

THE LIFE
OF
SIR JAMES FITZJAMES STEPHEN

BART., K.C.S.I.

A JUDGE OF THE HIGH COURT OF JUSTICE

BY HIS BROTHER

LESLIE STEPHEN

WITH TWO PORTRAITS

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brought the question to the front. Reviewing General Jacob's 'Progress of Being' in the 'Saturday Review' of May 22, 1858, he remarks that the argument from development is totally irrelevant. 'What difference can it make,' he asks, 'whether millions of years ago our ancestors were semi-rational baboons?' This, I may add, is also the old-fashioned empirical view. Mill, six years later, speaks of Darwin's speculations, then familiar enough, with equal indifference. In this, as in other important matters, Fitzjames substantially adhered to his old views. To many of us on both sides theories of evolution in one form or other seem to mark the greatest advance of modern thought, or its most lamentable divergence from the true line. To Fitzjames such theories seemed to be simply unimportant or irrelevant to the great questions. Darwin was to his mind an ingenious person spending immense labour upon the habits of worms, or in speculating upon what may have happened millions of years ago. What does it matter? Here we are—face to face with the same facts. Fitzjames, in fact, agreed, though I fancy unconsciously, with Comte, who condemned such speculations as 'otiose.' To know what the world was a billion years ago matters no more than to know what there is on the other side of the moon, or whether there is oxygen in the remotest of the fixed stars. He looked with indifference, therefore, upon the application of such theories to ethical or political problems. The indication is, I think, worth giving; but I shall say nothing as to my own estimate of the importance of the theories thus disregarded.

VI. THE CRIMINAL CODE

I return to the sphere upon which Fitzjames spent his main energies, and in which, as I think, he did his most

lasting work. Three months of the spring of 1874 had been spent in consolidating the laws relating to the government of India. About the same time, I may observe parenthetically, he had a scheme for publishing his speeches in the Legislative Council; and, at one period, hoped that Maine's might be included in the volume. The publishers, however, declined to try this experiment upon the strength of the English appetite for Indian matters; and the book was dropped. He returned for a time to the Contract Law; but must soon have given up the plan. He writes on September 23, 1874, that Macmillan has applied to him for a new edition of his 'Criminal Law'; and that he has been reading for some time with a view to it. He has been labouring through 3,000 royal 8vo. pages of 'Russell on Crimes.' They are full of irrelevant illustrations; and the arrangement is 'enough to make one go crazy.' The 'plea of *autrefois acquit* comes at the end of a chapter upon burglary'—a fact to make even the ignorant shudder! He would like to put into his book a penal code, a code of criminal procedure, and an evidence code. 'I could do it too if it were not too much trouble, and if a large part of the law were not too foolish to be codified.' He is, however, so convinced of the impracticability of parliamentary help or of a commission that he is much inclined to try. A fortnight later (October 8) he has resolved to convert his second edition into a draft penal code and code of criminal procedure.

The work grew upon his hands.¹ He found crudities in the earlier work and a difficulty in stating the actual law from the absence of any adequate or tolerably arranged text-book. Hence he resolved to make such a book for himself, and to this task he devoted nearly all of what he

¹ See prefaces to *History of the Criminal Law* and to the *Digest of the Criminal Law*.

humorously called his leisure during the later part of 1874 and the whole of 1875 and 1876. Moreover, he thought for a time that it would be desirable to add full historical notes in order to explain various facts of the law. These, however, were ultimately set aside and formed materials for his later history. Thus the book ultimately took the form simply of a 'Digest of the Criminal Law,' with an explanatory introduction and notes upon the history of some of the legal doctrines involved. It was published in the spring of 1877,¹ and, as he says in a letter, it represented the hardest work he had ever done.

It coincided in part with still another hard piece of work. In December 1875 he was appointed Professor of Common Law at the Inns of Court. He chose for the subject of his first course of lectures the law of evidence. His Indian Code and the bill introduced by Coleridge in 1873 had made him thoroughly familiar with the minutæ of the subject. Here again he was encountered by the same difficulty in a more palpable shape. A lecturer naturally wishes to refer his hearers to a text-book. But the only books to which he could refer his hearers filled thousands of pages, and referred to many thousands of cases. The knowledge obtained from such books and from continual practice in court may ultimately lead a barrister to acquire comprehensive principles, or at least an instinctive appreciation of their application in particular cases. But to refer a student to such sources of information would be a mockery. He wants a general plan of a district, and you turn him loose in the forest to learn its paths by himself. Fitzjames accordingly set to work to supply the want by himself framing a 'digest' of the English Law of Evidence. Here was another case of 'boiling down,' with the difficulty that he has to expound a

¹ The introduction is dated April 1877.

law—and often an irrational law—instead of making such a law as seems to him expedient. He undoubtedly boiled his materials down to a small size. The 'Digest' in a fourth edition contains 143 articles filling 155 moderate pages, followed by a modest apparatus of notes. I believe that it has been found practically useful, and an eminent judge has told me that he always keeps it by him.

