REPORT ON CIVIL AND COMMON LAW.

IN SENATE, February 27, 1850.

The Committee on the Judiciary, to whom was referred the petition of certain members of the bar of San Francisco, beg leave

Respectfully to Report,

That they have had the same under consideration, and have given the subject, of which it treats, that serious attention which its magnitude seems to demand. The petition, praying, as it does, that the Legislature will retain, in its substantial elements, the system of the Civil Law, distinctly presents the alternative of the adoption of the Common, or of the Civil Law, as the basis of the present and future Jurisprudence of this State. A choice between these two different, and in many respects conflicting systems, devolves upon this Legislature; and, we think, we do not over-estimate the importance of the subject, in expressing our conviction, that this choice is the most grave and serious duty which the present Legislature will be called upon to perform. It is, in truth, nothing less than laying the foundation of a system of Laws, which, if adapted to the wants and wishes of the People, will, in all probability, endure through generations to come,— which will control the business transactions of a great community,— which will direct and guide millions of human beings in their personal relations,— protect them in the enjoyment of liberty and property,— guard them through life, and dispose of their estates after death. Actuated by these considerations, your Committee have felt it their duty to submit to the Senate a more full and detailed Report upon the matter referred to them, than they should otherwise have felt themselves justified in doing.

The petition sets out with a description of the gentlemen, whose signatures are affixed to it, as "practising members of the Bar of San Francisco." Your Committee is of the opinion that the judgment of intelligent members of the legal profession upon this subject, is entitled to great weight, and should not be lightly disregarded. We are aware, that it is a somewhat popular doctrine, that, in matters of Law and Legislation, the crude notions of any man, who is *not* a lawyer, are entitled to higher consideration than the reflection and ripe experience of the most profound jurist. According to this creed that magic power, "good common sense," as it is termed, inspires every man who may

happen to be possessed of it, instinctively, and without investigation or study, with a thorough knowledge of an abstruse and difficult science. In short, reduced to its simplest terms, and traced through its legitimate consequences, the proposition is, that the man who is entirely ignorant of a multifarious subject, is more competent to form a just and correct judgment concerning it, than the man who has made it the business of his life to comprehend it in theory and understand it in its minute and practical details. From all such doctrine we respectfully dissent. We hold to the opinion, unpopular though it may be, that a person is best qualified to judge of the matter upon which he has bestowed most examination, and to which he has devoted most study and reflection. We hold that a carpenter may reasonably be expected to build a better house than a tailor, and a tailor stitch a coat more neatly than a house joiner; that a machinist may construct a steam engine, arrange and adapt its complicated parts, and set them in harmonious motion, with more facility and greater success than a shoemaker. We even think that an experienced surgeon may amputate an arm or a leg, with as little pain to the patient, and with as much safety to his life, as a wood sawyer; and that a well read and skilful physician may be able to counteract and remove the various "ills that flesh is heir to," as quickly and adroitly as a farrier, or even a quack doctor. And, for the same reasons, we do honestly maintain that a member of the Bar,— who has been educated to the profession which he practises,— who has made law his study and engrossing occupation,— who has bestowed upon it the "*viginti annorum lucubrationes*,"— made it the subject of his reflections by day, and of his meditations by night.— traced it through all its ramifications and mysteries,— gloried in its excellence, and regretted its defects,— is quite as competent to form a sound and correct judgment in respect to the wisdom or impropriety of its particular provisions, as well as the beauty or deformity of the whole, as if he had been educated behind the counter, or brought up at the anvil or the plough.

We think, therefore, that the enlightened opinions of the legal profession, when fairly expressed, should go far towards inducing conviction of the policy, or impolicy, of establishing, abrogating, or modifying, a system of laws; and if the petition under consideration be in unison with the settled convictions and real wishes of a large proportion of the practising members of the Bar in this State, we should feel bound to accord to it a very respectful deference.

For the purpose, then, of determining to what extent your Committee ought to consider the memorial as an expression of the sentiments of the Bar, we have taken some pains to ascertain the reasons why this petition happens to be laid before the Senate at the present time. From inquiries made by us, we have learned that, a short time since, a meeting of the members of the Bar of San Francisco was held, for the purpose of taking into consideration the subject of the adoption of the Common, or the Civil Law, as the substratum of the legal system of the State. We have further learned, that such meeting

was attended by a large portion of the members of the legal profession of that city; that it was adjourned once or twice, in order to enable all to express their predilections; and that, after a somewhat protracted discussion, in which some of the most distinguished of the petitioners took part, resolutions were almost unanimously passed, recommending the Common Law, and requesting the Legislature to adopt it. We understand that these resolutions are now before the Assembly.

There are, according to the best information and judgment of your Committee, not less than one hundred practising lawyers at San Francisco. The names of but eighteen persons are signed to this petition; and thus, the Civil Law comes recommended by less than one fifth of the profession at that place. Your Committee would further suggest that, in their opinion, the disparity existing between the number of those whose choice would be the Civil Law, and of those whose partialities are in favor of the Common Law, is not greater in that portion of the profession practising at San Francisco, than it is throughout the residue of the State. If, therefore, the question is to be affected in any way by the known and expressed wishes of that profession to which the petitioners claim to belong, it must be in favor of the Common rather than of the Civil Law.

