drawn up in order to afford proof on some future occasion. It is not necessary that the evidence be written to come under this classification. It may be oral but must be witnessed by two or more persons for the purpose of future use. Casual evidence is, as the name implies, evidence either written or oral but not pre-meditated.

There are certain laws or rules of evidence to be observed in conducting a trial. These rules are founded on basic principles known from ancient times. Primary rules are that the evidence adduced must be directed solely to the matters in dispute; that the accused must be proven guilty, at least in English law. In some countries the accused is considered guilty until he has proven his innocence. Certain rules exist as to the admissibility of evidence, as for instance, if it comes from a suspicious quarter.

One rule observed in weighing evidence is known as the "admitted facts" rule. By this rule, evidence, of whatever kind, must yield to the extent that it conflicts with admitted, or clearly established, facts. Doubtful evidence must conform to

these facts. The procedure to be followed, then, is to commence with certain established facts and to use these as a "measuring rod" for further testimony.

Written evidence is considered superior to oral. Judge Lumpkin of Georgia is quoted as saying, "I would sooner trust the smallest slip of paper for truth than the strongest and most retentive memory ever bestowed on mortal man."

When oral testimony and documentary evidence conflict preference is given to the latter.

Preponderance of evidence must be produced by the party on whom the burden of proof falls. The burden of proof rests, in almost every case, civil or criminal, on the accuser. If the evidence is equally balanced the party having the burden of proof fails.

Probability cannot be considered judicial proof. In order to get at the truth, however, it is sometimes necessary to give it consideration.

The quality of observance varies in degree with each individual. Some people are more observant than others. Charles Dickens, the novelist, is said to have been able to observe every detail while walking down a street. When he returned from his walk

he could give a detailed description of every place that he had passed including the kinds of vegetables on display in a store window. Another person might walk down the same street and see very little except that which particularly interested him. This quality of observation in a witness is a matter of importance and must be given its due share of consideration in weighing evidence.

The faculty of remembering is also important. In an individual this is good or bad. From the viewpoint of a jury this would be determined by the lapse of time, it being naturally assumed that the more recent the event the more vivid would be the impression. A person's memory, too, is especially retentive of facts for which he has an interest. Or the memory of one's own acts would be of more weight in evidence than the recollections of one individual concerning the acts of another, providing, of course, that the individual concerned was neither intoxicated or otherwise in a confused state of mind. Routine matters diminish the conscious attention with which one's acts are performed, consequently, this fact, too, would be balanced against the individual's recollection of his own acts. The memory is deceived by leading

questions, or suggestions, and in like manner suggestion often causes a person to see things which would have been impossible otherwise. As an example, we quote from "Hamlet."

"Hamlet:- Do you see yonder cloud that's almost in shape of a camel?

Polonius:- By the mass, and 'tis like a camel indeed.

Hamlet:- Methinks it is like a weasel.

Polonius:- It is backed like a weasel.

Hamlet:- Or like a whale?

Polonius:- Very like a whale.

Hamlet. Act III Sc. 2.

The memory may be refreshed. That a thing forgotten on one day may be remembered on another, especially by attentive and careful recollection, or by conference with other witnesses to the same facts, is an irregularity in the process of memory which courts fully recognize. In spite of this fact the courts are accustomed to inquire by what means a memory once confessedly faded was revived, and unless the answer is satisfactory, the testimony may be regarded lightly, or rejected as clearly fictitious.

A memorandum is defined to be a note

to help the memory. It would be considered by the court as increasing the value of a testimony. This was recognized by the Doctor in "Macbeth."

Doctor:- Hark! she speaks: I will set
down what comes from her, to satisfy
my remembrance the more strongly."

Act V. Sc. 1.

It is said that Sir Walter Scott dictated the novel "Ivanhoe" from a sick-bed. At the conclusion of the work he remembered those parts only which he had written out with his own hand.

Discrepancies in the testimony of witnesses is another factor which must be considered of great importance in weighing evidence. This is one of the very ancient principles of evidence which has been handed down to modern times. Biblical literature contains a glowing account of this principle, one which was almost overlooked by the ancient judges, or elders.

In the garden of a very rich man of Babylon was a park through which ran a stream of clear water. Susanna, the wife of this rich man, decided to bathe in the stream one day and sent her maids for towels and oil. Whilst she was alone two of the elders, who were passing through the park, saw her and, over-

come by evil passions, approached her. In spite of their threat to report her as being in the garden in company with a young man she refused their advances and managed to escape. The elders made good their threat and Susanna was brought to trial. On the evidence of the two elders she was convicted and sentenced to death.

Susanna appealed to Daniel, a young lawyer, who immediately called for a new trial. "Are ye so foolish, ye children of Israel," said he, "that without examination or knowledge of the truth you have condemned a daughter of Israel. Return to judgment for they have borne false witness against her."

The people consented to a new trial and Daniel immediately called for the accusers. "Separate these two far from me," he ordered, "and I will examine them."

When this was done he said to one of the two elders, "Tell me, under what tree thou sawest them conversing together?" "Under a mastic tree," replied the elder.

The other elder was called, and after he had told his story, Daniel asked the same question

as he had put to the first elder. The answer was,
"Under a holm tree."

Daniel, Chapter 13.

The discrepancy in this evidence of the two witnesses was so obvious that both elders were put to death and Susanna regained the same high esteem in which she had been held previously.

This story was possibly in Shakespeare's mind when he wrote the "Merchant of Venice" and provided inspiration for Shylock's exultant exclamation, "A Daniel come to judgment!"

According to Best there is no subject in the whole range of judicial proofs which demands more anxious attention than the forgery of real evidence. It may have originated in one of several causes. Sometimes it is done by the guilty person to free himself from blame as in the case where a man was condemned and executed for horse-stealing, on the strength of his having been found upon the animal the day it was stolen; but whose innocence was afterwards made clear by the confession of the real thief who acknowledged that, on finding himself

closely pursued, he had requested the unfortunate man to walk his horse for him while he turned aside upon a necessary occasion, and thus escaped.

