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The Right Hon Christopher Palles

LORD CHIEF BARON OF EXCHEQUR DIVISION IN IRELAND

THE

JURIDICAL REVIEW.

UNE BATAILLE DE LIVRES: AN EPISODE IN THE LITERARY HISTORY OF INTERNATIONAL LAW.(a)

Part I.

IN one of the charming addresses which compose "The Pleasures of Life," Sir John Lubbock says that "there is a struggle for existence," and a "survival of the fittest" among books as well as among animals and plants. The struggle with which we are to be concerned here, however, is not exactly a struggle for existence, though the books we are going to notice have certainly been the subjects of keen conflict. It is the proud boast of the history of the literature of international law, that many of the writings which compose it have exercised a paramount influence in the struggles of nations. Cannon have been fired and armies have met in the shock of conflict; fleets have battered one another, and privateers have destroyed hostile commerce; but, keeping pace with the march of destruction, there have been also struggles in the domain of jurisprudence—bloodless no doubt—but possessing, none the less, their elements of fierceness. As wars

(a) Translated from the French, by J. J. Cook, LL.B., Advocate.

took place, books and tractates have been repeatedly prepared by scientific jurists to support the claims of one or other of the belligerents. Wars have not always been made for the sake of progress; material interests, vain ambitions, or untempered rage have too frequently been the occasion of them. These causes, however, have not prevented the great writers of the past from lending the countenance and aid of their pens to support such conflicts. Patriotism, perhaps, was their justification, the glory and prosperity of their country seeming to demand their aid under all circumstances.

The episode, which is to occupy our attention in the following pages, is an interesting one in many aspects. It is the question of maritime supremacy. Was Great Britain to carry out, or was she not, the programme which had been heralded by an English poet in the middle of the 15th century, when in his "Libel of Policy," he called upon his countrymen to seize the empire of the seas—an empire which, according to him, was their heritage as of right? From the point of view of general doctrine, the question of supremacy was of great consequence; it raised the matter of maritime freedom, and virtually compelled a decision upon the validity of papal grants, and the claims by various monarchs to exclusive occupation of territories which had then been newly discovered. Finally, as a matter of legal history it is interesting to note that among those taking part in the controversy are to be found many illustrious jurists belonging to the United Provinces, to England, and to Scotland (which at least contributed one) among whom it may be sufficient to mention Grotius, Graswinckel, Selden, and Welwood.

The question of the freedom of the high seas was first raised by Grotius. The circumstances which led to his doing so deserve a passing notice. In 1597 a Dutch flotilla penetrated, for the first time, into the East Indian seas, from which the Portuguese had already asserted their right to exclude all other nations. The United Provinces were then

at war with Philip II., King of Spain, who was also King of Portugal, but the Dutch were not actually at war with the Portuguese. Relying, however, upon the rights of exclusion to which they laid claim, the Portuguese treated the Dutch sailors as pirates, and resisted their incursions by force. Soon after this the great East India Company of England, which had just been incorporated, became involved in conflict with the Portuguese. The Company, in this contest, succeeded in capturing some important prizes, which became a source of considerable revenue to it. It happened, however, that some of the shareholders, actuated by religious scruples, refused to participate in what they considered illegitimate profits, and it was the controversy that arose out of this that seems to have led Grotius to write his book dealing with the laws of prize in war. The "*De jure prædae*" (such was the title) did not, however, see the light at that time, and it was not till 1868 that it was published by Professor Hamaker.

In 1608 proposals were made for truce, if not for peace, between the United Provinces and Spain. The latter power sought, during the course of the negotiations, to induce the Dutch to abandon their trade in the East and West Indies. The India Company thereupon thought it an appropriate time to appeal to the public opinion of Europe, and Grotius, with the view of supporting the United Provinces, detached from the larger work, which he had then in progress, the chapter dealing with the freedom of the sea. He caused it to be printed without any indication of the name of the author, under the title of "*Mare liberum sive de jure quod Batavis competit ad Indicana commercia dissertatio.*"

This book failed at first in attracting the attention which one would have expected of it. When it appeared, the negotiations with the King of Spain and the archdukes had already ended, and the navigation of the Indian seas was assured.

Grotius once expressed his surprise that the Portuguese and Spaniards had not attempted any refutation of his doctrines. I observe that in a treatise of his, written in

1613, with which I shall deal later, he relates that only one refutation had been actually attempted, but that he had not been able to see the book. The explanation, however, was simple, and Grotius himself, afterwards, in 1617, in a letter to his brother William, refers to it—the king of Spain had forbidden the printing of the book. Nevertheless, in 1625, there appeared a book by Seraphin de Freitas, "*De justo imperio Lusitanorum Asiatico adversus Grotii mare liberum.*" The work was a remarkable one, and Grotius quite recognised its excellence, for in another letter to his brother William, dated 6th April, 1627, he praises the construction of it, and says that the author deserves an answer. He adds that he had been requested to refute this adversary, but that he assured those who recommended him to undertake this refutation to address themselves to one of his judges, referring to the unjust condemnation passed on him some time before by the partisans of Maurice of Nassau? Seraphin de Freitas was a man of real scientific eminence. Doctor of Laws of the University of Coimbra in 1595, he afterwards became Professor in Valladolid, and he may fairly be ranked, by virtue of his writings, in the phalanx of Spanish publicists, of which the great representatives were Vitoria, Soto, and Suarez.

We may note here, *en passant*, a point of interest—viz., That the *Mare Liberum* dealt only with the Spaniards and the Portuguese. It was England which, by the outcry it made in connection with it, gave to the modest work its celebrity.

The public law of England had early sanctioned the doctrine of the Crown's sovereignty and right of property in the narrow seas. From this there resulted an important consequence—the right of fishing was regarded as *inter regalia*. Treaties relating to fishings had, however, been concluded with other countries, and it is worth noting that, so early as the beginning of the 15th century, it had been agreed with the Dukes of Burgundy that "les pescheurs tant d'Engleterre, d'Irlande et de Calais comme des pays de Brabant et de

Flandres pourroient paisiblement aler partout sur mer, pour peschier et gaignier leur vie sans empeschement ou destourber de l'une partie ne de l'autre." An agreement of this kind is dated in 1439. Again, on 24th February, 1496, there was signed at London the "*Tractatus amicitiarum et mercium intercursus.*" This treaty was concluded between Henry VII. of England and Philip le Beau of Burgundy, and it was assented to and signed on both sides by personages of importance, and by the mayors and burgomasters of the principal towns. A Dutch ambassador was accordingly able with reason to reply to the English in the middle of the 17th century that it continued to bind the contracting parties, although Philip II., who had succeeded to the rights of Philip le Beau, had been declared to have forfeited the throne. The "*grand entrecourse*" contained a clause relative to fishing; fishers might ply their calling in safety and without hindrance, "*secure piscari absque aliquo impedimento.*" It was confirmed by several renewals, notably in 1515; at that time one of those who negotiated on the English side was Sir Thomas More, and on the Flemish there was Philippe Wielant.(*a*)

The right of fishing in the seas in which England claimed to have property was of the highest importance for the inhabitants of Holland and of Zealand, and was matter of interest to the whole republic. It was, in fact, with justice that an official document described the fishing as "one of the principal mines of the United Provinces." In the two provinces which we have named, there were 60,000 people who lived by it, and the annual yield was estimated at a million pounds sterling. But English rivalry had been excited, and after the first step was taken, England determined to pursue her aim with that tenacity of purpose which is the characteristic feature of the national character. Thus the chief object of her policy in

(*a*) Our authority for the greater part of what follows is the able treatise of M. F. Muller, *Mare clausum, Bijdrage tot de Geschiedenis der rivaliteit van Engeland en Nederland in de zeventiende eeuw, Amsterdam*, 1872.

the 17th century became the establishment of her naval supremacy in place of that of the Netherlands.

Even as far back as 1580 there had been farseeing Englishmen who were convinced that it was necessary at all costs for the nation to develope the fishing industry. One of the first of these, Robert Hitchcok, whom Selden would have styled "*rerum maritimarum peritissimus*," called the attention of his fellow-countrymen to this matter. Strenuous efforts were made, but unluckily some private interests were affected, conflicts broke out between the English and the Dutch fishermen, and difficulties of every kind arose. Finally, however, a royal proclamation of 16th May, 1609, was issued, and in it James I. forbade foreigners to fish in the seas and off the coasts of the three kingdoms, without having first obtained a license, which involved payment of an annual sum of money.

This was a severe blow to the Dutch; they sought immediately, however, to lessen the effects of the proclamation, and proposed negotiation. Thanks to the ability of the great pensionary, John van Oldenbarnevelt, and the conciliatory disposition of the Secretary of State, Sir Ralph Winwood, it was resolved that the *status quo* should be maintained until a Dutch embassy should proceed to England, and there endeavour to bring about an arrangement which would satisfy both parties. The embassy left towards the end of May, 1610. It was composed of John Berck, pensionary of Dordrecht; Albert de Veer, pensionary of Amsterdam; Elias van Oldenbarnevelt, pensionary of Rotterdam; Albert Joachimi, Deputy to the States-General; and Noel de Caron, lord of Schoonewalle, Ordinary Ambassador of the States-General in London. The Conference opened on 16th May. The English Delegates were Sir Julius Cæsar, then Chancellor of the Exchequer; Sir Thomas Pary, Chancellor of Lancaster; Sir Daniel Dunn and Sir Christopher Parkins, Masters of Requests; Dr. Marten, King's Counsel; and Levinius Munke or Munck, a Fleming who had settled in England, and become a Clerk to the Signet of His Majesty. The discussion was entirely a legal one, and it is probable that Grotius was

consulted by the Dutch envoys. The result of this Conference was to bring about agreement. There were two circumstances in favour of the Dutch—viz., that James I., full of hatred to Spain, hesitated to lose the friendship of the United Provinces; and, second, the assassination of Henry IV. had suggested to the king the possibility that he might place himself at the head of the Protestant party in Europe. Accordingly, while affirming his rights upon the seas, he consented to delay the application of his prohibitory proclamation of 16th May, 1609.