We will now proceed to the more immediate examination of the matter of the petition.

But before entering upon the subject in detail, we would premise, that no one for a moment entertains the idea of establishing in California the whole body of either the Common or the Civil Law. There are, in each, principles and doctrines, political, civil, and criminal, which are repugnant to American feelings, and inconsistent with American institutions. Neither the one nor the other has ever been, or ever can be, unqualifiedly adopted by any one of the United States. Thus, in Louisiana, where the Civil Law prevails, and in the rest of the States, in which the Common Law is recognized, great and radical additions, retrenchments, and alterations, have been made in the particular system which each has taken as the foundation of its jurisprudence. The Constitution of the United States swept away at once the entire political organization as well of the Common as of the Civil Law. The several State Constitutions make still further inroads, not only into the political, but also into the civil and criminal departments of both systems; and the statute law of each State eradicates many harsh doctrines, and abolishes many oppressive and tyrannical provisions, and in their place substitutes positive rules of action, milder and more enlightened in their nature, more applicable to our political organization, and more congenial with the cultivated feelings and liberal institutions of our people. But still the great body of each system remains untouched. Such is the wonderful complexity of human affairs — a complexity which must always increase more and more in proportion to the advance of commerce, of civilization, and of refinement — that of the immense multitude

of questions which are brought before courts for adjudication, but very few arise under, or are dependent upon, or can be controlled by, Constitutions or express statutory laws. Examine the reports of the different States, Louisiana amongst the rest, and it will be found that a precise rule has been laid down by statute for scarcely a tithe of the cases which the Courts have been called upon to decide; and it would be a futile attempt to provide, in advance, for every contingency which may occur.

We know it to be a favorite theme of some men, that the entire laws of a community, regulating every variety of business, and defining and providing the penalty for every grade of crime, may be, and ought to be, reduced within the compass of a common sized spelling-book — so that every man might become his own lawyer and judge — so that the farmer, the artisan, the merchant, with this "vade mecum" in his pocket, at the plough, in the workshop, or in the counting-house, might be enabled, at a moment's warning, to open its leaves and point directly to the very page, section, and line, which would elucidate the darkest case, solve the most abstruse legal problem, clearly define his rights, and prescribe the exact remedy for his wrongs. It is scarcely necessary to say that all such notions are but the chimeras of ignorance and folly, or the fancies of a spirit more reprehensible and more to be deprecated than ignorance and folly conjoined. The features and forms of men are not more diverse than their minds — and their business transactions are as ever-varying as their mental and moral characters. One man views the same object, whether physical, or moral, or legal, in a different light from another — no two men ever do the same thing in precisely the same way — perhaps no two cases ever arose without a shade of difference between them; and until you can cast the forms and features of all men in the same mould, reduce the operations of their minds to the same uniform level, and endow each individual with the same moral sense and the same intellectual faculties, you may expect nothing less than diversity in their modes of business, in their bargains and sales, their contracts, conveyances, and testaments, and their manifold devices for the perpetration of fraud and crime. To undertake, by statute or by code, to establish a just and accurate rule for every contingency of human avarice and of human passions, and for all the endless phases of varied life, is to essay a task which never yet was accomplished—a task which, until the Almighty shall change the nature and attributes of man, must forever remain impracticable and absurd. In truth, all the provisions of constitutions, and statutes, and codes, are but pebbles on the sea-shore — the vast ocean of legal science lies beyond. The most, therefore, that can be expected from the present Legislature is, to set the machinery of government in operation in all its departments, establish a system of pleadings and practice, enact certain statutes providing for the most common cases of judicial investigation; and for the rest, resort to one of the two great repositories of legal learning, the Common or the Civil Law.

The question naturally presents itself here, What is the Common Law?

what the Civil Law? and what the distinction between them? The several diversions of this question we shall now proceed to answer in their order.

The Common Law is that system of jurisprudence which, deducing its origin from the traditionary customs and simple laws of the Saxons, becoming blended with many of the customs and laws of the Normans, enriched with the most valuable portions of the Civil Law, modified and enlarged by numerous Acts of the English Parliament, smoothed in its asperities and moulded into shape by a succession of as learned and wise and sagacious intellects as the world ever saw, has grown up, during the lapse of centuries, under the reformed religion and enlightened philosophy and literature of England, and has come down to us, amended and improved by American Legislation, and adapted to the republican principles and energetic character of the American people. To that system the world is indebted for whatever it enjoys of free government, of political and religious liberty, of untrammelled legislation, and unbought administration of justice. To that system do we now owe the institution of trial by jury, and the privileges of the writ of Habeas Corpus, both equally unknown in the Civil Law. Under that system all the great branches of human industry — agriculture, commerce, and manufactures — enjoy equal protection and equal favor; and under that, less than under any scheme ever devised by the wisdom of man, has personal liberty been subject to the restrictions and assaults of prerogative and arbitrary power.