The forgery of real evidence may have been effected with the malicious purpose of bringing down suffering on an innocent individual. An instance of this is found in the case of Boethius. "What need," he says, "to speak of the forged letters by which an attempt is made to prove that I hoped for the freedom of Rome. Their falsity would have been manifest if I had been allowed to use the confession of the informers themselves, evidence which has in all matters the most convincing force?"

Boethius lived in the fifth century and was growing to manhood when Theodoric, the famous Ostrogoth, made himself master of Italy. Boethius enjoyed his favour to the extent of becoming sole Consul in 510 A.D. In 523, he was a prisoner at Pavia, convicted of treason. He says, "Instead of reaping the rewards of true virtue, I undergo the penalties of a guilt falsely laid to my charge - nay, more than this; never did an open confession of guilt cause such unanimous severity among the assessors, but that some consideration either of the mere frailty of human nature,

or of fortunes universal instability, availed to soften the verdict of some few. Had I been accused of a design to fire the temples, to slaughter the priests with impious sword, of plotting the massacre of all honest men, I should yet have been produced in court, and only punished on due confession or conviction. Now for my too great zeal towards the senate I have been condemned to outlawry and death, unheard and undefended, at a distance of nearly five hundred miles away." 2.

2. Boethius, "Consolation of Philosophy" tr. by James.

CHAPTER VIII.

LAWS OF PROPERTY.

Property is regarded in the legal sense as being some physical object capable of appropriation. The right of the owner of a physical object is that it shall neither be taken from him, nor impaired in value, nor shall his title to it be weakened. Boethius and Philosophy discuss money, which is a physical object capable of appropriation.

"There is nothing in the special nature of money to hinder its being taken away from those who possess it against their will."

"I admit it."

"Why, of course, when every day the stronger wrests it from the weaker without his consent. Else, whence come lawsuits, except in seeking to recover moneys which have been taken away against their owner's will by force or fraud."

"Then everyone will need some extraneous means of protection to keep his money safe."

Force and fraud differ in one essential point. When force is used to obtain possession of the property of another the act is committed against the will of the person of inherence. When fraud is perpetrated it is likewise an infringement of a right but the right is infringed while the person of inherence is a consenting party to his own loss.

1.

Professor Holland tells us that it has been laid down that "if a man, having no knowledge whatever upon the subject, takes upon himself to represent a certain state of facts to exist, he does so at his peril, and if it be done whether with a view to secure some benefit to himself, or to deceive a third person, he is in law guilty of a fraud: for he takes upon himself to warrant his own belief of the truth of that which he asserts. Although the person making the representation may have no knowledge of its falsehood, the representation may, nevertheless, have been fraudulently made."

Chaucer shows the poet's ability to read aright the past, present and future. In "The Canterbury Tales" he describes briefly a sergeant of the law.

1. Holland, "Jurisprudence" p. 224.

"A Sergeant of the Lawe, war and wys,
That often hadde been at the parvys,
Ther was also, ful riche of excellence.
Discreet he was, and of greet reverence:
He seemed swich, his wordes weren so wyse.
Justyce he was ful often in assyse,
By patente, and by pleyn commissioun;
For his science, and for his heigh renoun
Of fees and robes hadde he many oon.
So great a purchasour was no-wher noon.
Al was fee simple to him in effect,
His purchasing mighte nat been infect."

In this description of the lawyer, Chaucer had in mind two principles of property possession. In early times community ownership and not individual ownership was the general rule. From this developed family ownership. Children handled the property but did not own it. If the children died the father took possession as a matter of course. If the father died first the property passed to the surviving children, or if there were no children, to certain precisely designated collateral members of his family, or in default, to the clan, reverting once more to an advanced stage of community ownership.

It is in Athens, in the time of Solon, that the right and law of wills begins. If a man had sons he was to divide his property among them at his death; if he died childless he might bequeath to anyone the property that in such cases had heretofore reverted automatically to the clan.

Rome followed the example of Greece in the laws of succession, maintaining, however, that the order of succession is regulated by nature and when inheritance is left to a stranger instead of to a son or a daughter it would be a violation of the laws of nature, therefore, they required in such a case that reason for this would be stated and that the emperor would give the decision.

Survivals of Roman law are evident in British law as in the idea that property really belongs to a family group, and that the right of an individual is merely to administer his share of it during his lifetime. The principle that a man may voluntarily select the person, as by will, on whom his property is to devolve after his death is of later origin, as has been seen, than the principle of intestate succession and is known as testamentary succession.

To Chaucer's Sergeant of the Law the conveyance of property held by the intestate principle was as easy as though it were held by testamentary succession, or held in absolute ownership by one person. The conveyance of property is even to-day a slow and complicated process but the settlement of it is much more absolute and decisive than it was in the past. It

is doubtful if, in Chaucer's day, the lawyer's "purchasing mighte nat been infect."

Roman law declared that the general duties of mankind are imposed by their public and private relations but their specific obligations to each other can only be the effect of, (1) a promise, (2) a benefit or (3) an injury; and when these obligations are ratified by law, the interested party may compel the performance by a judicial action. This is a fair conclusion of universal reason and justice.

A promise is defined as a solemn stipulation. For purposes of law this requires two parties, a "Promisor" and a "promisee" known in Roman law as "debitor and "creditor."

A benefit is contracted by the delivery of a thing. It could be a loan, a sale, a lease, a mortgage, or an insurance.

Nature and society impose the strict obligations of repairing an injury.

The apparently simple division of obligations found in Roman law have been enlarged upon to such an extent that volumes have been written on each division, and particularly, on subjects which are classified here as benefits. It is not the intention, there-

fore, in this work, to deviate from the main subject into these many branches of jurisprudence. It is sufficient that we have traced such fundamentals through the paths of literature.

Many laws dealing with agrarian reform have been passed from time to time. The influence of writers has been instrumental in this phase of legislation as it has in other fields of reform.

Laws of property are the result of changes in the economic and political system of any country and, therefore, laws affecting these two systems play a vital part in land reform. It will be in order, then, to trace briefly the influence, direct or indirect, of writers in obtaining legislative reform.

2.