New difficulties, however, arose. In England persons of rank and influence continued the agitation, and excited the zeal of their countrymen. Among them was Sir Walter Raleigh, who wrote about 1610, his "Observations Touching Trade and Commerce," in which he attacked the United Provinces, and proposed to make maritime concerns his special interest in future. Moreover, another question was raised — that of the Indies. Dutch envoys were anew sent to London. They were Grotius, Pauw, Boreel, and Meerman. The negotiations fell through, but there remain to us some interesting if malicious remarks by George Abbot, Archbishop of Canterbury, regarding the stay of Grotius in London. They represent to us the illustrious publicist in a very unfavourable aspect. "At his first coming to the king," wrote the archbishop, under date 1st June, 1613, "he was so tedious, and full of tittle-tattle, that the king's judgment was of him that he was some pedant, full of words, and of no great judgment. And I myself, discovering that to be his habit, as if he did imagine that every man was bound to hear him so long as he would talk (which is a great burthen to men repleat with busyness), did privately give him notice thereof, that he should plainly and directly deliver his mind, or else he would make the king weary of him."(*a*)

(*a*) Memorials of Affairs of State in the Reigns of Queen Elizabeth and King James I. Collected chiefly from the original papers of the Right Hon. Sir Ralph Winwood, t. iii., p. 459.

About this time William Welwood appeared upon the scene. He was a Scotsman who had accompanied the son of Mary Stuart to England. He had been a Professor at St. Andrews; and James Melvill, Minister of Kilrenny, in Fife, and Professor of Theology in the University of St. Andrews, speaks in his Diary of a "Maister of the Universitie, Mr. Wilyeam Walwode, Professor of the Lawes, a man bathe in blude and affinitie joyned neir to the maist honest in all the town." This Melvill also reports how a wretched hireling, acting under the inspiration of the Bishop of St. Andrews, wickedly attacked "Mr. Wilyeam going from his hous in the town to the Collage, his gown on, his book in the a hand, and sand-glass in the uther, meditating on his lessone. Hendrie Hamiltone, a jakman of the bishop, rushes out of a hous, where he lay in wait for bloode, and unbeseating Mr. Wilyeam, with the first strok, wounds him in the hand and mutilates him, and haid proceidit fordar, giff be sum gentle men passing that way he haid not been steyed. Mr. Wilyeam is lead to his mother's house crewallie woundit."(*a*) Welwood published in 1594 his first book, which was printed at Leyden, and is entitled "*Juris divini Judæorum ac juris civilis Romanorum parallela*," and in 1622 there further appeared his "*Dubiorum quae tam in foro poli quam in foro fori occurrere solent brevis explicatio.*" Between these dates he wrote other works, of which we shall speak later, and he doubtless occupied an important position in England. Indeed, he was frequently consulted on questions of civil and common Law, both by the Government and by personages of consequence, such as Archbishop Abbot and Sir Julius Cæsar. In 1613, William Welwood, "Professor of the Civill Law," published "an abridgement of all Sea Lawes, gathered forth of all writings and monuments which are to be found among any people or nation upon the coasts of the Great Ocean and

(*a*) The Autobiography and Diary of Mr. James Melvill, Minister of Kilrenny, in Fife, and Professor of Theology in the University of St. Andrews. Edited by Robert Pitcairn, Edinburgh, 1842, p. 272.

Mediterranean Sea, and specially ordered and disposed for the use and benefit of all benevolent seafarers within his Majestie's Dominions of Great Britanne, Ireland, and the adjacent Isles thereof." The book is dedicated to James I., and the dedication is signed "Your most humble subject and daily orator." It consists of thirty titles, the twenty-seventh of which treats "of the communitie and proprietie of the seas." The author mentions that he has read and reflected on a "verie learned but a subtle treatise (*incerto authore*) intituled *Mare Liberum*"—the words *incerto authore* being intelligible when one recollects that the *Mare Liberum* bore for the first time the name of its author in the edition of 1618. Welwood protests against the argument of Grotius, and contends that if the liberty of the navigator upon the ocean is not even open to discussion, then the liberty to fish in any sea whatever does not exist at all.

This, then, was the state of the facts at the time; the *Mare Liberum* was in reality directed against the Portuguese and the Spaniards; it was not opposed in any way to English pretensions; but it was, nevertheless, at the instigation of the King of Great Britain that the most active and most serious attack upon the famous treatise of Grotius was made.

Grotius made elaborate enough preparations for a refutation of the criticisms of Welwood, but his work was never given to the world, probably because the author did not consider the time opportune for anew calling the attention of James I. to this "*Mare Liberum*," an idea with which the King had already expressed his dissatisfaction. The MS., however, of the Refutation exists, and extends to thirty-five pages folio of close writing.(*a*) It is entitled *Defensio capitis quinti Maris liberi oppugnati a Gulielmo Welwodo juris civilis professore capite* xxvii *ejus libri scripti anglia sermone cui titulum fecit compendium legum maritimarum.* In it he aims at

(*a*) The manuscript is in the Library of the University of Leyden. M. Muller has reproduced the text *in extenso* in the work above cited.

showing that the sea is common, and that no one can prevent fishing. He says of Welwood that he was *Vir eruditus et multi in defendendis paradoxis animi*, and again calls him *Homo nimium suspicax et qui quod non est potest videre.*

In 1615 Welwood returned to the charge, this time with a Latin work, *De dominio maris juribusque ad dominium praecipue spectantibus assertio brevis ac methodica*, in which his main proposition is, that the right of navigation does not belong to all, and that the right of fishing in the sea has been already in many places acquired in property.

The same year saw the rise of difficulties concerning expeditions to the Polar seas. The English had some right to complain of the proceedings of the Dutch. In Spitzbergen and in Greenland, as in the Indies, the latter claimed to exercise a monopoly, the legality of which they questioned when it was claimed by the Portuguese and the Spaniards. Sir Dudley Carleton also, ambassador of James I. at the Hague, was able to reproach them with imitating the Portuguese and the Spaniards in only leaving the sea free to their own people, while loudly crying *Mare Liberum*, and with attacking the English while calling them their "*meilleurs amis et confédérés.*"

At the head of the embassy which James sent to Holland to express his demands regarding the Polar Seas, was Sir Henry Wotton, the author of the famous definition of an ambassador as "An honest man, sent abroad to lie for the good of his country." Grotius was among the Dutch negotiators. The whole political ability of these latter was directed towards prolonging the proceedings, and they would probably have had little difficulty in doing that, if one may form an opinion from the remark of John Chamberlain, in writing to Sir Henry Savile, that Wotton "is not affable, always busy, but despatching little." After this, one is not surprised that the English, who had business in the United Provinces, were anxious for the arrival of Carleton.

From this time onwards few years passed without some incident more or less endangering the good understanding between the two countries, the most serious of which was the arrest by a Dutch captain of the agent of the King of Great Britain, who was entrusted with the collection of the dues demanded for the privilege of fishing,

ERNEST NYS.

THE STUDY OF EARLY LAW.

I.

THERE are signs of a renascence in the knowledge of ancient law. Britain feels the influence of the movement, and has begun to follow the example of the Continent. To cite the activity of the Germans in the matter is unnecessary; they have long been our instructors. But Frenchmen, for a time laggards in the field, are now in the forefront with a lucid, clearly defined conception of what is necessary to train antiquaries. There is a school of masters there whose publications are of great help in tracing the origins of law, the rise of institutions, and the growth of forms. The legal idea is ever changing its vestment little by little, and the style-book, with all its conservatism, alters day by day. Yet the changes are outward, they are never more than is absolutely essential; and so, while the new is taken on, much of the old survives. Our stock phrases of to-day are often the legacy of a remote past, and many of them are helps and guides to legal history. The admirable series of *Textes relatifs*(*a*) now appearing in France is designed in full appreciation of this; they are to present typical documents from actual deeds or from old formularies. The first of the series, dealing with public and private writings of the Merovingian and Carolingian epochs, is of a kind to whet curiosity for those which are

(*a*) *Textes relatifs* aux Institutions privées et publiques aux epoques Merovingienne et Carolingienne publies, par Marcel Thevenin. Paris: Alphonse Picard, 1887. The series is issued under the patronage of the *Societe Historique*.

to follow. It is full of interest in itself, rich in old words and forms and symbols and practices. If future volumes are edited with the same grasp as that of M. Thévenin, we shall soon see in France a set of easy-priced manuals, which fulfil a purpose and attain a standard unapproached in Britain. It is true that Bishop Stubbs' "Select Charters" is the paragon of all its tribe, but it embraces a field at once too narrow in scope and too wide in time to give it the possibility of being adequately instructive on the special lines of law. Its theme is the Constitution, not the legal history, of England. Professor Earle's Anglo-Saxon "Land Charters," again, is philological and linguistic, rather than legal, in its aims.