The Civil Law, on the other hand, is that system which, based upon the crude laws of a rough, fierce people, whose passion was war, and whose lust, conquest — received, in its progress through the various stages of civilization from barbarism to refinement, a variety of additions and alterations, from the Plebiscita of the Roman Plebeians, from the Senatus-consulta of the Roman Senate, from the decrees of Consuls and Tribunes, from the adjudications of prætors, from the responses of men learned in the laws, and from the edicts and rescripts of the tyrants of Rome, until, in the early ages of Christianity, the whole chaotic mass was, by the order and under the patronage of the Emperor Justinian, systematized, reduced into form, and promulgated for observance by the Roman people, in the shape of four books called the Institutes, fifty books known as the Pandects, and certain additional edicts designated as the Novels of Justinian. Thereafter, and until the final downfall of the Eastern Empire of Rome, the Justinian code furnished the guide for legal tribunals throughout the provinces subject to the Imperial sway, in all cases political, civil, and criminal, except so far as particular decisions were commanded, annulled, or modified by the will of despotic power. But, as, century after century, wave upon wave of Northern barbarism poured down on the effeminacy of Southern Europe, sparing in its course neither the intellectual nor the material monuments of civilization, the administration of Roman law was, city after city, and province after province, gradually obliterated, at the same time, and to the same extent, that Roman power was crushed, and Roman institutions demolished. The whole

system of Justinian was at length swept from the face of the earth, or buried in the recesses of cloisters, alike forgotten and unknown. In the twelfth century, however, a copy of it was accidentally discovered at Amalfi, in Italy; and, owing to the arbitrary nature of some of its provisions, as well as to the wisdom and excellence of its general features, it was seized upon with avidity by the clergy, as favorable to their spiritual authority, and by monarchs, as conducive to the support of their despotic power. It was at once taught in the schools, studied in the convents, sanctioned by kings, and commended by the Holy Father himself, who held the keys of heaven. In a few years it became the prevailing system of laws throughout most of that portion of Europe, in which the founder of Christianity was respected, and the saints and martyrs adored. Thus, as in earlier times, the fine arts, literature, philosophy, and graceful superstitions of Greece, had captivated the rude minds and softened the stern natures of the Roman people; so, centuries afterwards, the refined system of Roman jurisprudence overthrew the uncouth customs and ill-digested laws of its conquerors, and led captive kings and nobles, clergy and laity, in the progress of its triumphal procession. With the exception of England alone, the code of Justinian became engrafted upon the local institutions of each separate principality and kingdom, and constituted a general system of European law; but, neither the favor of kings, the denunciations of priests, nor even the fulminations from the Papal See itself, could induce the English barons, the English courts, or the English people, to receive it as a substitute for their own favorite and immemorial customs. At this early period, then, when the dawn of a new civilization was just beginning to burst upon the world, the kingdoms of Europe, though united in religious superstitions, were divided in reverence for laws. That division has continued to the present day; and has also extended over the islands and continents, not then known, but since discovered and occupied. Wherever the English flag has been unfurled upon a savage or hostile shore, possession has been taken in the name of its sovereign, and in behalf of its laws; and upon whatever coast an English colony has been planted, there also have the colonists established the Common Law, and have ever afterwards clung to it as the birthright of themselves and their children, with a tenacity that no power, no suffering, no fear of danger, no hope of reward, could induce them to relax. In the same way has the Roman or Civil Law gone hand in hand with the extended dominion of the continental nations of Europe. Thus it happens that, at the present time, the whole christianized world is ruled by one system or the other. England, her colonies in all parts of the globe, and the United States, with the exception of Louisiana, adhere to the Common Law; whilst, excepting Russia and Turkey, the nations on the continent of Europe, Mexico, Guatemala, all the republics of South America, together with the empire of Brazil, maintain the supremacy of the Civil Law, with certain restrictions, limitations, and additions, necessary to adopt it to the peculiar organization of each particular state.

Having thus endeavored to convey a general idea of the two systems in question, we come now to speak more particularly of some of the differences existing between them. And in so doing, we propose barely to call the attention of the Senate to a few leading characteristics and results, without attempting to trace them out through their remote and manifold and intricate consequences.

To commence, then, with the domestic relations. The Civil Law regards husband and wife, connected it is true by the nuptial tie, yet disunited in person, and with dissevered interests in property. It treats their union in the light of a partnership, no more intimate or confiding than an ordinary partnership in mercantile or commercial business. Whereas, the Common Law deems the bond which unites husband and wife, so close in its connection, and so indissoluble in its nature, that they become one in person, and for most purposes one in estate. At the same time, it puts the burden of maintenance and protection where it rightfully belongs, and makes the husband, in truth and reality, the head of the household. The concessions which it makes to the wife, in respect to property, by compelling the payment of her debts and vesting her with an estate and dower, are a full compensation for the sacrifices which it requires her to make, and an ample equivalent for the communion of goods allowed her by the Civil Law. The result is, that in no country has the female sex been more highly respected and better provided for—nowhere has woman enjoyed more perfect legal protection, or been more elevated in society; and nowhere has the neptual vow been more sacredly observed, or the nuptial tie less often dissevered, than in the Common Law countries — England and the United States.