Going back to the fourteenth century in England at the time when the old manor system was breaking up and the laboring class were no longer serfs on the land but sought work wherever wages were best we find a law called the Statute of Laborers. This law had for its object the holding of laborers on the land to which they were attached and prevented them from demanding higher wages. This made the peasants

2. Robinson "History of Europe" p. 265.

discontented with their lot in life and the poem entitled 'Piers Plowman' reflected their condition and caused greater discontent than ever. It needed only a poll-tax to cause the climax and this was not slow in coming. A revolt took place in 1381 and resulted in the nullification of the Statute of Laborers.

The land question in France played a large part in the French Revolution and peasants, maddened from taxation burdens, looked with envy on the large estates of the rich. Rousseau with his "Social Contract" influenced these people to a considerable degree and peasants were eager to grasp the principle of "Equality, Liberty and Fraternity."

^{3.} Daniel Defoe, known to all as the author of "Robinson Crusoe" wrote an "Essay on Projects" in 1698, which contained suggestions on banks, road management, insurance societies, bankruptcy, military colleges, etc. Many of his suggestions have been acted upon since the publication of his book.

Richard Price by his "Appeal to the Public on the Subject of the National Debt" in 1772 contributed to the re-establishment of the sinking fund.

Thomas Paine in the eighteenth century

3. See Sampson's "Concise Cambridge History of Engl.Lit. for the examples given.

expounded a radical constructive policy, including parliamentary reform, old-age pensions and a progressive income tax, which bore fruit in the nineteenth century. His pamphlet "Common-Sense" in 1776 consolidated American opinion in favour of war.

Adam Smith because of his "Inquiry into the Nature and Causes of the Wealth of Nations" is called the first prophet of Free Trade but Mr. Leslie Stephen claims that it would be more truthful to say that he was the first writer who succeeded in so presenting that doctrine as to convince statesmen in its favour. His remarks are borne out by the fact that the famous statesman Gladstone believed in the doctrine of "laissez faire" and as head of the nation put into effect social and economic reform which changed a liberal England into a radical England. He it was who gave the vote to the agricultural classes by his Reform Bill of 1832.

Jeremy Bentham was the leader of utilitarianism and his "Fragment of Government" in 1789 was an attempt to apply his principle to government. His later publication "Introduction to the Principles of Morals and Legislation" provided a foundation for the reconstruction of a democratic government in the American Declaration of Independence

in 1776.

Certain writers, who have also been members in Parliament, have not only influenced legislation but actually determined it and Macaulay is one of these. His debates on the Reform Bill gave him renown and his speeches on copyright actually compelled legislation. There are other writers who have been directly responsible for certain laws. Macaulay is named here because of his established place in literature.

Many writers have influenced legislators, and although not concerned in politics as a career for themselves have, nevertheless established principles upon which legislation was based becoming effective through the efforts of statesmen who believed in the author and embraced his doctrine.

4.

An example of this may be found in Daniel O'Connell, the most renowned of all Irish orators and certain it is, that no chapter on laws of property would be complete without a discussion, even though brief on agrarian reform in Ireland.

Daniel O'Connell, on his own confession, was influenced by certain books which he had read. Among these books were "Political Justice" by Godwin, "Vindication of the Rights of Women" by Mary
4. Gwynne " Daniel O'Connell.

Wolstonecraft, Paine's "Age of Reason" and "Rights of Man." O'Connell stated that these writings gave a definite framework to the democratic ideas which he held. They inspired him to the extent that he became one of Ireland's greatest advocates for an Irish Parliament sitting in Dublin which he believed would lead eventually to agrarian reform.

The prophetic vision of Daniel O'Connell has now been fulfilled. Ireland has been emancipated but even before the advent of Home Rule land laws in Ireland, through Gladstone's administrative policy, had been reformed and whereas before 1870 a tenant held his farm under a yearly tenancy and was liable to eviction at six month's notice without compensation for improvements, in 1870 a law was passed recognizing tenant right and later, in 1881, the Land Act gave the Irish tenant farmer fair rent fixed by land courts, free sale and fixity of tenure, whereby a tenant could not be evicted as long as he paid his rent.

From this brief sketch it will be seen that laws of property are fundamental laws and contribute vastly to the wealth and happiness of a nation. It will be seen, too, that writers have by

their works inspired legislators to social reform and have thereby established themselves as the prophets and legislators of the world.



CHAPTER IX.

ADMINISTRATIVE LAW.

Two divisions of Public Law have been dealt with in previous chapters, namely, Constitutional and Criminal Law. It is the intention in this chapter to trace through literature another phase of Public Law, that of Administrative Law.

The object of any government should be the defence and welfare of the people whom it controls and governs. To my mind, this can best be accomplished by adequate defence and good labor laws.

In the heroic poem of "Beowulf", a poem which stands at the very beginning of English literature, we may discover a primitive form of a defence law which is written into our own statutes under Immigration Laws.

From his station on the Danish coast a coast-guard saw glittering shields being carried across the gangplank by a group of armed and armoured men. He jumped on his horse and dashed down to the strand. Shaking his war-spear he shouted these words:

"Who are ye, men, all mailed and harnessed,
What brought yon ship o'er the broad seaways,
And hither have come across the water,
To land on our shores. Long have I stood
As coast-guard here, and kept my sea-watch,
Lest harrying foe with hostile fleet

Should dare to damage our Danish land.
Armed men never from overseas came
More openly hither. But how do ye know
That law of the land doth give ye leave
To come thus near. I never have seen
Statelier earl upon earth than him,--
Yon hero in harness. No house-carl he,
In lordly array, if looks speak true,
And noble bearing. But now I must learn
Your names and country; ere nearer ye come,
Underhand spies, for aught I know,
In Danish land. Now listen ye strangers,
In from the sea, to my open challenge:
Heed ye my words and haste me to know
What your errand and whence ye have come."

To this the leader of the small band
made reply that he and his party belonged to the tribe
of the Jutes and had come to rid the land of the
monster who had been ravaging the halls of the prince
of the Danes and had been slaughtering his men. Al-
though the party thus appeared to be on a friendly
mission the coast-guard was cautious.

