III.—*Suggestions for a Bill to regulate Sales of Property.* By J. H. Monahan, Q.C.

THERE is no legal topic more closely connected with economic science than sales of property: therefore I trust that a short paper on the subject may not be deemed out of place in this section of the British Association. Certainly there is no other single legal subject where the materials for rational legislation are more rich and abundant, nor where a systematic arrangement of these materials is more urgently needed; and many symptons indicate that the great work of reducing our chaotic *corpus juris* to order, may be accomplished much sooner than was thought possible some short time ago. The Judicature Acts constitute a stride in advance towards this desirable achievement. So long as one standard of legal conduct was recognised in courts of common law, while other, and in many respects conflicting doctrines were enforced in courts of equity, it seemed hopeless to attempt a methodical treatment of English legal principles. The introduction and reception of Sir J. F. Stephens' Criminal Code is also a most important step gained. And the debate and the division on Mr. Potter's Real Estate Intestacy Bill, is also encouraging to those who desire the substitution of rational and intelligible rules for the survivals of feudalism, still permitted to continue to exist in our law. Though the Bill was lost, the majority against it was comparatively a small one, and the speeches against it were, in effect, statements that enough instances of positive mischief, caused by the existing law, had not been looked up and quoted by the supporters of the measure, rather than attempts to meet their arguments by any intelligible reasons for approving of our present rule.

The introduction of Sir J. F. Stephens' Bill has naturally evoked the usual objections from those who do not believe in codification, and, as usual, the great authority of Von Savigny has been cited as to the inherent difficulty and uselessness of framing codes; but I should think that most honest litigants who have had practical experience of protracted litigation will be inclined to believe Mr. Carlyle, a person not likely to be wanting in due deference to the authority of the great Prussian lawyer. Referring to Von Savigny's disapproval of codes in general, and of the French code in particular, Mr. Carlyle says:—"Unfortunate mortals do want to have their bits of lawsuits settled and have on trial found even the ignorant Code Napoléon a mighty benefit in comparison with none." And we have again heard recently, as we have often heard before, that "you can codify rules, but it is impossible to codify principles." One asks, naturally, what then is meant by "a principle," when it is said that "you cannot codify principles"? If the expression "a legal principle" means anything intelligible, surely a legal principle can be stated in plain English, and nothing more is wanted to fit a legal principle for its proper place in a code. In truth the statement of a legal principle is no more than a compendious description of a general characteristic of the conduct of persons who act in conformity with legal rules. And there is certainly no insuperable diffi-

culty in the way of shaping such descriptions, once legal rules are known.

No doubt the best way to set about a systematic statement and arrangement of our civil law would be to attack the whole subject at once, and to try to get shaped a comprehensive civil code. But there are obviously great difficulties in the way of doing this, and, provided a sound method of working is adopted, it appears to be useful and practicable to deal with the matter in detail, and to try to get comparatively short Bills, dealing with properly selected divisions of the subject, introduced, discussed, and if possible passed into law. If the framers of such Bills all adhere to the use of the same legal symbols, and all use each symbol in precisely the same sense, and if they all adopt the one sound method of dealing with legal topics, the passing of such Bills will be freed from most of the evils of piecemeal legislation, and their preparation might well be taken up by many persons—each selecting the topic in which he feels most interest, or with which he is most familiar. The all-important characteristic of the method to be employed in framing such Bills is that they should all at first be confined to the department of law determining whether intentional conduct is legal or illegal. When this branch of law shall have been reduced to order, it will be time enough to attack the more difficult topics, where the means of preventing illegal conduct, or of obviating its effects, are considered. Again, such Bills should not, at first, deal with legal disabilities, such as those arising from infancy or coverture. They should, at the commencement, be confined to settling and stating the legal rules governing the conduct of persons having plenary legal rights and powers, leaving the effects, for example, of infancy in modifying such legal rules for a separate statement. There is no difficulty whatever in the way of selecting and defining the legal symbols to be used in all such Bills, to signify the relations between acts and omissions, and the legal standard of conduct. The familiar words "duties," "rights," and "powers," furnish all such symbols as are needed. That it is a man's "duty" to perform his contracts, expresses the legal proposition, that if he breaks a contract, his conduct departs from the legal principle of the standard of conduct conversant with the fulfilment of contracts. That a man has a right to the exclusive use of his property, means that others who meddle with the property without his consent act illegally. That a man has "a power," means that he can, by an act of his, impose duties and confer rights and powers. It is to be observed, also, that the ground to be taken up by such measures as I have described, has hardly as yet been at all occupied by any legislation. The rules to be embodied in such Bills are, for the most part, to be found in the decisions of judges. Thus many of the enactments to be contained in them need be no more than short declaratory laws stating an existing legal rule. And it is difficult to suppose that there can be much reasonable opposition to such enactments. It may be fairly expected that if the work of passing such measures is once well begun, it will advance at a rapidly accelerating pace. As the use of such compendious statements of legal rules—now to be hunted for through hundreds of volumes of reports—is experienced in prac-