The Civil Law holds the age of majority in males, for most of the ordinary purposes of life, at twenty-five years. Even after this, the son continues in many respects subject to parental authority until it is dissevered in one of six specified modes. This system retains man in a continued state of pupilage and subordination from earliest infancy, until, in some cases, his locks become hoary with age. But the Common Law absolves the age of twenty-one from parental restraint, and clothes it with the complete panoply of manhood. It bids the youth go forth into the world, to act, to strive, to suffer,—an equal with his fellow man — to put forth his energies in the service of his country, or in the eager strife for the acquisition of wealth or the achievement of renown. Hence, under the latter system, the activity, the impetuosity, the talents of early manhood, stimulated by fresh aspirations of ambition, or love of gain, are, at the earliest period, put under requisition and brought into exercise, in developing the resources, and adding to the wealth and glory of a State; whilst, under the former, they stagnate for lack of sufficient inducement to action, and are to a great degree lost.

While the fundamental principles of domestic society thus differ in the two systems, an equal diversity runs throughout all the deductions therefrom; and

we are convinced that, in the several relations above noticed, and also in that of guardian and ward, contrasted with tutor or curator and pupil, there are nicer distinctions and a greater multiplicity of rules and qualifications in the Civil than in the Common Law.

Again, in relation to mercantile transactions. In the Civil Law the purchaser of property may, within the period of a certain limitation, in some countries four, and in others two years, come into court and claim, under the doctrine of lesion, that the goods purchased by him were worth only a part of the price which he paid therefor. Thus A. sells property to B. in a perfectly fair sale, without deceit or false representation. After the expiration of some months, or it may be years, B. brings suit, and alleges that he paid twice the value of the property, and compels A. to make restitution. But the Common Law in such cases, where no fraud appears, and no false representations are made, leaves each party to act upon his own responsibility, and for his own interest, as his judgment shall dictate.

But again: The Civil Law holds, under the doctrine of implied warranty, that where one article eventually proves to be of different material from, or of inferior quality to, that which the purchaser intended to buy, and supposed he was buying, he may require the vendor to refund the whole or a portion of the consideration received. Thus A. sells to B. a package of broadcloth or a bale of sheeting, both parties supposing the goods to be in perfect condition, both having the same opportunity of inspection and examination, and both equally ignorant of any defect. After the goods are removed, perhaps thousands of miles, they are ascertained to be damaged. B. then brings suit against A., and recovers upon the ground of warranty implied by law. On the other hand, the Common Law more wisely says, that if B. wished to guard against the contingency of a possible defect, he should have made it a part of the contract of sale, that A. give his express warranty of the merchantable quality of the goods. Its doctrine is *caveat emptor;* and when a trade is fairly consummated, without fraud or undue advantage, or untrue statements, the rights of the parties are fixed, and it becomes too late for retraction. In other words, the Common Law allows parties to make their own bargains, and when they are made, holds them to a strict compliance; whilst the Civil Law looks upon man as incapable of judging for himself, assumes the guardianship over him, and interpolates into a contract that which the parties never agreed to. The one is protective of trade, and a free and rapid interchange of commodities — the other is restrictive of both.

If time and space permitted, and it would not be occupying too much the attention of the Senate, we might trace the same general principle of distinction through various other departments of the two systems, through their provisions for the tenure and transfer of real estate, for the transmission of inheritances and successions, for the execution and validity of last wills and testaments and distribution of property in pursuance of them, and for the

enumeration of the powers and duties of executors, administrators, and trustees; but we must pass them by, and hasten to other considerations, for we deem it of more consequence to understand the general scope, and tendency, and results of the two systems, than the single and isolated principles which go to make them up. We have already invited your attention to a few of their leading heads, and contrasted their strong points of difference; and in so doing have only touched upon the confines of a wide and diversified field of legal science. To follow up the infinite divisions, sub-divisions, and exceptions, of even the few branches to which we have particularly adverted, would require more time than we have had to bestow; and to run out the comparison between the various heads which we have merely designated by name, would fill volumes. We shall, therefore, leave this part of the subject, and proceed to consider various objections which are sometimes urged against the Common Law.