"'Twixt words and deeds
A keen-witted thane, if he thinks aright,
Must well distinguish and weigh the difference.
Your words I believe, that you wish no evil
To the Scylding lord. I will let you bring
Your shields ashore and show you the way.
My comrades here shall keep the watch,
From meddling foe defend your craft,
Your fresh-tarred boat, fast by the beach,
And faithfully guard her till again she bear
With curving bow, o'er the bounding main,
Her master well-loved to the Wedermark."

The party appeared before the king,
told them their names, and the reason of their journey.
The king spoke, thereby putting his seal of approval

on the immigrants.

"Beowulf I knew in his boyhood days;
His aged father was Ecgtheow named.
To him, to take home, did Hrethel give
His only daughter. Their dauntless son
Now comes to my court in quest of a friend.
My sea-faring men whom I sent afar
To the land of the Jutes, with generous
 gifts,
In token of friendship, have told me this,
That the power of his grip was so great it
 equalled
The strength of thirty stout-armed thanes.
Him bold in battle, the blessed God
Hath sent in his mercy, to save our people
- So I hope in my heart - from the horror
 of Grendel.
I shall offer him gold for his gallant spirit.
Go now in haste, and greet the strangers;
Bid to the hall the whole of the company;
Welcome with words the warrior band,
To the home of the Danes."

The question arises as to how this country would meet such a situation as described in the preceding lines. In war time the ship would be interned together with the warriors and crew, provided it were an enemy ship. In ordinary times, it is very probable that the governments of the two countries would communicate with each other and the arrival of the ship would be anticipated. If such a step had not been taken the provisions made in Chapter 93 of the Statutes of Canada would be carried out. Sections 13, 14 and 29 of this chapter read as follows:

"13. The Minister may nominate at any port of entry any number of Officers to act as Boards of Inquiry and any three Officers so nominated shall constitute a Board of Inquiry.

14. A Board of Inquiry shall have authority to determine whether an immigrant, passenger or other person seeking to enter or land in Canada or detained for any cause under this Act shall be allowed to enter, land or remain in Canada or shall be rejected and deported.

29. The immigration officer in charge, after satisfying himself that the requirements of this Act, and of any Order-in-Council, Proclamation or regulation made hereunder, have been carried out, shall grant written permission to the master of the vessel to allow the passengers to leave the vessel."

No written code of laws existed among the Scyldings in the days of Beowulf. The scope of history is limited to a few bare facts which are capable of being verified. It is only through literature, as represented in the poem of "Beowulf", that we are able to obtain a satisfactory picture of the ancient customs of the Anglo-Saxon race. History does not delve into the unwritten immigration laws of an ancient race because the means of proving their existence is practically negligible. In perusing the poem of "Beowulf," which has been handed down verbally from ancient time until about the eighth century, when it was put into writing, we find that the duties of the coastguard were very similar to that of our modern immigration officer.

In any country, wherever there is a government, the first obligation of that government is the defence of the people it represents. In every civilized country of the world certain specified rules are set down, either in the constitution, or by a special code of militia laws, which governs the method of calling troops for defence.

The stories of King Arthur and his Knights of the Round Table are considered to be legendary. Undoubtedly many of them are fictitious but no one can read Layamon's "Brut" without feeling that a certain amount of fact could be found in those tales. Witness his testimony of calling troops together.

"Vortiger, cunning steward of all Britain had contrived craftily to make Constance, King. The tidings are evil that are come to land; herefore I am most adread, for I know no good counsel, unless we may with might send after knights, that are good and strong, and that are well able in land; and fill thy castles with keen men, and so thou mightest defend thy kingdom against foreigners and maintain thy worship with high strength. For there is no kingdom, so broad or so long, that will not soon be taken if there are too few warriors."

Again, in the same chronicle, we are told that when the Saxons under Octa, invaded the land, Uther, the King of Britain gave instructions to his son-in-law, "to take in his own hand all his royal

land; knights and freemen, and freely hold them, and lead them in a host, as the laws are in the land."

These knights were always available for the king's service. The freemen may have registered under a volunteer service as in our own times. No standardized rates of pay were paid to the armed forces but "to some he gave land, some silver and gold; to some he gave castles, some he gave clothes; bade them go in joy, and amend their sins; forbade them to bear weapon because age upon them went."

These words were spoken by Arthur after he had taken France and "freely it settled."

In every age, in every country, men and women have sacrificed much, giving their lives freely if necessary, for the defence of their homeland. There seems to be inherent in every one the spirit of patriotism. This spirit may lie dormant and will not manifest itself until aroused by an appeal to the emotions, as for instance, the death of a dear one, martial music or the patriotic eloquence of some one versed in oratory and mob psychology. Sir Walter Scott gives us an example of a stirring call to arms accompanied by the skirling music of the bag-

pipes, a sound which never fails to stir the heart
of a true Scotsman.

"Pibroch of Donuil Dhu,
Pibroch of Donuil,
Wake thy wild voice anew,
Summon Clan Conuil.
Come away, come away.
Hark to the summons!
Come in your war array,
Gentles and commons.

Come from deep glen, and
From mountain so rocky,
The war-pipe and pennon
Are at Inverlochy.
Come every hill-plaid and
True heart that wears one,
Come every steel blade and
Strong hand that bears one.

Leave untended the herd,
The flock without shelter;
Leave the corpse uninterred,
The bride at the altar;
Leave the deer, leave the steer,
Leave nets and barges:
Come with your fighting gear,
Broad swords and targes.

Come as the winds come, when
Forests are rended;
Come as the waves come, when
Navies are stranded:
Faster come, faster come,
Faster and faster,
Chief, vassal, page and groom,
Tenant and master.

Fast they come, fast they come;
See how they gather!
Wide waves the eagle plume,
Blended with heather.
Cast your plaids, draw your blades,
Forward each man set!
Pibroch of Donuil Dhu,
Knell for the onset!"

When the laws of a country have provided for its defence, the second consideration should be its labor laws. If we take as an example the figures given by King, as expressed by Professor Slichter, we can see that labor laws affect a large majority of the population.¹ He states "that of the 45,400,000 gainfully employed persons in the United States in 1927, approximately 9,800,000, or slightly more than one-fifth, were employers or in business for themselves and approximately 35,600,000, or nearly four-fifths, worked for wages or salary. About 8,300,000 were salary workers and nearly 27,300,000 were wage-earners."