The French publications noticed are evidence of some public call for works of the class. Still more unequivocally they testify to the recognition by masters in history of what the student most needs. In Great Britain as yet the movement in that direction is somewhat slow. The *Formulare Anglicanum* of Madox has no nineteenth century successor. There are no *textes relatifs* accessible in a handbook of modest price. There is not even a modern manual of palæography such as that of M. Maurice Prou,(*b*) which, by its detailed aid, its numberless fac-similes, and its prevailing clearness, tempts to the study of early writing, and makes its difficulties a pleasure. Certainly the Rolls Series lengthens with diligent rapidity, piling the shelves of our libraries with the raw material of history in chronicle and chartulary. But with it all, there is little or nothing to direct the student how he is best to use that raw material. There is nothing done to smooth or simplify his path; he is left to himself. Those who are able and willing to give him a helping hand have not yet chosen the right means. There are, no doubt, University classes of Constitutional History, but the professors' voices do not arouse the echoes outside the walls. In particular, there are no classes for teaching the history of law at

b) Manuel de Paléographie Latine et Française du VIe au XVIIe Siecle, par Maurice Prou. Paris: Alphonse Picard, 1890.

all. We have brilliant generalisations on the philosophy of the subject—which some of us hold in chronic suspicion. When you have not groped in the darkness and made sure of your facts, what stability is there in your philosophy?

II.—English scholars have long had Domesday Book under the microscope; they have searched diligently to discover its message on the relationship of lord and villein and bondman; the rights of the people in the land; its bearings on what we *call* the Feudal System, and, calling, think we understand. But Domesday Book is not transparent; much of its sense is still to seek. One thing is very certain, after years of patient and acute study; *manerium* is well-nigh as tough a word as that harmless drudge, the antiquarian lexicographer, has ever failed to define. When the definition comes, if it is not from a legal pen, it will come only after the lawyer gives the *ratio decidendi*. The minutiæ of ancient life, the details of common men's existence in the thirteenth century, are nowhere seen so plainly as in legal records. The inter-dependence of society is best shown in the rolls of early Courts, and the extents and customaries of the great estates of England. They are charged with human, vivid interest, alive with stirring incident; their simple, cold-blooded, crisp narrative is often of tragic intensity, whilst an indescribable quaintness pervades the whole. The shell of clerkly law-Latin is easily cracked; the kernel of these old plea-rolls is toothsome to any palate; but it has, at the heart of it, a part which is "tough and technical" to a degree, and which is caviare to the general, calling for special learning to digest.

Within the last ten years there has been a marked advance in the knowledge of thirteenth century English law. It is now seen more clearly than ever before what giants there were in those days—how the same forces at work in rearing the English constitution, amid the fierce zig-zag of party war, were planning on the same broad grand scale the structure of a jurisprudence on essentially native foundations. In the recent progress of antiquarian law, the work of one man's hand has been conspicuous. The "Pleas of the Crown

for the County of Gloucester," in 1221, published(*a*) in 1884, was a series of pictures of English life under King John and Henry III., when the effects of the misrule of the former monarch were slowly dying down. These miniature etchings by the clerks of the royal justiciars are excellent and life-like, and of absorbing interest. Mr. F. W. Maitland's vigorous and satisfying preface showed, once for all, that here was a man with his heart in his work. Incidentally, he made reference to an "invaluable note-book discovered by Professor Vinogradoff."

For three years little more was heard of that invaluable manuscript; but, in 1887, it appeared in two stout volumes, with a short preliminary volume of critical and prefatory elucidations. This last raises and solves a problem absolutely unique in interest in the history of English law. Built, course by course, upon internal evidence of the most convincing character, the conclusion of a memorable argument is expressed in the title,(*b*) "Bracton's Note-Book." The editor leaped, at a bound, into distinction as the author of one of the most important literary theses ever written—into a position of head-and-shoulders pre-eminence as a master of early English law. The "invaluable note-book" he had proved to be none other than the commonplace book, the rough studies, the preliminary collection of cases, on which was based that legal glory of England, Bracton's "De Legibus Angliæ." No doubt, as has been with the frankest cordiality acknowledged all along, an eminent Polish scholar, Professor Vinogradoff, bears the credit of first finder. He, at the outset, pointed to resemblances between the note-book and Bracton's great work. But the praise of giving to the world a book of prime value, in illustrating the rise of English jurisprudence, the honour of a startling hypothesis

(*a*) London: Macmillan & Co.

(*b*) "Bracton's Note-Book": A collection of cases decided in the King's Courts during the reign of Henry the Third, annotated by a lawyer of that time, seemingly Henry of Bracton, edited by F. W. Maitland. London: C. J. Clay & Sons, Cambridge University Press, 1887.

triumphantly demonstrated that it was Bracton's book, that its margins are the making of Bracton's later text, that they are written by Bracton's very pen, and are the scaffolding of his immortal treatise—these, and all the other praises due to capable, painstaking editing, have been worthily earned by Professor Maitland. The note-book, anonymous and all but unknown for 600 years, is anonymous no more, and, in that fact, its editor has definitely linked his name, for future centuries, with Henry of Bracton's.

It was an inspiriting discovery, fitted to stir to its depths the coldest and most formal current of legal blood. This book pointed to endless possibilities on cognate ground. Its 2000 cases, checked by the extant rolls, enable the student to get behind even Bracton, to look at the law not merely as he states it, but to revise his words by a comparison with those of the judge he cites. There is no finality in knowledge, every point gained is but a stepping-stone to get farther. The time was opportune for the birth of a legal antiquarian society, and the Selden Society, founded in 1886, came into existence under a fortunate star. It is the expression of the ambition of the English bar to grapple with great legal problems, especially with the profound subject of legal origins. Since the Note Book appeared, Professor Maitland has been a great part of the Selden Society,(*a*) which has already a substantial record of sound work, and gives promise of a victorious career, reaching far into the future, conquering and to conquer in the domain of antique law.

III.—"And why stands Scotland idly now?" Why, when the Englishmen are thus rapidly dispelling the mists which hovered round their ancient jurisprudence, why is it that Scotland gives no sign? The apathy is unintelligible and inexcusable. Never before were the omens so encourag-

(*a*) "Select Pleas of the Crown" (1205-1225), 1888, and "Select Pleas in Manorial and other Seignorial Courts," 1889, published by the Selden Society, are both edited by Professor Maitland.

ing. Every result achieved south of the Tweed is an aid to us. It is not only their own difficulties that they are explaining away, it is ours also. The early Scots and the early English systems are inseparably interlinked. Our southern brothers, happily, have a princely series of records, unbroken rolls, of decisions of all sorts, bewildering in number and variety, back to the 12th century. We, alas! have none for a long period later, but our poverty of parchment gives us the fewer problems to tackle, the more shame while they remain unsolved. Our jumble of fragments mainly assembled in the first volume of our Acts of Parliament, is still without form and void. No masterhand has yet reduced chaos into order, and causation, and sequence.

It is a fair question if legal inquiry flourishes in Scotland. We had a great controversy once, which lasted for over a century; but we let it reach raging heat, and then slowly simmer down to a coolness far below the *status ante quo*. Men wrestled with the *Regiam Majestatem* for a time, they waxed vehement and objurgatory in its attack and defence; but long ago they gave it up. They had advanced the question to the length of establishing that Glanvill was the original, not the copy. Beyond that meagre fact, the very threshold of the theme, thick Cimmerian darkness girds the *Regiam* round; its date, its object, its history, lie in the primeval doubt. The cobwebs have closed over it once more. To be devoured by the Sphinx for failure were surely a more honourable doom than to earn her scorn by fearing to attempt. There are new *rationalia* for such problems now. There is more certainty to go upon, more hope than ever before of successful inquiry. There is a world of new apparatus ready for the critic's hand. The necessity of doing something is clamant. A hundred questions in the history and chronology of the Scots statute-book cry loudly for release from their long obscurity.

One is tempted to put a few unpleasant queries. Clearing our minds of cant, What do we really know about the foundations of Scots law? Who has yet told us to what

extent we are indebted to the civil law? True it is that it came in like a torrent in the 16th century, but was that so before? Are we yet rid of our vain imagining that all its roots are Roman? Who has tracked the pedigree of its oldest and native part? Is it worth while to sigh for a handbook of comparative law and charter, a register of brieves, an illustrative selection of charters, ranging from the simple grants of the 11th to the complex full-fledged feudalism of the 14th, 15th, and 16th centuries—in short, a manual of Scottish *textes relatifs?* Till that comes how shall we know the truth about our land tenures, our baronial jurisdictions and their encroachments, the rise of our guilds and burghs, the story of our conveyancing?