tical affairs, the desire for an extension of the work will be naturally developed, and the specious objections now sometimes urged against the reduction of judiciary law to a system of enactments, will soon be universally discredited. And, when the work of passing such Bills shall have proceeded a certain length, the task of codifying our civil law will have become merely a matter of consolidation and of some easy adjustments. Perhaps the matter connected with the framing of such Bills as I have endeavoured to describe most likely to cause trouble is the selection of the precise limits of the legal ground to be occupied by each Bill, so as to avoid overlapping enactments, while still rendering each statute sufficiently complete in itself to be practically useful. There is, however, no real difficulty in defining these limits; but the plan of doing so will be better shown by an example than by any mere abstract description, and I shall now try to give such an example. Let us suppose that it is desired to frame such a Bill about "sales of property," and that we want to define the precise limits of the ground to be occupied by such a measure.

Rules governing sales of property involve applications of certain central legal principles, which will ultimately find their proper place in an introductory title or chapter of an English civil code; but as these principles, so far as we are concerned with them just now, are perfectly settled and well known—at all events to lawyers—there is no harm in assuming them to be established and known, and we proceed to deal with the topic we have in hand on this assumption. These central principles will remain—after our proposed Bill shall have become law—just as they are now, embodied in judgments in the reported cases scattered through very many volumes of reports. Each student must, until these principles shall have been arranged and stated with legislative authority, still search for them and arrange them for himself with such help as he can gain from the text books. No doubt much labour is thus cast on the conscientious student, which he might well and easily be spared; but at all events our Bill wont make matters any worse than they are now. On the contrary, it shall rather tend to improve matters in this respect by supplying a compendious and authoritative statement of some, at least, of the applications of those principles. Sales of property depend directly on the branch of the central principle of ownership conversant with powers of disposing of property, and on the branch of what I have elsewhere ventured to call the principle of veracity or truthfulness conversant with the general doctrines governing contracts. When dealing with sales of property, we of course do not attempt to include in the work in hand the general principles governing the rights and duties of owners. When the sale is completed and carried out, the purchaser becomes the owner of the property, and he thus acquires all the rights and becomes bound by all the duties of an owner of the property in question. But the detailed descriptions of these rights and duties obviously belong to the heading or division of law dealing with the principle of ownership. Thus, when shaping our proposed Bill, we have no need to state or to refer expressly to the right of an owner of property to its exclusive use—to the right of an owner of land to the lateral support of adjoining land—to the

duty of the owner of a dangerous animal to prevent it from doing mischief. All we are concerned to say is, that the purchaser becomes the owner, and, thus, to state compendiously, that he becomes subject to the rules governing owners; the statement of these rules being left to be stated in a separate Bill.

A sale always involves an exercise of his power of disposing of the property by the owner. It is important, for the purposes of legal method, to discriminate powers of disposing of property from rights of owners, but as this is not always done it is well to explain the matter somewhat fully. Of course, as a general rule, an owner can, by an act of his, cease to be owner and cause another to be owner of the property in his place; but this is often spoken of as being one of the rights of an owner. Practical lawyers and legislators have been hitherto very reticent as to the precise meaning of the term "a right." The term has often been defined by writers on jurisprudence, but their definitions have not been found to be of much use in practical law. It is most convenient to use the term "a right" of a person, as a symbol to denote the relation between the conduct of others, besides the person whose right is spoken of, and the legal standard of conduct. And the power of defining the commencement of a new right is thus necessarily excluded from the meaning of the term "a right," when used for the purpose of denoting such relations. And, as it is of vital importance for the purposes of legal method, to avoid all chance of any risk of ambiguity, or vagueness in the sense in which the terms used as legal symbols are understood, it becomes necessary to employ a separate symbol to denote that a person can define or fix rights and duties. The term "a power" is ound to be a most convenient one for this purpose. This being understood, we find that, just as a full description of the rights of owners of property is out of place in an Act dealing with sales, so a full description of their powers of disposing are also excluded. The existence and the limits of these powers are supposed to be known by persons who will have to use such an Act of Parliament as we suppose ourselves to have in hand.