The wage system is not in itself evil. It acts as an incentive and as a source of income at the same time. It is a necessary part of the capitalistic system. It can, however, be subject to abuse and unless equitable laws are made and enforced, can be the source of many evils. Without such laws employers will become callous and competition unrestrained.

The workman, as we have seen by the previously quoted figures, forms the greater part of the population of any country. As it is the business¹. Slichter "Modern Economic Society" p. 592.

of a government to secure the greatest happiness for the greatest number the working man should have the greatest consideration. By the law of nature an animal's instincts guide him to strive for self-preservation and the propagation of the species. So do man's -- but with this difference. Man is given reason and a will by which he may control his appetites and perceive his end, or purpose, in life. Anything, therefore, that will help man to attain his true purpose in life is in accordance with the Divine Law. The right of possession is, therefore, the right of man and of every man. The possession of a home, of property, is man's God-given right and as such should be recognized by the state. It is not right, therefore, that a capitalistic system, or any other system, should deprive him of that right.

Pope Leo XIII in his "Rerum Novarum" published May 15, 1891, justifies private ownership on the grounds that when a man engages in remunerative labor, the very reason and motive of his work is to obtain property, and to hold it as his own private possession. He lives sparingly, saves money, and invests his savings, for greater security; in land, the land in such a case being only his wages in an-

other form; and consequently, a working man's little estate thus purchased should be as completely at his own disposal as the wages he receives for his labor. Every man has by nature the right to possess property as his own. The animal creation is governed by two chief instincts, self-preservation and the propagation of the species. Man, too, possesses these instincts but having reason he knows that the temporary or momentary use of things does not provide for permanent security, or self-preservation. It must be, therefore, within his right to have things in stable and permanent possession for use in the future. Furthermore, it is due to man's labor that those things required for his well-being are produced, and when he thus spends the industry of his mind and the strength of his body in procuring the fruits of nature, by that act he makes his own that portion of nature's field which he cultivates.

It is the duty of a government not only to protect man's right to the fruit of his labor but to come to his aid if he is in extreme difficulty and unable to provide for his family.

Pope Leo XIII gives his support on this opinion. He does not believe that the civil government should, at its own discretion,

penetrate and pervade the family and the household but he says, "If a family finds itself in great difficulty, utterly friendless, and without prospect of help, it is right that extreme necessity be met by public aid; for each family is a part of the commonwealth."

This argument is as justifiable in this instance as it is in that of providing law-courts by the commonwealth to protect its citizens from an invasion of their rights.

For is not the public well-being and private prosperity the first duty and the ultimate object of every State and, too, are not the poor the members of the national community equally with the rich?

As has been mentioned before, the family is the foundation of society and should be protected and maintained. It may be as well to mention here, in the event that a wrong impression is created, that a criminal loses many of his rights by his acts against society. It is the duty of the state, however, to keep him from starvation and his right to be fed when he is incarcerated should be recognized.

It is a recognized fact that capital and labor are dependent upon each other. One cannot do without the other. A factory cannot operate without labor and labor cannot operate a factory unless capital be provided for its operation. Whether the capital be supplied by individuals or by the state it must be supplied.

Whether capital be supplied by one man, or a group of men, it is the duty of the State to apply fair and just labor laws. These laws should have for their aim public well-being and private prosperity. Owners of property and the rights of shareholders should be protected against violation or destruction. Free competition and economic domination should be controlled. Wage-earners should be protected from exploitation.

On the subject of just wages I shall
2. quote Pope Leo XIII. "To labor is to exert one's self for the sake of procuring what is necessary for the purposes of life, and most of all for self-preservation. A man's labor has two notes or characters. First of all, it is personal; for the exertion of individual power belongs to the individual who puts it
2. Pope Leo XIII, "Rerum Novarum" p. 27.

forth, employing this power for that personal profit for which it was given. Secondly, a man's labor is necessary; for without the results of labor a man cannot live; and self-conservation is a law of nature, which it is wrong to disobey. Now, if we were to consider labor merely so far as it is personal, doubtless it would be within the workman's right to accept any rate of wages whatever; for in the same way as he is free to work or not, so he is free to accept a small remuneration or even none at all. But this is a mere abstract supposition; the labor of the working man is not only his personal attribute, but it is necessary; and this makes all the difference. The preservation of life is the bounden duty of each and all, and to fail therein is a crime. It follows that each one has a right to procure what is required in order to live; and the poor can procure it in no other way than by work and wages. There is a dictate of nature more imperious and more ancient than any bargain between man and man, that the remuneration must be enough to support the wage-earner in reasonable and frugal comfort," and not as Thomas Hood pictures it in his "Song of the Shirt".

"Work - work - work!
My labor never flags;

And what are its wages? A bed of straw,
A crust of bread - and rags.
That shattered roof - this naked floor -
A table - a broken chair -
And a wall so blank, my shadow I thank
For sometimes falling there!"

The part that literature plays in reform laws is not given its due share of credit. Politicians may clamour for reform and immediately upon election become engrossed in higher affairs of state; the people may complain and then be mollified by fair promises, but are the men and women of literature so easily ignored? True, they do not quote facts and figures and argue specifically on a given issue. How then do they exert their influence? Turn to the novels of Charles Dickens and in his works of fiction read for yourself his protest against the prisons of his day. You will not find there any direct charges against the government but you will find there an indirect reproach against prison conditions through the medium of a fictitious character in which you have become intensely interested. His hardships and unjust treatment because of the existing laws of the country will kindle your emotions and through them arouse you to intellectual endeavour for prison reform.

Read Harriet Beecher Stowe's "Uncle

Tom's Cabin" and you will register many violent inward protests against slavery and both your heart and your mind will cry out for its abolition.

Turn to Elizabeth Barrett Browning's "The Cry of the Children" and, having read those touching lines, try then to justify child labor.

In the pottery works of Sheffield and Manchester in 1836, Hammond tells us that "one large employer said that many of the children in his works worked 15 hours a day, with 1½ hours for meals."

"They are weeping in the playtime
of the others,
In the country of the free."

Such was the protest registered by Mrs. Browning and she asks the question:

"But the young, young children,
O my brothers,
Do you ask them why they stand
Weeping sore before the bosoms of
their mothers
In our happy Fatherland?"