How comes the gap in our reports of cases? Was there no law, civil or criminal, laid down in the Courts for about a century after 1495? Is it not feasible that we should be able to check Sir Thomas Craig, born in 1538, at least as thoroughly as the Englishmen check Bracton, who was dead in 1268? Why are the two volumes of the "*Acta Dominorum Concilii*" and the "*Acta Auditorum*" left companionless and forlorn, no man seeking to continue them or to have them continued, no man turning to them to expound the law they contain? It is well known that the historical department of the Register House, under the erudite guidance of its courteous curator, is doing great and good work with very slender funds. The Record grant for Scotland does not go very far, and is sadly hampered with conditions to boot. The task of putting 16th century legal records into print cannot be touched there for years to come. There must be voluntary work if they are to be printed for the use of the present generation. We cannot expect it at the nation's cost. The Societies which exist for such purposes are not bringing their attention to the field of law. They are busy with other things, well enough in their way. But who can deny that the legal records, civil and criminal, of the 16th century, are of infinitely higher historical importance than 18th century diaries, or Latin

poems on the march to Killiecrankie? Is not "Pitcairn's Trials" a perfect mine of historic lore? If a mere volume of selections, well edited, be so serviceable, what may we not hope from a systematic series of justiciary proceedings?

We have said enough, perhaps more than enough, in querulous questioning. One does not with any satisfaction frame an indictment against his country and against his own profession. Willingly we turn to a more congenial theme, to say that the deterrent forces at work are not truly formidable, that Scots legal antiquities are not that distilled dulness which some suppose. Though no field of history has been less explored, it is no trackless wild. At every turn in the tangled pathway one may start a fresh theory, the pursuit of which becomes an enthusiasm, and its capture a crowning pride, for the student of history knows no joy so great as the establishment of some new certainty, the proving of his own hypothesis. It is a field full of literary no less than legal interest. Technical it necessarily is, but its technicality is by no means extreme, and, were it ten times greater, should be no barrier to the undertaking of the stern duty which lies upon the Scot to vindicate his old repute for vigorous patriotism, to show himself conscious of the importance of the legacy left him in his laws, and to know the value of his own treasure. For there is no doubt that Scots legal history, differing essentially from that of any other country, subjected to many cross currents of influence, yet resolutely standing out for old tradition and independence, will form a chapter of great significance when the full import of legal history in Europe can be summarised. Running on lines parallel to, and often identical with, those of English jurisprudence, it pursued a course of its own, little changed by either English or French influence, until the sixteenth century, when the civilians gained an ascendancy fatal to the natural native development of the national law. That this resulted in a system broader based in philosophy need not be called in question, but the movement was a radical change, not a continuance of the old traditional course. Such, at least,

seems to have been the opinion of Cosmo Innes, an opinion which nothing we have seen shakes in its essentials. Our law, therefore, is so great a phenomenon, so striking a contrast to the product of native development which Bracton and Blackstone alike expound, that the burden which lies upon us of knowing something about a history so eventful is certainly not discharged by the present state of the knowledge of legal antiquities in Scotland. A first requisite to effort is to make us dissatisfied with ourselves, and this article may give some small help to that end. We must shake off our lethargy, and bestir ourselves to awaken the drowsy interest of our profession in a subject which is emphatically theirs. How best to give voice and form to that interest when once it is fully aroused is a problem. The lawyers of Scotland are not a whit less liberal in their views of culture than their brethren in the South, and their legal-literary aspirations are assuredly not restricted to the current law reports. We suggest that the example of the Selden Society should be followed.

GEO. NEILSON.

MR. JUSTICE MILLER.

THE death of Mr. Justice Miller has removed from the Judicial Department of the Government of the United States a jurist of commanding ability, who has made deep and lasting impressions on jurisprudence.

His original entrance into the legal profession was something of an accident. Born in an obscure town in the state of Kentucky, he began life there as a physician. His practice extended over a considerable part of the surrounding country, and required him to make long journeys, usually on horseback, at the cost of no little fatigue and privation. For several years, in short, he led the hard life of a country physician in large practice, in a sparsely settled country, which, as may well be supposed, leaves little time for anything outside of his profession.

It happened, however, that Dr. Miller had an office in common with a lawyer. He was tempted to open the lawyer's books. He became interested in them, and then formed the resolution to abandon physic for the law. He pursued his law studies secretly, lest his practice should suffer if it should be known he was thus engaged. It was truly an invincible determination that enabled Dr. Miller to qualify himself for the bar, under circumstances which would have completely discouraged almost any other man. The writer has heard him say that, after he came to the bar, some of his old patients continued to go to him for medical aid, from which it may be inferred, as was in fact the case, that he had considerable reputation as a physician.

A short time after he began to practise law, he found

himself embarked heart and soul in the movement for the abolition of slavery in Kentucky. But the pro-slavery party carried the day, and slavery remained for a time undisturbed. In consequence of this defeat of the emancipation party, Mr. Miller left the state of his birth and settled in Keokuk, Iowa, alleging as a reason for the change, that he was unwilling to bring up his children under the influence of slavery.

These facts give us some insight into the mind and character of the man. They show a strong resolute intellect, tempered with magnanimity and human sympathy, and swayed by earnest convictions and a love of justice. These were the qualities from which proceeded the power and influence exerted by their possessor, and we need look no further for their sources.

Mr. Miller received his appointment as a Justice of the Supreme Court of the United States from President Lincoln in 1862, and what has been said of President Adams with reference to the appointment of Chief Justice Marshall, that if he had done nothing else worthy of remembrance, his appointment of John Marshall as Chief Justice would alone entitle him to the lasting gratitude of his country, may be said of Mr. Lincoln in connection with the appointment of Miller. As may be assumed from his appointment to the Supreme Bench (which was, by the way, the first and only public office he ever filled), Miller had risen to great prominence as a lawyer after his removal from Kentucky to Iowa. And of this there is the best evidence. His reputation, and the public confidence in him were so great, that it was the general sense of the bar of the North-West that he should receive the appointment.

The appointment was a particularly opportune one, because the great civil war, then raging, and the amendments of the Constitution, soon to be made, were to give origin to questions whose solution would require judges of breadth and originality of thought, and not too dependent on precedent.

There was a happy union of originality and conservatism

in Miller's mind which much enhanced his value as a judge. This combination of the two qualities is strikingly exemplified in the *Slaughter House* cases, 16 Wall. 57, and the case of *Murdock* v. *Memphis*, 20 Wall. 614. His judgments in these cases (both of which might well have been decided in conformity with the views of the minority of the Court without exciting surprise), show a scrupulous repugnance to extending the federal constitution into what had been theretofore considered the domain of state powers, except upon the most explicit grounds. In each of these cases statutory language, which admitted of a wider meaning than the Court gave it, was restricted in its scope by this, so to say, conservative policy. That such a policy, as a general proposition, tends to strengthen the bonds of the Union may be asserted without presuming to determine whether it was rightly applied by the majority of the Court or not in the cases cited. *Non nostrum tantas componere lites.*

To give the English reader a better idea of the magnitude of the work accomplished by the subject of our sketch, it may be proper to advert briefly to the character of the questions that come before the Supreme Court. In the first place, this Court is the tribunal that determines controversies between states and affecting ambassadors, other public ministers, and consuls, and settles the interpretation of the Constitution, laws, and treaties of the United States when a case turns on any of them. This part of its jurisdiction is the most difficult and delicate, and calls for the highest order of intellect. Indeed, it requires not only great judicial ability, but even statesmanship, because cases sometimes come before the Court which have a decidedly political complexion. Secondly, under its appellate jurisdiction in controversies between citizens of different states, the Court is called upon to administer the laws of every state in the Union, and to this Congress has added an appellate jurisdiction as to suits decided in the courts of the *territories*. There are considerable differences, more or less, in the laws of the several states —those of Louisiana in particular, where the Code Napoleon,

with some modifications, is in force, being derived directly from the Civil Law. The Court has, also, to consider frequently the laws of Spain, France, and Mexico whenever a question arises upon a grant from any of those countries of land lying within territory ceded by it to the United States. Moreover, in passing judgment upon questions of general jurisprudence (such as belong to commercial law or equity, for example), the Supreme Court does not consider itself bound to follow the law of the state from which the question comes, but follows its own conclusions, and in doing so has contributed largely to jurisprudence. Again, in administering the laws of the United States, the Court has to decide questions arising under the intricate system of land laws, and many difficult questions arising under the patent laws, in disposing of which latter the most varied knowledge, embracing mechanics, and some other departments of science, is necessary. To these may be added a limited appellate criminal jurisdiction. Finally, questions growing out of conflicts of laws, and requiring the application of the law of nations, are also frequently occurring in the Court, and, when sitting as an appellate tribunal in prize cases, as it frequently did in Miller's time, it has decided questions of the very first importance.

When it is considered, then, that Miller performed these diversified and difficult duties in such a way as to earn a place for his name high up on the scroll that bears the names of Marshall and Story, and that he entered on this great work with perhaps a somewhat inadequate preparation, it must be conceded that his natural endowments were very exceptional.

In the course of his service of twenty-eight years on the bench, the deceased judge delivered many noteworthy opinions. From the very beginning, he showed both vigour and lucidity. During the second term after his appointment, he filed a dissenting opinion, in the case of *Gelpeke* v. *The City of Dubuque*, 1 Wall. 175, of remarkable power, and about two years after that came his decision in *Lovejoy* v.

Murray, 3 Wall. 1, which attracted considerable attention in Westminster Hall in the case of *Brinsmead* v. *Harrison*, Law Rep. 7 C.P. 547, where it was cited in support of the position that a judgment against one joint-trespasser, without satisfaction, is no bar to an action against another. "The whole theory of the opposite view," said Mr. Justice Miller, "is based upon technical, artificial, and unsatisfactory reasoning."