And first, it is claimed, that under this system the landed interest has ever prevailed over the interests of commerce, manufactures, and labor. It is probably desired that the inference should be drawn, that while the Common Law fosters and encourages agriculture, it operates to depress and impoverish commerce, manufactures, and labor, and that the Civil Law has a tendency to promote and cherish them all. The objection, if of any weight at all, is applicable only to the system as administered in England and her colonies, and not as it prevails in the United States in other words, to the English rather than to the American Common Law. But we deny that it is of any validity anywhere. On the contrary, we maintain that nowhere do all these great branches of national wealth thrive as vigorously and prosper to so great an extent, as they do under the countenance and protection of the Common Law. Is there any country of the world in which wages are higher and labor less subservient to the great landed interest, than in England and the United States? If there are, we have not heard of them. It is true, that in the former, owing to a peculiar combination of circumstances, and despite the elevating principles of the Common Law, the laborer does not occupy as favorable a position as he does in the United States. But we would ask, in what country governed by the civil system, is his condition better? Every one knows, that in France, Spain, Italy, Germany, Mexico, and South America, he is depressed in the last degree. In truth, in no nook or corner of the earth, except in the United States, is labor looked upon otherwise than as degrading, and as the appropriate task of serfs; and nowhere, save under the benign influences of American Common Law, can it look up, in the midst of its toil, and say that it receives an adequate and abundant reward.

Is it otherwise in respect to manufactures? We have yet to learn that England and the United States are behind any nation of the earth in the growth and prosperity of the manufacturing interest. They are, eminently, the great manufacturers of the world. Their superiority is seen equally in the nicety

of a pin, and in the strength and power of a steam engine. Their skill is displayed, with the same success, upon a penknife and a sabre, and the excellence of their handiwork is confessed, as well in the coarser cloths for substantial use, as in the most delicate tissues.

How is it with that other department of industry, over which it is claimed that the landed interest predominates? English and American commerce enlivens every port, whitens every sea, woos every breeze. Its enterprise is not consumed by the heat of a tropical sun, nor chilled by the frosts of the frigid zone. It goes forth from every city and town, from every river, and bay, and inlet; it pushes its career wherever civilized man can penetrate; it circles the earth in quest of the necessaries and luxuries of life, and returns, at last, laden with the spoils of a whole ransacked world. Its merchants are princes—its ships palaces—its sphere, the illimitable sea. On the other hand, the commerce of Civil Law countries is confined to a limited range, and prosecuted in inferior ships. It creeps timidly along a few familiar shores, or if, occasionally, it does put forth into remoter regions, it is with a hesitating, faltering step, uncertain in its movements, sluggish in its progress, and unprofitable in its results. It is not fostered by the quickening influence of English and American law—it writhes under the petitioners' favorite system,—the spirit of life is not in it—it is dead.

If, then, the laboring, the manufacturing, and the commercial interests are in a higher state of prosperity in those countries governed by the Common, than in those under the dominion of the Civil Law, we see not how an argument can be drawn in favor of the latter against the former, on the ground that the landed interest predominates over all the others. And if the landed interest does indeed so predominate, then we have not only commerce, manufactures, and labor, but agriculture also, constituting altogether the great departments of human industry from which any nation can derive wealth and power—all enjoying more perfect protection, all better promoted and cherished and fostered, all more highly successful, under the worst administration of the Common, than under the best code founded upon the Civil Law.

It has been said by a distinguished writer upon the principles of government, that the laws of a country are fashioned after the character of its people. To a certain extent, this is true. But it is at the same time equally true, to as great an extent, that the character of a people is moulded by its laws. The two mutually act and re-act, the one upon the other, each producing gradual, though perhaps imperceptible changes, until, when generations have passed away, it becomes impossible to resolve, with any degree of accuracy, what effect the character of a people has had in the formation of its laws, or what influence the laws have had in determining the character of a people. It would be a curious, if not an instructive subject of inquiry, were it possible to arrive at a satisfactory conclusion, to ascertain how far the intellectual and moral condition of the people of those countries in which the Civil Law prevails, has

been produced by their legal system, and what influence the free principles and exact justice of the Common Law have exercised in developing the sturdy, sagacious, and self-relying spirit of the English and American people. To whatever cause it may be owing, it is nevertheless true, that with a few rare exceptions on either side, there is a strongly marked boundary between the domains of the respective systems. In the one, you perceive the activity, the throng, the tumult of business life—in the other, the stagnation of an inconsiderable and waning trade; in the one, the boldness, the impetuosity, the invention of advancing knowledge and civilization—in the other, feebleness of intellect, timidity of spirit, and the subserviency of slaves; in the one, the strength and freshness of manhood—in the other, the weakness of incipient decay. The one possesses a progressive and reforming nature—the other partakes of quietude and repose; the one is the genius of the present and the future—the other, the spirit of the past; the one is full of energetic and vigorous life—the other, replete with the memories of a by-gone and antiquated order of things. It was with views of the Civil Law like these, that Chancellor Kent, whose authority is invoked by the petitioners, says, in the eloquent language quoted by them, "that it is impossible, while engaged in the contemplation of the system, not to be struck with some portion of the awe and veneration which are felt in the midst of the solitude of a majestic ruin."