The picture is pathetic.

"They look up with their pale and
sunken faces,
And their looks are sad to see,
For the man's hoary anguish draws
and presses
Down the cheeks of infancy.
Ask the aged why they weep, and not
the children,
For the outside earth is cold,
And we young ones stand without, in
our bewildering,
And the graves are for the old:

'True' say the children, 'it may happen
That we die before our time:
Little Alice died last year, her grave
is shapen
Like a snowball, in the rime."

3

Hammond verifies these lines in his statement that the physical condition of the children employed as scourers, mould-runners, and jiggers was deplorable, and that not many scourers lived long, as almost without exception, they were pale, thin and stunted in growth.

It was not until 1842 that an act in Great Britain was passed forbidding the employment of children under ten years of age in the coal mines. It was in 1841 that Elizabeth Browning wrote her poem.

"Go out, children, from the mine and
from the city,
Sing out, children, as the little
thrushes do;
Pluck your handfuls of the meadow-
cowslips pretty,
Laugh aloud, to feel your fingers let
them through!
But they answer, 'Are the cowslips of
the meadows
Like our weeds anear the mine?
Leave us quiet in the dark of the coal-
shadows,
From your pleasures fair and fine!

For oh' say the children, 'we are weary,
And we cannot run or leap;
If we cared for any meadows, it were merely
To drop down in them and sleep.
For, all day, we drag our burden tiring,
Through the coal-dark, underground;
Or, all day, we drive the wheels of iron
In the factories, round and round.'

It was not unknown for children of seven to be forced to work at a machine for twelve hours a day,

"And all day the iron wheels are droning:
And sometimes we could pray,
'O ye wheels,' (breaking out in a mad
moaning)
'Stop! be silent for to-day!'
Still, all day the iron wheels go onward,
Grinding life down from its mark;
And the children's souls, which God is
calling sunward,
Spin on blindly in the dark."

Factories were damp, hot, ill-lighted and ill-ventilated. True, indeed, both their souls and bodies went spinning on "blindly in the dark." How could these children be expected to be convinced of God's great mercy.

"'But no!' say the children, weeping faster,
'He is speechless as a stone:
And they tell us, of His image is the master
Who commands us to work on.'
'Go to!' say the children, - 'Up in Heaven,
Dark, wheel-like, turning clouds are all we
find:
Do not mock us: grief has made us un-
believing.
We look up for God, but tears have made us
blind.'
Do you hear the children weeping and dis-
proving,
Oh my brothers, what ye preach?
For God's possible is taught by His world's
loving,
And the children doubt of each.

And well may the children weep before you!
They are weary ere they run;
They have never seen the sunshine, nor the glory
Which is brighter than the sun:

They know the grief of man, without its
wisdom;
They sink in man's despair, without its
calm;
And slaves, without the liberty in Christdom
Are martyrs, by the pang without the palm."



CHAPTER X.

INTERNATIONAL LAW.

Professor Holland says that International Law is the vanishing point of Jurisprudence. For this reason I have chosen it as the subject for the final chapter of this thesis.

International Law is not obligatory as with public and private law. It is a moral code of nations and appeals to the civilized world. It is a law of courtesy rather than a legal code. Hooker, in his Ecclesiastical Polity defines it as follows:

"Besides that law which simply concerneth men as men and that which belongeth unto them as they are men linked to others in some political society there is a third kind of law which toucheth all such several bodies politic, so far as one of them hath public commerce with another, and this third is the Law of Nations."

Although Grotius is generally acknowledged as the founder of International Law he

owes a great deal to his predecessors who laid the foundation for this great science. Greece had International Law in a primary form but it did determine authority on questions of right between the independent states. It was not until the fifteenth and sixteenth centuries, due to the progress of international relations and to the frequency of wars, that it was realized how much such a code was required. War had its rules and an enemy had his rights. The study of ancient history furnished examples of justice among foes which put modern Christendom to shame, and the voice of the Church could not be suppressed in her demands for justice in war.

Balthazar Ayala, judge-advocate to the Spanish army in the Netherlands compiled a systematic treatise of rules in 1581 on the practice of nations in the conduct of war. In 1583 Albericus Gentilis published a treatise on embassies and in 1589 his *De Jure Belli*. Grotius acknowledges his debt to these two writers on international jurisprudence.

Grotius went further than his predecessors on the subject of International Law. He was a philosopher and his opinions on international matters are based on the laws of Nature. Moreover, the work of Grotius was more than a legal treatise.

It was a literary masterpiece.

In the preceding chapters I have endeavoured to show that the wisdom and the prophetic vision of literary geniuses could be made a basis for the whole field of Jurisprudence. In this chapter I am dealing with a phase of law which was actually founded on literature. It is true, philosophy played a big part but this philosophy was derived by Grotius through the medium of the poets. No reader could fail to be impressed by the literary strain in the De Jure Belli of Grotius.

² For Grotius, the object of international law was the preservation of society; the system owed its primary foundation to "the Roman law, the universal law, upon which was based the canon law, as universal as the Church from which it emanates."

Grotius quotes a great deal from Hesiod, Horace and Juvenal. Gellius is not overlooked as witnessed by these lines:

"Not on grounds of right is battle joined
But rather with the sword do men
Seek to enforce their claims."

Gellius xx.10

2. Grotius "De Jure Belli" tr Helsey, 1925.

Grotius claims that there is nothing in the first principles of nature which is opposed to war and verifies his statement by Ovid.

"To all has it been given
To recognize a foe, likewise to know
Their safeguards each its own, and power
and use
Each of its weapon."

Horace, too, is drawn into the argument.

"With tooth the wolf, with horn the
bull attacks
And why, unless the inner feeling
guided."

In his opinion, it is not unjust to use force if it does not violate the rights of others.

The subject of the treatment to be accorded to ambassadors has always been an interesting one. It would appear from actual practice that ambassadors are treated with respect for fear of retaliation rather than from any moral code. The same principle would apply, likewise, to prisoners of war. And yet, although self-interest may be the guiding principle, all nations, however brutal, do realize that some code of honour among nations is necessary.