It would require more space than is at our disposal to notice all the interesting opinions from Judge Miller's pen, but some of them, not already referred to, may be briefly mentioned, in order to give an idea of the character of his work.

It was one of his conspicuous traits that he upheld with equal firmness the just rights of the Government and the citizen. His judicial dicta on the rights of the state and federal governments in enforcing the collection of taxes have placed the law on that subject upon an extremely satisfactory foundation, and are a contribution to jurisprudence of great practical value.

His opinion, in the case of *in re Neagle*, 135 U.S. 1, affirming the judgment of the lower Court discharging, from the custody of the authorities of the state of California, the deputy United States marshal who prevented a national disgrace by slaying the man who, but for that timely act, would have compassed the death of a distinguished federal magistrate (Mr. Justice Field), contains a noble vindication of the inherent right of the executive department of the Government of the United States to protect the federal judges, while in the performance of their official duties, independent of legislative authority. His opinion, in this case, has the elevated tone of the judgment of Mr. Justice Grier in the celebrated actions known as "The Prize cases." It vindicates, completely, the patriotic and determined action of Attorney-General Miller in ordering the marshal for the district of California to protect the person of Mr. Justice Field while in the discharge of his duties, and

declares that the Government of the United States, like an individual, has, through its executive, the full right of self-protection against violence without any legislative sanction, and is, within the circle of its powers, on as firm a foundation as any Government. "The Prize cases," just alluded to, vindicated the authority of the executive to repel the onset of open war by exercising all the powers of a belligerent and without waiting for a formal declaration of war by Congress, and the case of *in re Neagle* lays down that the executive has all the authority essential for the protection of the Government against violence in time of peace, without assistance from the legislative department.

His judgments, in the cases of *Johnson* v. *Towsley*, 13 Wall. 72 and *United States* v. *Throckmorton*, 98 U.S. 61, have contributed no little to the stability of land titles resting on patents of the United States, by giving the conclusiveness of judgments and decrees, in some respects, to the official proceedings that precede the issuing of the patent. And in *Gaines* v. *Thompson*, 7 Wall. 347, he shows, with irresistible logic, that the principle on which it had been determined that the Courts could not control the discretion of executive officers, by means of the writ of mandamus, is applicable, to its full extent, to the writ of injunction.

In the case of *United States* v. *Kagama*, 118 U.S. 375 there was taken a very advanced step in recognising the validity of an Act of Congress making Indians in the tribal condition amenable to trial and punishment in the United States Courts for murder and other crimes committed by Indians against Indians, as well as others. Before this legislation, the United States had recognised the Indians as semi-independent and its only control over them was exercised by means of treaties. This case marks a great development in the law regulating the relations between the United States and the Indian tribes, and was the necessary result of their broken power and the complete ascendancy of the Government over them.

We might mention many other cases bearing on the

rights of the Government did space permit, but must content ourselves with brief references to some of the cases in which Mr. Justice Miller stood forth as the vindicator of private right against Governmental pretension.

Conspicuous among these are the "Arlington cases," as they are generally called, 106 U.S. 196. These cases involved the Government's right to the Arlington estate, on the Virginia side of the Potomac and opposite the city of Washington, where the United States had established a national cemetery, in which were buried many officers and soldiers who had died during the late civil war. This place was, up to the outbreak of the war, the seat and home of the Confederate General Robert E. Lee, and the Government claimed to have acquired title to it under a tax sale during the war. A son of General Lee brought an action some years after the war, to recover possession of the property, to which action certain officers of the United States, who were in possession, were made defendants. Promptly after the declaration was filed the Attorney-General of the United States intervened and assumed the defence of the action, claiming that, as the defendants were acting under the orders of the Government of the United States, their possession was the possession of the Government, and that the suit was virtually against the United States, and so beyond the jurisdiction of the Court. Lee prevailed in the Court below, and thereupon writs of error were sued out by the defendants proper, and the United States as well. The case was twice argued with great ability and most carefully considered. The judgment of the Court affirming the judgment below, and prepared by Mr. Justice Miller, is remarkable for strength and research and contains some noble enunciations which deserve to be quoted.

After refuting the argument that because the Government chose to put a man, without authority of law, in possession of land belonging to a citizen, the latter was wholly without remedy in the Courts, he used the following language, which deserves to be written in letters of gold :—

"No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law, and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives. Courts of justice are established, not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the Government; and the docket of this Court is crowded with controversies of the latter class. Shall it be said, in the face of all this, and of the acknowledged right of the judiciary to decide, in proper cases, statutes which have been passed by both branches of Congress and approved by the President to be unconstitutional, that the Courts cannot give a remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the Government without lawful authority, without process of law, and without compensation, because the President has ordered it, and his officers are in possession? If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other Government which has a just claim to well-regulated liberty, and the protection of personal rights."

In the case of *Kilbourn* v. *Thompson*, 103 U.S. 168, we have another striking instance of the boldness and ability with which Mr. Justice Miller defended the rights of the citizen against usurping power. That case was an action by an individual who had been imprisoned by order of the House of Representatives of the Congress of the United States, for the alleged contempt of refusing to answer certain questions put to him by a Special Committee of the House appointed by its order to make certain inquiries and investigations for the information of the House. The Sergeant-at-Arms, who made the arrest, justified under the order of the House and the Speaker's warrant, and the members of the Committee, who were also defendants, filed substantially the same plea. The Speaker himself had died before process was served on him.

The Court held that the questions, the not answering of which was the alleged contempt, related entirely to the private affairs of the plaintiff, and that it was beyond the

powers of the House to prosecute the inquiry they involved, and, consequently, that the demurrer to the plea of justification of the Sergeant-at-Arms should have been sustained by the Court below. But the judgment of that Court sustaining the plea of justification of the members of the Committee was to that extent affirmed, on the ground that the report made by the Committee to the House, on which the order of the House for the arrest was based, and which was the only connection they had with the arrest, was protected by their constitutional privilege as members of the House. The case went back for further proceedings, and resulted in a verdict for a large amount against Thompson, the Sergeant-at-Arms.

No one can read the opinion of Mr. Justice Miller in this case without admiring its strong masculine force, and without feeling that it, like the *Arlington* cases, is worthy to stand side by side with the greatest judgments that have been delivered in England in similar cases—for example, *Bushell's* case, *Entick* v. *Carrington*, *Sutton* v. *Johnstone*, and *Stockdale* v. *Hansard*.

His judgment in *Loan Association* v. *Topeka*, 20 Wall. 655, in which he lays down with great power the principle that no matter in how comprehensive language the taxing power may be granted, there inheres in the power itself the limitation that it shall only be exercised for objects of a public nature, and that its employment for a purpose purely private is an unjustifiable invasion of the rights of the citizen, contains the following language, which breathes the true spirit of Anglo-Saxon liberty :—

"It must be conceded that there are such rights in every free Government beyond the control of the state. A Government which recognised no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism. It may well be doubted if a man is to hold

all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many."

To the same class of cases belong his judgments in *ex parte Lange*, 18 Wall. 165; *Kring* v. *Missouri*, 107 U.S., 221, and *ex parte Bain*, 121 U.S. 1, to which we can only refer as containing valuable discussions involving some of the fundamental principles of human liberty, which may be read with as much profit in Great Britain as in America.

It may, in conclusion, be said with truth that every department of jurisprudence felt the touch of Mr. Justice Miller, and that he touched nothing on which he did not leave the impress of his original mind. He will be long remembered as one of the greatest judges who have adorned the Supreme Court of the United States.

WILLIAM A. MAURY.

THE RECOGNITION OF FOREIGN LAWS IN THE CASE OF CONTRACTS.

THE remarkable extension of the sphere of contract, which has followed upon the growth of modern commerce, has mainly contributed to the recent development of the doctrine as to the recognition and application of foreign laws. In the most recent English case of *In re Missouri Steamship Co.*, 1889, 42 Ch. Div. 321, Mr. Justice Chitty in the Court below, and the Lord Chancellor in the Court of Appeal, held, that the only question was—"What was the law which the parties contemplated as being the law governing this contract?" It is evident from the authorities there quoted and commented on that this is no new rule. It was well established in *Lloyd* v. *Guibert*, L.R. 1 Q.B. 115, a case that was followed in *The Gaetano and Maria*, 7 P.D. 137, by the Court of Appeal. It is familiar to Continental writers under the name of "autonomy." It has been recognised in the case of wills and marriage contracts, where *Mitchell & Baxter* v. *Davies*, 1875, 3 R. 208, and *Bradford* v. *Young*, 1884, 26 Ch. Div. 656, may be taken as types of a long series of decisions. The fact, however, of questions on this topic being still occasionally litigated, proves either that the rule is imperfectly appreciated by the legal profession or that there are practical difficulties in the way of its application.

Two obvious exceptions, which are recognised in every system of municipal law, as well as in every branch of that law and must therefore be recognised in the department of private international law so-called, are where the foreign law

is contrary to morality or public policy. Our Courts refuse to recognise immoral foreign laws for the very same reason as they refuse to recognise immoral native customs, or immoral contracts by natives. Further, it may be assumed that our Courts would on the ground of public policy refuse to recognise a foreign law which had been merely arbitrarily or capriciously adopted by natives in this country to regulate their contracts.