But the technicalities of the Common Law are objected to, as if there were none in the opposing system, and the whole was as simple and plain as a New England Primer. On the contrary, we take it upon ourselves to say, that for every one technicality in the former, we will point out another in the latter. We speak of the Common Law as it is now, not as it was three centuries ago, or even when Sir James Mackintosh uttered his criticisms upon it. But technicalities in any system of law, whether Common or Civil, whether the law of Moses or the law of Mahomet, are as necessary and unavoidable as they are in any other profession, art, trade, or mystery. Medicine and divinity, painting and poetry, commerce and navigation, chemistry, mineralogy, botany, and geology, all have their own peculiar and appropriate technicalities. The merchant has his; the mechanic, his; the engineer, his. A printer cannot explain the use of his types or his press, a watchmaker the construction of a watch, or a jeweler the setting of a diamond, without the use of technicalities. Nay, even the work of legislation, in which we are now engaged, has its own peculiar and indispensable terms, which are nothing but technicalities. In all these cases, instead of being objectionable, they are in the highest degree deserving of commendation. They are, in reality, labor-saving machines, enabling people to express by one significant word, what would otherwise require a tedious circumlocution. If, then, they are necessary in every department of human art and science, how can it be expected that law, the most abtruse and comprehensive of them all, shall be divested of them? The wit of man never has accomplished, and never will accomplish so difficult a task. He, therefore, who indulges in the expectation that it may be freed from them, and reduced to such a state of simplicity that he who runs may read, and the wayfaring man need not err therein; or he, who supposes that all the principles of any civilized system of jurisprudence are so written in the heart of every man who has received a moral education, that he will be able to comprehend them without study, and apply them without hesitation or doubt—much more, he who imagines that, because a man of sense and moral culture may experience no hardship in living under a law which compels him to do what he ought to do, will find in his breast a response to all the technicalities, principles, and rules of the Civil Law, with all their multiplied divisions and qualifications, subdivisions, ramifications, and exceptions, the explanation and illustration of which have filled thousands of volumes, and occupied for centuries the life-long study and application of thousands of the wisest and most learned men of the world, is doomed to pass through life under a mistake, and will probably die with it uncorrected.

The charge of dilatoriness is also made against the Common Law. But is it true, that it is only where this system has prevailed, that courts have become odious for their wearisome delays. The very converse of the proposition supposed, is true. In all the Civil Law countries of Europe and America, with but two solitary exceptions, the courts are notorious for prolixity and dilatoriness of proceedings, and for verbosity of pleadings and process, occasioning ruinous expenses, and swallowing up whole estates in the vortex of a single litigation. And although, in former times, the courts of England were in some cases justly exposed to the censure of unnecessary delays, yet, at the present day, England and the United States are the only countries where justice is both swift and sure in the pursuit of wrong, and punishment treads closely upon the heels of crime. But the truth is, we see nothing inherent in either system which necessarily requires the intervention of long delays. In this respect, the administration of the system is of more consequence than the system itself. If we authorize but one or two terms of the several courts in a year, choose incompetent judges, and pay them the same salaries which we give to the doorkeepers of our respective legislative halls, we must expect that, enact whatever laws we may, litigation will drag its slow length along. Lowness of price implies inferiority in the quality of law, as in the quality of everything else; and it is in this view, that a cheap judiciary will always prove, in the end, the dearest of all.

It is also urged that something is due to the rights of the people who became a part of the American Union by the acquisition of California. Undoubtedly the same respect should be paid to their interests, that is awarded to all the citizens of this State. They stand upon the same level with the rest, neither elevated above nor depressed below their fellows; and we should be the last persons in the world to countenance the least infringement upon any of their rights. They have become citizens, like ourselves; they stand at the polls, they sit in the halls of legislation, they appear in the courts of justice, as

our equals. They will receive from the Legislature, courts, and juries, the same attentive hearing, the same fair and impartial determination of their rights, that all other citizens are entitled to claim. But if it be meant that it is due to their rights, that they should become recipients of special legislation, or should, for their exclusive benefit, have laws enacted or continued injurious or ill adapted to the best interests of the whole State, we take issue upon the allegation, and deny it. There is no just ground for supposing that their rights will not be regarded under one system as much as under the other. In Texas and Florida, both formerly Civil Law countries, the Common Law was afterwards substituted, and we are not aware that the life, liberty, and property of those who were citizens at the time of such change, have not since been quite as well protected under the latter as they had before been under the former.

Having thus endeavored to answer several objections which are sometimes urged against the Common Law, we shall now proceed to consider certain reasons which, in our opinion, render its adoption in this State peculiarly appropriate; and this, too, without especial reference to its intrinsic superiority. Nay, in this view, we are willing to concede, against our own strong and decided convictions, that the Civil Law is equally wise in its provisions, humane in its doctrines, progressive in its spirit, and susceptible of an equally expeditious administration.