In Layamon's "Brut" we get an example of chivalrous treatment to the representative of a hostile power. When Roman envoys came to Arthur bearing their

Emperor's message, to submit to Arthur because he was not entitled to Britain but that he, the Emperor, claimed it by right of Julius Caesar's conquest, "there leapt towards them the Britons, exceeding wroth, tore them by the hair and laid them to the ground. There were the Romanish men pitifully treated if Arthur had not leapt to them, as it were a lion, and said these words, 'Leave ye, quickly, these knights alive! They shall not in my court suffer any harm; they are hither ridden out of Rome, as their lord commandeth them, who is named Lucus. Each man must go where his lord biddeth him go; no man ought to sentence a messenger to death, unless he were so evilly behaved, that he were traitor to his lord."

Virgil defines what nations are "foreign."

"Every land which free is, and not subject
to our rule,
I hold as foreign."

Aeneid VII. 389f.

Euripides showed his horror of violating the person of an ambassador in "The Children of Hercules."

"Do you thus dare to slay a herald hither sent?"

Grotius believed in arbitration to settle differences, and war only as a last resort. He quotes the poets to substantiate his belief.

"The wise man should try all things
before arms
How know you if my bidding she will do
Without constraint?"

Terence.

Also, in the "Helena" of Euripides.

"Fools in sooth are they who set
A single test for virtue - steel
Who seek for human strife no pause
Save by the ruthless sword
For if in blood alone can virtue be
discerned
Then raging discord never will desert
The states once embattled."

The policy of arbitration and discussion of international problems advocated by Grotius bore fruit in the League of Nations. Unfortunately, this did not save the world from being torn asunder in another gigantic conflict of arms, but it was a step in the right direction. It is hoped that the seed planted by the Greek and Latin poets and nourished by Grotius will grow and flourish in the soil of the new world which will emerge eventually from the smoking ruins of the present.

CONCLUSION

In commencing this thesis I set out to show that literature can be made a basis for jurisprudence, and through this jurisprudence, founded on the philosophy of poets, laws have been and may be codified which will work to the betterment of the human race.

I defined jurisprudence as a science, the knowledge of things human and divine, in short, the philosophy of law. Further, I stated that it was not national in its scope and was not any defined system of laws although it did embrace the study of various systems of law.

In my enthusiasm I have at times gone beyond the bounds of jurisprudence and invaded the realm of politics and of law itself which is, in its proper sense, a body of rules recognized by a community as binding. It is upon the foundation of Jurisprudence that laws are made.

Literature has played its part, and can play a yet greater part in contributing to

jurisprudence a philosophy which is sound and has for its object the betterment of the human race.

Shelley, in claiming that poets are legislators, had in mind the philosophy that could be extracted from poetry and embraced in jurisprudence. He knew that the principles of human law could be found in literature and used as a basis for legislation. He knew, too, that writers have shaped the opinions of mankind and that from poets, orators, and historians principles of equal justice and equal privileges have been derived. He knew the influence of literature on the public mind and that the notions advanced by writers would take definite shape in the minds of public men and lead to legislation.

I have endeavoured to show by examples as Chaucer, Spencer and Pope that the minds of poets are more sensitive than the average persons and that these apostles of rhythm and order are able to detect incongruities in the natural order of things and that from these deviations from the order they are able to prophesy the future and suggest philosophies which will restore mankind to its proper place in the universe.

That the minds of poets are extremely sensitive we cannot deny. The average farmer who ploughs a field and overturns a mouse's nest gives the matter no consideration. He continues with his ploughing and thinks no further about the "poor mouseie." "Bobby" Burns was so affected by ploughing up the home of one of these little creatures that he composed a poem on the subject. The incident led to a whole train of philosophical thought which he embodied in his poem "Ode to a Mouse."

The influence of literature on human conduct is exemplified in these pages by pointing out the effects of the writings of Victor Hugo, Jules Verne, Rousseau, Voltaire, Montaigne and others. Napoleon was so influenced by certain writers that the doctrines of these writers were manifest in his codes of law.

As jurisprudence defines the nature, the object and the divisions of law I have endeavoured to give the interpretation of the nature and object of law as conceived by the poets and how, if these notions conceived by them and based on natural law, were developed and embodied in the principles of legislation that the welfare of the people as a whole would be accomplished.

The forms of government and the methods of administering justice have not been overlooked in the literary world and the comments of writers on the forms of government have been given. Philosophic writers, such as Locke, Hobbes, and Hume have contributed no small share in the theory of government and the philosophy of these theorists has been converted into actual practice in our own British and American form of government.

Because jurisprudence includes the study of various systems of law I have sketched briefly the extant systems of the world with particular emphasis on the British form of government. As the three main phases of this government is firstly, the broad principles upon which justice is based, secondly, the rules of procedure and lastly the quality of bench and bar I have arbitrarily extended the subject of jurisprudence to embrace these aspects in order to show that literature approves of the method used in British law in order to achieve justice.

As the laws of property are fundamental laws I have endeavoured to show the influence that writers have had on legislation and to prove that laws based on the principles they have expounded have

have actually been passed. No one can dispute that writers have been responsible for certain political, economic and social systems which are in operation today and that certain legislation under these systems has been the direct result of the work from an author's pen.

In a work of this nature all laws which have been codified and may be codified from the philosophy of literature cannot be given. It is considered that a few examples from both Private Law and Public Law dealt with in detail will show the possibilities. Defence and Labor Laws are definitely a grave responsibility of any government and any measures suggested for legislation on these two subjects should receive careful consideration.

These are issues which can make or mar a nation and members of Parliaments would do well to consult nature's laws through the medium of literature before making decisions or introducing bills. The views on labor as set forth by a Pope who made an intensive study of the subject have been given in part in these pages and it is hoped that legislators will avail themselves of the opportunity to read the original document.