It may be gathered from the judgments in the *Missouri Co.'s* case above quoted that the question as to what law regulates a contract is one of fact and not of law. If, therefore, a contract is made in a particular place called by a rather narrow usage, the *locus contractus*, there is only a presumption of fact that the parties, in the absence of evidence to the contrary intended the law of this place to apply. It is as natural that persons contracting in a foreign market should adopt the law prevailing there, as that they should speak the language of the place, or employ the money weights and measures there in use.

The rule that contracts about land are governed by the *lex rei sitæ* as by a "real statute" may be explained either in accordance with the above general rule or with the exception of public policy. On the one hand, it is reasonable to expect that parties contracting with reference to foreign land, should keep in view the foreign system of land tenure, the foreign forms of conveyance, and in general the foreign laws relating to the subject of their contract. The exceptions, where this cannot be done, must be few. On the other hand, if a State were in general to recognise foreign laws as to its land, the confusion and inconvenience to natives and foreigners alike would be extreme, and we therefore on just grounds of public policy in this case refuse to recognise such laws.

Corporeal moveables are not generally regarded in the same way as immoveable property, and there is not an invariable consensus of opinion among international authorities as to how they should be dealt with. If the subject be a corporeal moveable, situated in Scotland, the law

of Scotland, at least as to forms of conveyance, has been held to apply, to the exclusion of foreign law. This question was anxiously debated and settled in *Connal* v. *Loder*, 17th July, 1868, 6 Macph. 1095, where the Court held that the iron in dispute being locally situated in Scotland, the question whether the right to the iron was carried by indorsation of the warrant, or by indorsation and intimation, fell to be determined by the law of Scotland. Mr. Foote in his work on Private International Law (2nd edit., pp. 247-251) deduces the same law from the English decisions, and Story lays down the same rule (§ 392).(*a*) The case of *Coote* v. *Jecks*, L.R. 13 Eq. 597, followed in Ireland by *Brookes* v. *Harrison*, 6 L.R. Ir. 85 and 332, may appear to conflict with this view. In *Coote's* case the parties were English, and the transaction (a mortgage by bill of sale), took place in England, but the subject of the security was the lease of a property and certain chattels in Scotland. The security was bad by the law of Scotland, and it was also bad under the Bills of Sale Act, and yet the Vice-Chancellor (Bacon) preferred the mortgagee to the trustees of the bankrupt debtor, on the ground that the Bills of Sale Act did not apply to property in Scotland. This decision was no doubt in accordance with English Equity and Bankruptcy rules, but if the bankruptcy had been Scottish, the Scottish Court would undoubtedly have preferred their own trustee, who is in the position of a creditor holding a completed security.

The cases just considered have led us one or two steps beyond the simple contract. In its simplest form a contract is a legal relation between two individuals, though, even there, a further relation to the general community is always implied. But a third party may be, or may become, *directly* interested in a contract. A may grant an obligation to B, and B may transfer this to C, and hence we have rights in competition, and such doctrines as warrandice, novation, and

(*a*) Compare the *dicta* of Lord Blackburn in *M'Bain* v. *Wallace & Co.*, L.R. 6 App. Ca. at 609. These push the doctrine to the utmost limit.

delegation. A complication is presented if the parties are subject to different territorial laws, or if the transactions take place in different countries. There are two modes of solving this new problem. It may be assumed by the Court, either that A has promised beforehand to recognise *any* mode of transfer that B may find it convenient to adopt, or that C ought to have informed himself as to the form that prevailed at A's domicile, and ought to have conformed thereto. Much may be said for both of these assumptions, and the decisions generally resolve themselves into a balancing of the conveniences or equities of the particular case submitted. The case of the creditor which was considered in *Coote* v. *Jecks* presents a further difficulty. A and B have made a contract; C, a creditor attaches the obligation prestable by A, according to the forms recognised by the Courts of A's domicile. But he may find that D has entered into a prior contract with B for the transfer of the obligation to himself. C's judicial transfer then comes into collision with D's extra-judicial transfer, which is to prevail? In times of greater international jealousy, the solution was quickly arrived at (Story, § 395). In the interests of the public, and for the general security of rights, it was thought inexpedient to allow a foreign transfer, latent it might be, to compete successfully with completed diligence in the native court. The dignity of the Court and jealousy of foreigners combined to produce this result. But now there is just a danger of excessive politeness, and a feeling of what is called "comity," leading us to an opposite extreme. It may, perhaps, be suggested that the solution here may depend largely on the circumstances of the special case. If the debt formed a fund of credit on which B traded, and by means of which he induced C and his other creditors to intrust him with funds, then there would be an injustice in allowing a foreigner to carry off this asset by a latent security. It would have been easy for D to ascertain the law regulating the debt, and conform to the mode of transfer required by it. By not doing so, he has either been accessory to a fraud, or has enabled B to defraud his other creditors,

and therefore D ought to suffer. On the other hand, C, the creditor doing diligence, or the general creditors, may not have so trusted to this asset, and may be merely attempting to secure payment of their debts. In this case there is little hardship in allowing D the foreigner, who has already completed a security by his own law to carry off the asset. But such a distinction must be extremely difficult of application in practice, even if it were not open to the objection of demanding a judicial inquiry in every case and so encouraging speculative litigation.

Keeping these general principles in view, we may resume the examination of the decisions. We have seen that both on the ground of public policy and on the principle of implied or express consent, it has been held that—(1) land; and (2) corporeal moveables are subject to the *lex rei sitæ*. This doctrine was applied to share certificates in the very recent cases of *Williams* v. *Colonial Bank*, and *Williams* v. *London Chartered Bank of Australia*, 38 Ch. Div. 388, affirmed (H.L.) 15 App. Cas. 267. Lindley, L.J., speaking of the railway share certificates in that case, said:—". . . the certificates are chattels, and when we are considering who is entitled to a chattel bought or sold or pledged in England, it is English law and not American law that is to govern the case." But the parties in this particular transaction were all domiciled in England and presumably looked to English law to determine their rights, and Lord Watson therefore drew the very sound distinction that the American law applied between the holder of the stock and the company. He said (p. 276), "That the interest in the railway company's stock, which possession of these certificates confers upon a holder who has lawfully acquired them, must depend upon the law of the company's domicile, seems clear enough, and has not been disputed by the respondents. But the parties to the various transactions by means of which the certificates passed from the possession of the respondents into the hands of the appellants, are all domiciled in England; and it is in my opinion equally clear that the validity of the contracts

of pledge between Blakeway and the appellants, and the right of the latter to retain and use the documents as their own, must be governed by the rules of English law. In the application of these rules the appellants are of course entitled to the benefit of any privilege, which the law of America attaches to possession of these documents, as conferring right or title to the property of the shares." *Dicta* in previous judgments which appear to support the position that the negotiability of a foreign bond depends on the law of the place where the original contract is made, must be read in the light of this distinction. (*Cf. Crouch* v. *Crédit Foncier of England*, L.R. 8 Q.B. at p. 384; and *Goodwin* v. *Roberts*, 1 App. Cas. at p. 495.)

But it is a comparatively recent idea so to identify a debt and a certificate of debt, that the debt shall be held to be situated wherever the document of debt is. In its first conception a stock certificate is merely evidence; and the debt itself has a domicile apart from its evidence, just as a man may be domiciled in one country and temporarily resident in another. The *locus* of a debt is generally taken to be the place where it is payable. It is the law of this place which is generally held to apply to debts. Thus Westlake (3rd edition), § 152, says :—"The *forum* for the recovery of a debt presents much analogy with the *situs* of a corporeal moveable, and notice to the debtor of the assignment of a debt, presents much analogy with the delivery of a corporeal moveable to the transferee of it;" and again, "when an obligation is assignable by its proper law, *lex loci contractus* or *solutionis* or *lex loci delicti commissi*, the assignee may sue on it in England" (§ 236). Wharton, after a careful examination of all the authorities, native and foreign, concludes thus :—"We may in fine hold it to be the settled law of our Courts, both federal and state, that as against attaching creditors, an extra-territorial assignment has no effect unless valid by the *lex situs*, even though the assignment was valid by the law of the state of the assignor's domicile, in which state it was made" (2nd edition, § 353, *cf.* § 374). Further on he

says, "Assignments on books of corporations are to be regulated by the laws of the state, by which such corporations are created" (§ 376). These laws will in general be at once the *lex domicilii* of the company, and the *lex fori*. With respect to the question whether the *locus* of a debt is the domicile of the debtor or that of the creditor, it may be suggested that the true answer depends on where, by statute, custom, or convention, the debt is payable (*cf.* Story, 399; and Bar, ii. 83).