We wish to remark in the outset, that we by no means concede the position, that the Civil Law is in full force in this State at the present time. It is extremely uncertain to what extent it ever did prevail. Situated at so great a distance from the Mexican capital, occupying months in the interchange of communications with that central point of law and legislation, connected with it by the fragile tie of common descent, rather than by any intimate communion of interests or sympathy of feeling, exposed to frequent revolutions of the general and departmental governments, finding but little stability in the Mexican Congress, little convenience for the promulgation of its laws, and less power to enforce them, the people of California seem to have been governed principally by local customs, which were sometimes in accordance with the Civil Law, and sometimes in contravention of it. However this may be, it is very certain, that it now prevails to but a limited extent, and equally certain, that the Common Law controls most of the business transactions of the country. The American people found California a wilderness—they have peopled it; they found it without commerce or trade—they have created them; they found it without courts—they have organized them; they found it destitute of officers to enforce laws—they have elected them; they found it in the midst of anarchy—they have bid the warring elements be still, have evoked order out of confusion, and from the chaotic mass have called forth a beautiful creation. Throughout all this, they have taken the Common Law, the only system with which they were acquainted, as their guide. Their bargains have been made in pursuance of it—their contracts, deeds, and wills have been drawn up and executed with its usual formalities — their courts have taken its rules to govern their adjudications—their marriages have been solemnized under it—and, after death, their property has been distributed as it prescribes. Are you to hold all or a great portion of these things as naught? Will you overturn or invalidate the immense business transactions of a great community? And yet, to this must you come, if you say that the Civil Law is in force throughout the State. The first settlers of the United States brought with them from the mother country the Common Law, and established it in an uninhabited region. The emigrants to California have brought with them the same system, and have established it in a country almost equally unoccupied. If a change therefore is made, it must be a substitution of the Civil Law in place of the Common Law. If you sanction the latter by legislative enactment, you only give your authority to what has already been done in anticipation of such authority.

But the precedent of Louisiana, in which the Civil Law prevailed at the time of its cession to the United States, may possibly be cited as a parallel case. The analogy, however, does not hold good. There existed in Louisiana, at the time of its acquisition, a government in full operation in all its departments, a system of laws regularly and effectually administered, and a population large in comparison with the first influx of American settlers. The immigration there was, at first, but a trifling rill, creeping languidly to the river, and it has continued to increase but gently and moderately down to the present time. The American population there have thus, gradually and imperceptibly, accommodated themselves to the habits, and adopted the customs and laws of a community which they found, at the respective periods of their settlement, completely organized, and consisting of much greater numbers than themselves. In confirmation of this, we have barely to call your attention to the fact, that the immigration to Louisiana from the United States, during a course of some forty-seven years, has not probably been greater than that which has flooded California during the short period of one year. Here we have, indeed, had no insignificant stream, lost in the ocean, without its feeble tribute being perceived; it has been, and still continues, the broad, deep, rushing torrent, suddenly pouring down upon and inundating a whole region of country.

The petitioners ask, in substance, for the adoption of the English definition of crimes, the English Law of Evidence, the English Commercial Law, and the Civil Code of Louisiana. Without doubting that a harmonious and symmetrical system might be deduced from them all, by the long and patient labor of years, of men fully adequate to the task, we must, nevertheless, be allowed to suggest our opinion, that were we to attempt to adopt them, as they are, without more labor devoted to reconciling their jarring provisions than any Legislature would have either the will or the time to bestow, we should have a system of laws which would be no system at all — a system of contradictions and absurdities — a rule here conflicting with a rule there — the same principles thrice reiterated, and each time in different terms, and in a new shape.

But there are additional reasons of still greater cogency for the adoption of the Common Law. Of the thirty States in the Union, twenty-nine are governed by the Common, and one by the Civil Law. More than twenty-nine thirtieths of the citizens of the United States have been brought up under, and accustomed to transact their business in conformity with, the principles of the former system. More than twenty-nine thirtieths of the emigration to this country, is from Common Law States; and an equal proportion of the business of our people, is now, and will continue to be, carried on by Common Law men. If you change this system, which, in all ordinary matters, they sufficiently understand, you draw a cloud of doubt and uncertainty over every department of business. In the most familiar transactions, as well as in those of graver import, merchants, mechanics, farmers, speculators, and miners, will hesitate in taking a single step, without having first been put to the trouble and expense of consulting a lawyer, to ascertain whether the contemplated matter, or the particular method of doing it, well known by them to be valid under the Common Law, would not, under the Civil system, prove an utter nullity, or require a different mode of performance. Indeed, if the legal profession were in reality, as the ignorant and prejudiced sometimes allege, composed of a mercenary class, seeking their own emoluments, and regardless of the general and permanent welfare and convenience of the whole community, there is nothing which they ought so ardently to desire as the granting of the prayer of the petitioners; for, in that event, their offices must be thronged by clients to repair blunders already committed, to prosecute or defend suits occasioned by such blunders, or to procure legal opinions in advance, whether a contract or instrument, requiring by the Common Law a well known method of execution, or a compliance with certain definite rules, would not, in the Civil Law, demand another mode of execution, or a compliance with other, or different, or additional rules. Nay more, and worse — the best lawyers in the State, though having a general acquaintance with the Civil system, yet not being possessed of accurate and critical knowledge of its minute and practical details, would be in doubt how to advise their clients; and your judges, educated under the Common Law, and perhaps competent to administer it creditably, would not know how to decide *according to law*, but would be obliged to base their judgments either upon the system with which they are familiar, or upon their own abstract notions of right or wrong in every case. The community would thus be exposed to the exercise of discretionary and arbitrary judicial power, and would find themselves in a condition which a profound writer upon law has declared to be the very worst phase of civilized society — that in which the laws are vague and uncertain.