Fitzjames held his office of professor until he became a judge in 1879. He had certainly one primary virtue in the position. He invariably began his lecture while the clock was striking four and ceased while it was striking five. He finally took leave of his pupils in an impressive address when they presented him with a mass of violets and an ornamental card from the students of each inn, with a kindly letter by which he was unaffectedly gratified. His class certainly had the advantage of listening to a teacher who had the closest practical familiarity with the working of the law, who had laboured long and energetically to extract the general principles embedded in a vast mass of precedents and technical formulas, and who was eminently qualified to lay them down in the language of plain common sense, without needless subtlety or affectation of antiquarian knowledge. I can fully believe in the truth of Sir C. P. Ilbert's remark that whatever the value of the codes in other respects, their educational value must be considerable. They may convince students that law is not a mere trackless jungle of arbitrary rules to be picked up in detail, but that there is really somewhere to be discovered a foundation of reason and common sense. It was one of Fitzjames's favourite topics that the law was capable of being thus exhibited; and that fifty years hence it would be a commonplace that it would be treated in a corresponding spirit, and made a beautiful and instructive branch of science.

The publication of these two books marked a rise in his general reputation. In the introduction to the 'Digest of the Criminal Law' he refers to the rejection of his 'Homicide Bill.' The objections then assigned were equivalent to a challenge to show the possibility of codifying. He had resolved to show the possibility by actually codifying 'as a private enterprise.' The book must therefore be regarded as 'an appeal to the public at large' against the judgment passed upon his undertaking by Parliament and by many eminent lawyers. He does not make the appeal 'in a complaining spirit.' The subject, he thinks, 'loses nothing by delay,' and he hopes that he has improved in this book upon the definitions laid down in his previous attempts. In connection with this I may mention an article which he contributed to the 'Nineteenth Century' for September 1879 upon a scheme for 'improving the law by private enterprise.' He suggests the formation of a Council of 'legal literature,' to co-operate with the Councils for law-reporting and for legal education. He sketches various schemes, some of which have been since taken up, for improving the law and legal knowledge. Digests of various departments of the law might be of great service as preparing the way for codification and illustrating defects in the existing state of the law. He also suggests the utility of a translation of the year-books, the first sources of the legal antiquary; a continuation of the State Trials, and an authentic collection of the various laws of the British Empire. Sir C. P. Ilbert has lately drawn attention to the importance of the last; and the new State Trials are in course of publication. The Selden Society has undertaken some of the antiquarian researches suggested.

Meanwhile his codification schemes were receiving a fresh impulse. When preparing the 'Digest,' he reflected

that it might be converted into a penal code. He communicated this view to the Lord Chancellor (Cairns) and to Sir John Holker (afterwards Lord Justice Holker), then Attorney-General. He rejoiced for once in securing at last one real convert. Sir John Holker, he says, appreciated the scheme with 'extraordinary quickness.' On August 2, 1877, he writes that he has just received instructions from the Lord Chancellor to draw bills for a penal code, to which he was soon afterwards directed to add a code of criminal procedure. He set to work, and traversed once more the familiar ground. The 'Digest,' indeed, only required to be recast to be converted into a code. The measure was ready in June and was introduced into Parliament by Sir John Holker in the session of 1878. It was received favourably, and he reports that the Chancellor and the Solicitor-General, as well as the Attorney-General, have become 'enthusiastic' in their approbation. The House of Commons could not spare from more exciting occupations the time necessary for its discussion. A Commission, however, was appointed, consisting of Lord Blackburn, Mr. Justice Barry, Lord Justice Lush, and himself to go into the subject. The Commission sat from November 1878 to May 1879, and signed a report, written by Fitzjames, on June 12, 1879. They met daily for over five months, discussed 'every line and nearly every word of every section,' carefully examined all the authorities and tested elaborately the completeness of the code. The discussions, I gather, were not so harmonious as those in the Indian Council, and his letters show that they sometimes tried his temper. The ultimate bill, however, did not differ widely from the draft produced by Fitzjames, and he was glad, he says,¹ that these thorough discussions brought to light no serious defect in

¹ Preface to *History of Criminal Law*.

the 'Digest' upon which both draft-codes were founded. The report was too late for any action to be taken in the session of 1879. Cockburn wrote some observations, to which Fitzjames (now a judge) replied in the 'Nineteenth Century' of January 1880. He was studiously courteous to his critic, with whom he had some agreeable intercourse when they went the next circuit together. I do not know whether the fate of the measure was affected by Cockburn's opinion. In any case the change of ministry in 1880 put an end to the prospects of the code for the time. In 1882, to finish the story, the part relating to procedure was announced as a Government measure in the Queen's speech. That, however, was its last sign of life. The measure vanished in the general vortex which swallows up such things, and with it vanished any hopes which Fitzjames might still entertain of actually codifying a part of English law.

VII. ECCLESIASTICAL CASES

Fitzjames's professional practice continued to be rather spasmodic; important cases occurring at intervals, but no steady flow of profitable work setting in. He was, however, sufficiently prosperous to be able to retire altogether from journalism. The 'Pall Mall Gazette' during his absence had naturally got into different grooves; he had ceased to sympathise with some of its political views; and as he had not time to throw himself so heartily into the work, he could no longer exercise the old influence. A few articles in 1874 and 1875 were his last contributions to the paper. He felt the unsatisfactory nature of the employment. He calculates soon afterwards that his collected works would fill some fifty volumes of the size of 'Liberty, Equality, Fraternity,' and he is anxious to apply