Bills of exchange present the most common example of contracts to which other contracts come to be added. The difficulty of the questions submitted is shown by the frequency with which questions practically identical are presented to the Courts, and by the diversity of the views enunciated by judges and text writers. The results of the latest English decisions have been embodied in the 72nd section of the Bills of Exchange Act, 1882, where an attempt has been made to combine the advantages of fixed rules with the elasticity of private contract. Want of space precludes anything like an examination of the provisions of the Act in this connection, but it may be observed that the general application of the rule *locus regit actum* to matters of form, and the making of the due date depend on the *lex loci solutionis* can hardly ever work hardship, especially as the Act recognises bills issued abroad as valid between persons who become parties to them in the United Kingdom if the bills conform to British law. In practice the result will be the same as that laid down in some foreign codes, that a bill will be valid if it conforms either to the law of the place of issue or of the place of payment. The Act further embodies the decision in *Robertson* v. *Burdekin*, 14th Nov., 1843, 6 D. 17, where it was held that a bill of exchange payable in Scotland was transferable by indorsement in England, though it was not so transferable by the law of England. This case followed the English one of *De la Chaumette* v. *Bank of England*, where it was held that the right of transferring a Bank of England note and consequently the liability of the bank, was to be determined by

the law of England, and not by the law of France where the transfer was made. To the substance of the contract the *lex loci contractus* is said to apply. The rule is laid down that the contract of an indorser for example is regulated by the law of the place where such contract is made, but this is subject to the proviso in sub-section 3 that the duties of the holder as to presentment, notice of dishonour, and some other matters are to be regulated by the law of the place where the act is done, again on the principle of *locus regit actum*. We may illustrate this enactment by the decision in *Hirschfeld* v. *Smith*, L.R. 1 C.P. 340, which the Act was intended to embody. Erle, C.J., in delivering the judgment of the Court, said: "The indorser of a bill accepted payable in France promises to pay in the event of dishonour in France, and notice thereof. By his contract he must be taken to know the law of France relating to dishonour of bills, and notice of dishonour is a portion of that law. Then although his contract is regulated by the law of England relating to indorsement, and although he may not be liable unless reasonable notice of dishonour has been sent to him, yet the notice of dishonour according to the law of France, may be, and we think ought to be, deemed reasonable notice according to the law of England, and be sufficient in England to entitle the plaintiff to recover according to that law." In other words, the Court, under the guise of applying the *lex loci contractus* in the narrow sense, applied the *lex loci solutionis*. The word "law" is used here in two different senses. What the Chief Justice meant, it may be pointed out, with all deference to such an authority, is that according to English *notions of justice*, the *customs* prevailing in France as to notice of dishonour should be recognised and applied. That the decision gave rise to difficulties is evident from the arguments in the subsequent case of *Horne* v. *Rouquette*, 3 Q.B. Div. 514—the last English case on this precise point which appears to be reported. Brett, L.J., in giving judgment said (p. 520): "Every party to a bill knows, that by the law merchant it may be indorsed

abroad. He by the law merchant undertakes some liability in respect of such indorsement abroad. . . . By the law of England applied to the English contract, made between the plaintiff and the defendant, the defendant is liable to the plaintiff." We must of course read those observations in connection with the facts before the Court. Both in *Hirschfeld's* and in *Horne's* case the indorser knew that the bill might be indorsed abroad, and in the one case the French law, and in the other the Spanish law, was in the view of the indorser when he entered into the contract. In this view both of these cases are resolved into cases of tacit acquiescence, or implied contract. The law is still said to be that the indorsement is interpreted by the *lex loci contractus*—the law of the place of indorsement—but the Courts by a legal fiction and the Act, by express enactment, adopt the *lex loci solutionis* as profoundly affecting the obligation of the indorser. By the same fiction the law of every civilised country may become *pro hac vice* the law of England, and the final solution of the difficulty will be the assimilation of exchange laws by treaty and legislation. Such a universal law is demanded for the same reason as merchants demand a common coinage and uniform weights and measures.

Among recent foreign authorities reference may be made to Laurent (vii. p. 294; viii. pp. 192-200), and von Bar (2nd edition, ii. 79-82, *cf.* p. 301 of Mr. Gillespie's translation of the 1st edition). These writers differ in theory, but it will be found on closer examination that the practical result, in many cases, is not different. Laurent's solution depends ultimately on the interpretation of the law of the Court in which the competition takes place, which must generally be that of the debtor's domicile. If certain formalities (such as intimation) are required by that law, he denominates this a *real statute*,—that is, an imperative law binding on the Court in the interests of the public (*cf.* vol. ii. pp. 271, 337. *et seq.*)—and in a competition between a creditor holding an assignation, or an arresting creditor, who has conformed to the rules of that law, and one who holds an informal transfer,

valid by a foreign law, he would prefer the former. But if the law allows transfer by mere consent, the transfer may take place in a country which demands stringent formalities without their observance, on the principle of implied adoption, particularly if the parties are themselves subject to the less stringent law. In like manner it is open to the parties expressly or impliedly to adopt their own native law, though it should be more strict. But surely it is hard to presume that parties have adopted a law which may defeat their contract. Bar holds that the transference of an obligation is in general subject to the *lex domicilii* of the debtor. This is of course a special application of his theory as to the *locus contractus*. But he holds further that the formalities of transfer may be regulated by the law of the place where the transfer takes place, on the principle *locus regit actum*. In a question between the creditor and his assignee, the debtor is bound to pay an assignee who holds an assignation valid according to either the *lex domicilii debitoris*, or the *lex loci translationis*. If the debtor has *bonâ fide* paid such an one, he is discharged. But if another assignation complying with his own local law is intimated to him, or if an arrestment is laid in his hands, he is interpelled from payment. In this case Bar prefers the arresting creditor, or the assignee, who has adopted the forms of the *lex domicilii debitoris*.

Bar, in his last edition, refers to the passages already quoted from Story, Westlake and Wharton, and comments on the confusion in English and American decisions on this subject. This may simply be due to the fact, that mercantile cases are more numerous in these countries; for diversity of opinion is not confined to English and American jurists. But the state of our authorities certainly adds to the regret which must be felt, that the latest case presented to the Scottish Court does not appear to have received the consideration which the importance of the subject demanded. The question before us was raised in a very clear form in *The Scottish Provident Institution* v. *Cohen & Co.*, 20th Nov.,

1888, 16 Rettie, 112. The facts were the following: Walker a domiciled Scotsman delivered to Cohen & Co., domiciled in England, a policy of insurance of the Scottish Provident Institution in security of a loan of £200. The transaction took place in England. Walker died insolvent, and the policy was claimed by the trustee on his sequestrated estate and also by Cohen & Co., who had previously given to the Insurance Co. intimation of the delivery. The Court (First Division) preferred Cohen & Co. The argument was complicated apparently by an untenable objection as to preferences in bankruptcy, and the only authority referred to, out of many that might have been quoted, is Story. The following points may be noted:—(1.) The judgment apparently overturns, without even an attempt to distinguish it, the prior case of *Strachan* v. *M'Dougle*, 13 S. 954. (2.) When the Lord President says, that according to English law, "the intimation put the holders of the contents of the policy—viz., the insurance company, in the same position as if a Scottish deed of assignation had been intimated on the same date," it must be observed with respectful deference that this is simply begging the question. Bar (p. 83) declares that the assignation in such a case as that of Cohen's is *res inter alios acta* and has no effect on the legal arrestment. That the insurance company was willing to recognise Cohen's right at all, may prove that that right was sufficiently complete; but, if that were held, they must be prepared to pay also to Scotsmen who (without any formal written assignation) receive delivery of policies and intimate such delivery, and the question then ceases to be one of international law. It may, however, be suggested that the Court have treated the law as to the intimation of assignations in the same way as the English Courts did that as to notice of dishonour in *Hirschfeld's* and *Horne's* cases. (3.) When Lord M'Laren speaks of the right of credit (in the policy) following the domicile of the creditor, wherever he goes, his lordship appears to forget that mere change of residence does not change domicile and that in the case in question, the creditor was

always (*ex hypothesi*) a domiciled Scot. Besides, as Westlake shows (pp. 164-168), the tendency of foreign authorities, and also of later English authorities, has been to restrict the application of the maxim, *Mobilia sequuntur personam* to cases of universal assignment. Bar (p. 83) is very emphatic on this point.(*a*) (4.) When Lord M'Laren says, "We should certainly not recognise an assignment to an English policy by way of deposit made in Scotland," we instinctively feel that the statement is far too sweeping. This view would result in a Scottish Court giving a different decision from an English one in the same case, for we could never expect an English Court to impose strict rules of Scots law upon an English transaction, perhaps entered into between domiciled Englishmen. The very passages quoted from Lord Kames by Story, which were before his lordship, prove that Lord Kames held that the foreign creditor had a choice of forms of assignment—either according to the law of the domicile of the debtor, or according to that of his own domicile. In *Cohen's* case if the assignation had been in some form valid in Scotland, but not recognised in England, we may assume that no question would ever have been raised. No such rigid application of the *lex loci contractus*, as Lord M'Laren seems disposed to make, is countenanced by the authorities.