Closely in connection with the foregoing remarks, occurs another which we deem deserving of very great consideration. Books are to a lawyer or a judge what tools are to a mechanic, or surgical instruments to a surgeon; and it is important that such books should be cheap, accessible, and convenient for use;

and highly appropriate, if not indispensable, that they should exist in the native language of the American people. Adopt the Common Law, and lawyers, and judges, and the community at large can readily procure all necessary books, at a moderate price, in their own tongue, and bearing the venerated names and containing the extensive learning of such jurists as Blackstone and Chitty, Story and Kent, together with the reported decisions of all the eminent judges in England and the United States, headed by the illustrious Mansfield and Marshall. The names of such men are to every American amongst us familiar as his land's language; they are connected with his earliest associations of business and study — are endeared to him by a thousand recollections — and constitute many bright links in the chain of memory which binds him to the land and the institutions of his fathers. On the other hand, substitute the Civil for the Common Law, and it will be with great delay and expense, in limited supplies, and in strange tongues, that books can be procured which will be found absolutely necessary for the lawyer and the judge in the intelligent administration of the system. The Louisiana Reports, a few copies of translations of the Institutes, and perhaps of the Pandects, and of the works of Pothier and Domat, may perhaps be procured by diligent search. Beyond this you will, for the most part, be obliged to resort to the original works upon the Civil Law, written in the Spanish, Italian, French, German, and Latin languages, which, if they can be found at all in the United States, will have to be ferreted out amongst the dusty volumes of some antiquarian bookseller, and can be purchased only at an exorbitant price; and, in order to clear up a disputed point, to elucidate a novel question, or deduce new corollaries from old principles, it will become necessary to refer back to works existing only in a foreign language, to names strange to an American ear, to Escriche and Febrero, to the Nueva and Novissima Recopilaciones, to the Partidas, to the Fuero Real of Alonzo the Wise, and perhaps even to the Fuero Juzgo of his Gothic predecessors.

But, finally, another reason which we would urge in behalf of the Common Law is, that we may have a system which will be satisfactory to the people, and therefore permanent. A continual fluctuation in the fundamental laws of any country, is a great calamity. A sudden and radical alteration of them, is even more difficult to be carried into effect, than a fundamental and violent change in the political organization of the government. A system of laws always becomes inseparably interwoven and intimately blended with the character of the community, reared under and habituated to them. A substitution so great as would be that of the Civil for the Common Law, of a whole system, so radical and entire, and over a community so extensive and homogeneous as the American population of California, though often attempted, has never yet once met with success. You might as well undertake to eradicate the American character, and plant the Mexican in its stead — to substitute the Catholic for the Protestant religion, by statute — to abolish the English language and sanction

none but the Spanish, by legislative enactment; for the laws, not less than the character, religion, and language, constitute part and parcel of the American mind. We apprehend that any such attempt, if made, would in due season be answered by the people, as the bishops were answered by the sturdy barons of England at Merton, when a similar effort was made to impose upon them a part of this same system of Rome, "We will, that the laws of England be not changed."

We have thus endeavored to present before you some of the reasons which impressed the minds of your Committee that the prayer of the petitioners should not be granted. In so doing, we have necessarily been led into a more lengthened review than at first we anticipated. We have wished to discharge the duty imposed upon us by the Senate in a manner somewhat commensurate with what we have deemed the importance of the subject. We have conceded that the Civil Law has great merits, and displays great wisdom; but we have insisted that the Common Law is congenial with the American character, and the character suited to the law, and that, in this mutual adaptation, consists the excellence of each.

Your Committee, therefore, recommend the establishment of the system of pleadings and practice which has already been laid before you; the prompt organization of the Courts, with not less than six terms of the District and County Courts of San Francisco in each year, and not less than four terms in each of the other counties of the State; the immediate passage of a bill erecting a municipal Court for San Francisco, with three Judges, and one term every month; the enactment of statutes providing for the tenure and transfer of real estate, for the recording of deeds and mortgages, for the practice upon writs of habeas corpus, and in other special proceedings, with such other legislation connected therewith as may be deemed necessary; and then a statutory provision, that all laws heretofore in force be abolished; and that, in cases not falling within the Constitution of the United States, or the Constitution or statutes of this State, the Courts shall be governed in their adjudications by the English Common Law, as received and modified in the United States; in other words, by the AMERICAN COMMON LAW.

They, therefore, herewith return the petition referred to, and respectfully ask to be discharged from the further consideration thereof.

All of which is respectfully submitted.

By order of the Committee.