It is hoped, too, that they will heed the warning cries of authors on the conditions of their respective countries and follow the example set by Britain, but with less delay, in instituting reform measures when the voices of Dickens, Browning, Hood and others were raised in piteous appeal for prison reform and the abolition of child labor. To those, who after having read these pages, are yet unconvinced that Nature's Laws can be interpreted in literature and from thence extracted to form a basis for good legislation in both Public and Private Law I would refer them to the work of Grotuis and ask that they read carefully the several hundred pages of one of the most interesting volumes in literature and on which international law was founded. In these pages the skeptic will find numerous quotations from the poets from which Grotuis builds up a philosophy of international law that all nations of the world recognize as sound in principle and utilitarian in practice. If a system of international law can be founded on literature, a law that must be agreeable to all nations, there should be no reason why the legislation of any one nation could not find its source in the philosophy of literary men as expressed in their works.

BIBLIOGRAPHY

- A DEFENCE OF POETRY by Percy Bysshe Shelley contained in ENGLISH ESSAYS, Sidney to Macaulay (Harvard Classics), J. P. Collier & Son, N.Y. Vol. 27, 1910.
- MODERN ECONOMIC SOCIETY by Sumner H. Slichter, Henry Holt & Co., N.Y.
- CONSOLATION OF PHILOSOPHY by Boethius, edited by H. R. James, M.A. London, 1897.
- JURISPRUDENCE by T. E. Holland, D.C.L., Henry Frowde & Stevens & Sons, Ltd. London, 1900.
- COSMOLOGY by J. A. McWilliams, MacMillan Co., N. Y., 1933
- BRITISH POETRY AND PROSE edited by Lieder, Lovett & Root, Houghton Mifflin Company, N. Y.
- PSYCHOLOGY by Michael Maher, S. J., Longman's Green & Co. London.
- FIRST BOOK OF JURISPRUDENCE by Sir Frederick Pollock, Bart., MacMillan & Co., N. Y., 1904.
- OTTAWA EVENING JOURNAL, Jan. 16, 1942.
- POLITICAL THOUGHT IN ENGLAND, from Bacon to Halifax, by G.P. Gooch, Williams & Norgate, London.
- LITERATURE OF EUROPE by Henry Hallam, LL.D., Boston, 1864.
- COMPLETE WORKS OF WILLIAM SHAKESPEARE, Avon Edition, George G. Harrap & Co. Ltd. London.
- EUROPEAN GOVERNMENTS AND POLITICS by Frederick A. Ogg, Ph.D., LL.D. The MacMillan Company, N. Y. 1936.
- ARTHURIAN CHRONICLES - J. M. Dent & Sons, London.
- STATUTES OF CANADA, 1927, Chapter 35, Supreme Court Act.
- OLD ENGLISH CHRONICLES, edited by J. A. Giles, D.C.L.
"Asser's Life of Alfred."
- DECLINE AND FALL OF THE ROMAN EMPIRE by Gibbons, John Murray, Lon. 1868.
- THE LIFE OF GREECE by Will Durant, Simon and Schuster, N.Y. 1939.
- A SHORT HISTORY OF MARRIAGE by Edward Westermarck, Ph.D., Hon. LL.D. MacMillan & Co. Ltd. London.

BIBLIOGRAPHY.

STATUTES OF ONTARIO, Chapter 148, Sec. 4, Vol. 1, 1914.

MARRIAGE by John Marshall Harlan, Assoc. Justice Supreme Court of U.S.A. and Charles Henry Butler, United States Supreme Court Reporter.

THE PRINCESS by Alfred Tennyson, edited by Hallam, Lord Tennyson, Macmillan & Co. Ltd., London, 1908.

LIFE AND WORK OF TENNYSON, by Hallam, Lord Tennyson.

MARRIAGE AND DIVORCE LAWS OF THE WORLD, by Hyacinthe Ringrose, D.C.L., Musson-Draper Company, London, 1911.

BROWNING'S COMPLETE POETICAL WORKS, Cambridge edition, Riverside Press, Cambridge, Mass. 1895.

PLAYS OF SHERIDAN edited by Rudolf Dircks. Walter Scott, London.

STATUTES OF CANADA, 1927. Vol. 1, Chapter 36, Sec. 942.

PRAISE OF FOLLY by Erasmus, translated by Wilson, 1668. Edited by Mrs. P. S. Allen, Clarendon Press, Oxford, 1913.

JURISPRUDENCE by Sir John Salmond, edited by J. L. Parker, Sweet & Maxwell, Ltd., London, 1937.

THE PRINCIPLES OF THE LAW OF EVIDENCE by W. M. Best, A.M., LL.B., Henry Sweet, 3 Chancery Lane, Publisher, 1883.

HOLY BIBLE from the Latin Vulgate, John Murphy Co., Baltimore, N.Y.

STATUTES OF CANADA 1927 with amendments to 1935. Chapter 93.

LAYAMON'S BRUT, ARTHURIAN CHRONICLES, J. M. Dent & Sons, London.

THE RISE OF MODERN INDUSTRY by Hammond & Hammond, Methuen & Co., Ltd., London, 1925.

ELEMENTARY ECONOMICS, Fairchild, Furniss & Buck. Vols. 1 & 2, Macmillan & Co., New York, 1932.

RERUM NOVARUM, by Pope Leo XIII, The Paulist Press, N.Y. 1891.

DE JURE BELLII by Hugo Grotius, 1625, Translated by Francis W. Helsey, 1925. Clarendon Press, Oxford.

BIBLIOGRAPHY.

MILTON'S PROSE WORKS, Vol. 111. Edited by J. A. St. John. London.

GOLDEN TREASURY OF FAMOUS WORKS by Willison. The Macmillan Co.
of Canada, Ltd., Toronto, 1929.

THE AGE OF POPE by Dennis, G. Bell & Sons Ltd. 1918.

THE POETICAL WORKS OF ALEXANDER POPE, Frederick Warne & Co., Lon.

LIFE OF NAPOLEON by Bourienne.

HISTORY OF ENGLISH LITERATURE by Gosse, Macmillan Co., London,
1904.

HISTORY OF WESTERN EUROPE by James Harvey Robinson, Ginn & Co.,
Boston, 1934.

THE CONCISE CAMBRIDGE HISTORY OF ENGLISH LITERATURE by George
Sampson, Cambridge University Press, 1941.

DANIEL O'CONNELL by Gwynne, Hutchinson & Co., London.

PARNELL by John Haslip, Frederick A. Stokes Co. N.Y. 1937.

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