A sale involves the making of a contract, and consequently our proposed Bill must contain statements of the results of the applications of the general principles of contracts to contracts for the sale of property; but it should not meddle with the general principle of veracity further than is necessary for the purpose of stating the results of these applications. Thus the topics usually dealt with under the heading "fraud," have no place in such an Act, and certainly their absence need cause no regret to any one who may have to frame or to support our proposed Bill. Perhaps, except the word "malice," there is no other legal term which has given so much trouble to lawyers as this word "fraud." In effect they have almost given up the attempt to define the meaning of the word, in despair. I have elsewhere ventured to suggest the recognition of a central legal principle of veracity, to embody the doctrines now usually treated under the heading "fraud"; and although doubts have been expressed as to whether I have not gone further in this direction than our existing authorities warrant, still it has been distinctly recognized that "the

strong tendency of modern decisions is to establish a principle of veracity on a broad footing, and that whenever we attempt to codify the civil law, we shall have to establish it more definitely." But however this may be, the matter of importance just now is to ascertain whether the legal doctrines concerning fraud should be dealt with in our Act on sales. Now when a man commits a fraud, or acts in violation of the legal principle of veracity, he does an illegal act—just as a man who strikes another, or who imprisons another without legal justification, commits an illegal act, by violating the legal principles of "the protection of the person," and of "personal freedom." But the investigation of the legal consequences of such illegal acts does not belong to the legal standard of intentional conduct. A man who is assaulted may defend himself, and in doing so may be justified in doing an act which would otherwise be illegal; but it is obvious that the rules sanctioning an assault in self-defence are, in effect, extrajudicial means used to prevent violations of the legal standard of conduct. In the same way, a man who is forced to make a promise, by means of blows or imprisonment, can legally refuse to perform his promise, and thus obviate a part of the consequences of the illegal conduct of the person who struck or imprisoned him. When a man induces another to do any act of consequence—for example, to enter into a contract—by means of a false representation, he acts illegally, and appropriate means ought to be provided to obviate, as far as possible, the consequences of such illegal conduct. One of these means is the power given to the person imposed upon to rescind or to repudiate the contract, when he discovers the fraud that has been perpetrated. But all such cases display a common characteristic, excluding the rules governing them from such Bills as we have now in contemplation. In all of them some illegal act or omission has occurred or has been anticipated, and it is considered what consequences should legally follow from such illegal conduct. The business of such Bills as we have in view is discharged when it is ascertained that a particular representation or concealment violates the principle of veracity, and the consequences belong to another department of law. And the statement of the general principle of veracity, does not, of course, belong to an Act of Parliament, or chapter of a code dealing with sales. It will ultimately find its place in a general introductory statement of central legal principles.

Nor, of course, should the proposed Bill deal at all with the doctrines of agency or of partnership. Each of these topics should be dealt with in a separate Bill, where the effects of agency and of partnership on all contracts and other legal acts can be compendiously stated.

Having roughly indicated the bordering topics to be excluded from our draft Bill, and having thus, as it were, defined the boundaries of the legal ground intended to be occupied, we have now to describe briefly the enactments which, according to our method, ought to be found in the Act, and thus to indicate the nature of the legal structure to be placed in the space cleared and prepared for our operations. The most general characteristics of the conduct of persons who sell and buy are the same in all cases of sales—they do

not depend at all on the nature of the property sold. In all cases of sales, the parties make a contract, which is subject to the general rules governing all contracts; in all cases of sales, the purchaser pays a price, and the vendor causes the purchaser to become owner of the property. These, the most general characteristics of conduct affected by the law of sales, are to be found alike in sales of land, of tangible movables, of shares in companies. Thus the whole subject of sales can and ought to be dealt with in a single Act, and its introductory enactments should amount simply to a statement of these general characteristics.

The contract involved in a sale is subject to the general rules governing all contracts; and thus here, as in dealing with other contracts, it is found necessary to provide by general legal rules for incidents of the contract which the parties may have failed to provide for by their agreement. Some of these incidents are common to all kinds of sales, and can and should be stated in general terms; but some of them vary according to the nature of the property sold—differing in cases of sales of land from those applicable to sales of tangible movable things; while sales of animals, for example, are subject to incidents peculiar to sales of property of that class. Thus the Bill should contain divisions, each devoted to one of the classes of property, and stating the incidents peculiar to sales of property of the class dealt with. For example; each division should contain a statement of the warranties, as they are called, which are said to be implied, in the absence of express stipulation, in cases of sales of the particular class of property dealt with in the division. These divisions need not be at all long or complicated; but of course it is impossible to enter into details of their contents in a paper like this, and I shall only venture to trouble my hearers with a single example of one of the details which should be provided for. I have selected it because it affords an interesting and instructive example of the curious subtleties that are sometimes suffered to cause difficulties in matters that are in truth very simple when we confine ourselves to the region of positive fact, and carefully avoid meddling with legal fictions.

I refer to the curious controversy between jurists as to the time when, and—as they will have it—the way how a purchaser becomes owner of the thing sold. To simplify matters, let us take the case of a sale of a tangible, movable thing, such as a haystack, sold by the owner. The "way how" the purchaser becomes owner may appear not to be of much importance from a practical point of view; but fixing the "time when," has often practical legal consequences. Thus, suppose a farmer sells a haystack standing in his field, the purchaser to remove it from time to time in parcels, and to pay the price by instalments: the parties to such a transaction often do not trouble themselves to fix by express stipulation the moment of time at which the seller ceases to be owner of the stack, and the buyer begins to be owner; but the matter is sometimes of practical importance. Thus, suppose the stack to be accidentally burned before any of it has been removed, which of the parties is to bear the loss? According to the French codes, the property is said to be transferred by the effect of the contract, and it is said to follow, as a consequence,

that the sale is complete between the parties, and the property is acquired by the purchaser, as regards the seller, from the time when they have agreed as to the thing sold and fixed the price, although the thing sold is not delivered, nor the price paid. This law must have worked pretty well in France, as it has been in force without alteration ever since the codes were framed; and it is to be observed that the same doctrine is adopted by the framers of the civil code of Lower Canada, which was put in force by Lord Monck's proclamation in 1866. And Mr. Benjamin, in his work on sales, appears to follow the same doctrine, when he speaks of the "effect of the contract of sale in passing property." But Mr. Austin deemed this notion of a contract having the effect of "passing property" to be "exquisitely absurd;" and, according to the modern German school of Roman law (following the older Roman jurisprudence and the French doctrine before the codes) the contract of sale, when complete, does not confer the ownership on the purchaser, but only a right to have the ownership conferred by delivery; although when the contract is complete, and before delivery, the risk, as it is called, of the thing sold is said to pass to the purchaser, save in certain exceptional cases. No doubt, from Mr. Austin's point of view, it may seem absurd to say, that the mere making of the contract amounts to a performance of one of the most important of the obligations imposed by the contract. On the other hand, the so-called delivery is often the merest formality, and sometimes a pure fiction. And it seems to be somewhat inconsistent to say that the purchaser does not in any sense become owner before delivery, although he becomes liable to one of the most important consequences of ownership, viz. —that of having to bear the loss, if any accident happens to the thing sold. Now practical English lawyers seldom trouble themselves with such a controversy. Without entering into the question how the thing happens, they usually confine themselves to saying when it happens. And this sensible plan has been adopted by the framers of the Indian Contract Act of 1872, sec. 78. That enactment says nothing about "how" the property sold passes to the purchaser. It is confined to saying when it passes: it provides that—"When there is a contract for the sale of ascertained goods, the property in the goods sold passes to the buyer when the whole or part of the price, or when the earnest is paid, or when the whole or part of the goods is delivered. If the parties agree, expressly or by implication, that payment or delivery, or both, shall be postponed, the property passes as soon as the proposal for sale is accepted."

For reasons which I have fully given elsewhere, it is to be wished that the framers of the clause had not spoken about "the property passing." Property here really means ownership; and it is preferable to confine the word property to the sense of the thing owned. It is to be observed that the rules of evidence established by the Statute of Frauds, and which require certain contracts to be proved by written evidence, are repealed, so far as India is concerned, by the Indian Contract Act. But I have no space to go further into these matters now, and it is only to be added that the Indian clause can be most easily turned into just such an enactment as is needed for our proposed Bill.