In conclusion it may be permissible to suggest that a solution of this problem as to competing assignations may be found in well-recognised principles of our municipal law. Freedom of contract allows the parties to an original contract to choose for themselves within certain limits, well defined in the public interest, the law which shall apply to their contract. There is no reason why this privilege should be denied to the parties to a secondary contract of sale or assignation *in questions between themselves*. But there is still less reason why by their contract they should interfere with the rights or the privileges of third

(*a*) Lord Watson's observations in *Williams* v. *Colonial Bank*, quoted on p. 35, may also be open to criticism on this point. Compare Laurent's bold defence of the principle which Bar condemns (vii. p. 238, ii. p. 319).

parties, the debtor, subsequent assignees, or arresting creditors or trustees for creditors. An assignation may be valid between the assignor and the assignee and certain parties representing them, but if the assignee trusts to the honour or the credit of his author, and either allows him an opportunity of granting a subsequent assignation, or delays until creditors have attached the debt, the Scots law does nothing to help him. A foreign assignee is in precisely the same position. It is not difficult to communicate with the debtor and make sure that the assignee is now recognised as the creditor according to the law of the original contract. If he does not adopt this plan he cannot complain that a transaction between him and the assignor does not affect third parties or the general public. Any attempt to make laws which will assist persons who are asleep as to their rights must do more injustice than such laws can prevent. And just as equity is very apt to degenerate into a system of bolstering up slipshod legal transactions for the benefit of natives, so is comity apt to be invoked as a similar institution for the benefit of foreigners.

Wm. Galbraith Miller.

CODIFICATION AND THE PARTNERSHIP ACT, 1890.

ANOTHER step towards the codification of the laws of the United Kingdom has been taken by the passing of the Act to "declare and amend the law of partnership."(a) It is not a great step, or a matter of any remarkable importance, but it will be of considerable service to the mercantile community, which, for the first time, is now offered a succinct, authoritative, and tolerably plain statement of the rules governing the rights and liabilities of partners as between the firm and those with whom it has dealings, and as between themselves. More interest, however, attaches to the Act for the indication it gives that the plans for codifying the law as a whole have not been wholly abandoned, and that it is still possible to hope that a systematic body of abstract rules such as most of the Continental States possess, or such as we ourselves have conferred upon India in many departments of the law, will, at no distant date, be substituted for what John Austin indignantly described as a "monstrous chaos, partly consisting of judiciary law, introduced bit by bit, and embedded in a measureless heap of particular decisions, and partly of legislative law stuck by patches on the judiciary law, and embedded in a measureless heap of occasional and supplemental statutes." The great law reform agitation, identified with the names of Bentham, Romilly, Brougham, and a host of other determined and devoted workers, has died away. Part of its

(a) 53 & 54 Vict. c. 39.

work, and the more important part, is done. The law has been rationalised, shorn of useless technicalities, and adapted to the changed needs of modern life, so that it is hardly recognisable as the system which Blackstone described, and —an even greater improvement—its administration has been simplified so that it is no longer a hopeless quicksand or a solemn juggle. But, nevertheless, its form remains, for the most part, almost as unsatisfactory as ever. Excellent text-books indeed have been written on every branch of the law, but good as they are, and useful as they may be as guides to its sources, they are unauthoritative, and, being of necessity encumbered with arguments to support the statements and propositions enunciated, they are terribly diffuse. Hardly any one now-a-days expects or desires to see an attempt to codify the law of England *en bloc*. The intrinsic difficulties of the undertaking are too well recognised, and, besides those involved in the preparation of the code itself, the existing conditions of Parliamentary legislation preclude the possibility of so gigantic an undertaking. The less ambitious plan of selecting branches of the law which are sufficiently self-contained to allow, and sufficiently important to invite separate codification, and dealing with these one by one was suggested many years ago, and several specimen digests of the law were prepared and discussed by a Commission appointed for the purpose, but it is only quite recently that any considerable performance has been achieved. Mr. Justice Stephen's criminal code, constructed and revised with elaborate care, remains a half-forgotten bill. The pressure of matters which attract more of the attention of the public than the definition of the criminal law, has prevented any Government from pressing it forward. But the Bills of Exchange Act of 1882 has passed into the statute book with great advantage to the community. The success of this measure in passing through the troubled waters of Parliament, where merely to encounter serious opposition would have been to court failure, was due to the happy device of its author, who confined his draft in the first instance to a

simple statement of the existing law, reserving any improvement or alteration for amendments in Committee. The same plan was adopted last session with respect to the Partnership Bill, with the satisfactory result that the bill, which was originally drafted so long ago as 1879, passed, has been at length successfully carried.(*a*)

The bill was drafted by Sir Frederick Pollock, whose well-known Digest has long been a standard work upon the law of Partnership, and it is unnecessary to say that it was an able piece of work. Some amendment of the wording and some rearrangement of the clauses have been made, and the provisions in the original draft for the introduction of limited partnerships in imitation of the partnerships *en commandite* of the French code, and for the Registration of firms, have been dropped, but substantially the Act is identical with the draft which has been so long before the public.

Perhaps the most important clause in such a codifying Act is the definition clause; it is unfortunately also the most difficult to construct. "To frame a definition of any legal term which shall be both positively and negatively accurate," says Lord Justice Lindley, "is possible only to those who, having legislative authority, can adapt the law to their definition,"(*b*) and in the case of partnership the difficulty is unusually great. It is to be regretted that it is not more resolutely grappled with in this Act. "Partnership is the relation which subsists between persons carrying on a business in common with a view of profit," is the definition given; (*c*) and this is followed by a statement that joint ownership, or the sharing of gross returns, does not constitute or create partnership, and that, while sharing of profits is *primâ facie* evidence of its existence, it does not of itself make the person sharing a partner, and particular instances of this are given which must, we suppose, be treated, as are the examples which follow the rules laid down in the Indian codes, as merely intended to

(*a*) See Appendix to Pollock's "Digest of the Law of Partnership."
(*b*) "Law of Partnership," p. 1. (*c*) Section 1.

illustrate the rule. Our complaint against this definition is that it supplies no positive test by which it can be determined whether a man is a partner or not. The question often arises, and particularly in cases where an attempt has been made by some one who is interested in the profits of a business to secure all the advantages without the liabilities of partnership, and it would have been well if an authoritative statement could have been furnished of what the real issue for the Court or jury in such a case is, and of what may be relied on as a working guide by business men who are asked to give credit where such an arrangement exists. The law has hitherto been, apparently, that where there is no express agreement for a partnership, and when the person sought to be charged as a partner has not "held himself out" as such, he is only liable if he has constituted the ostensible managers of the business,—the persons who it is suggested are his partners,—agents for him,(*a*) and this test is included in the definition adopted by Sir Frederick Pollock himself in his Digest.(*b*) It is no doubt vague and difficult of application, but it is at least something positive and comprehensible.

The Act, for the most part, makes no change in the existing law, and it provides that existing rules shall continue in force so far as they are not inconsistent with its provisions,(*c*) but in one particular it effects an important alteration. Hitherto a creditor who has recovered judgment against a partner for his separate debt has been allowed, and indeed obliged, for he had no other remedy, to seize, by the hands of the Sheriff, the goods of the firm, and sell the interest of his debtor in them, leaving the purchaser to settle his rights as against the other partners as best he could.(*d*) This clumsy method of execution, which was disadvantageous

(*a*) *Kendall* v. *Hamilton*, 4 App. Cases, 504, Lindley, p. 34.

(*b*) "Partnership is the relation which subsists between persons who have agreed to share the profits of a business carried on by all *or any* of them on *behalf of all of them*."

(*c*) Section 46.

(*d*) Lindley, p. 356.

to both the indebted partner and his creditor, for the share sold under such circumstances could realise but little of its true value, and which was often disastrous to the business of the firm, has long called for improvement. More than a century ago Lord Mansfield tried to introduce a better remedy but without success,(*a*) and it has remained a standing danger to partnership businesses till now. The new Act provides that henceforth no writ of execution shall issue against the firm property for the private debt of a partner, but instead the Court may make a charging order upon the partner's share in the business, and this charge the other partners may redeem, or, if it be sold, may buy in.(*b*)

Some amount of obscurity has, unfortunately, been allowed here and there to rest upon the meaning and effect of the Act, even where a mere consideration of the alterations in the draft must have suggested the danger. Thus, the draft provided that if a partner assigns his share, the assignment shall work a dissolution where the partnership is at will, or shall be sufficient to enable the Court to declare a dissolution where it is for a fixed term,(*c*) and this is in accordance with the old law. Both clauses are, however, left out of the new Act, but it would seem that, in as much as they are not inconsistent with its provisions, they express what is the law now as it was before the Act. Notwithstanding some defects of this kind, we are convinced that the Act will prove a real boon to commercial men. A perusal of its provisions will not enable an untrained mind to form a competent opinion upon the matters it deals with, nor will its presence on the statute book banish "Lindley on Partnership" from a lawyer's library. The simplification of the law, while the questions it has to answer remain complex, so that it can be understood and applied, without special knowledge, is a chimera. But the Act will enable a man of ordinary understanding to readily acquire an acquaintance with the

(*a*) Lindley, p. 359. See *Eddie* v. *Davidson*, 2 Dougl. 650.
(*b*) Section 23. (*c*) Draft bill, 1883, § 51 (a), (c).

general outline of the law of partnership, and, by solving many disputed questions and filling up some gaps, will enable his advisers to tell him with greater confidence and facility, what, in detail, the law on any particular matter is.

Incidentally, on reading the Act, one is struck by the enormous difficulty a real codification of the law, in the sense in which the term was used by the older writers, would entail. To express the law on a particular subject, in definite sentences, is difficult enough, if the principles which govern the Courts in its construction and application are assumed; but to express these principles themselves, also, and to accurately define every term of art employed, passes, in all probability, the wit of man. Thus, in one of the drafts of this Act, when providing that a majority of the partners shall decide all differences arising on matters within the ordinary course of the firm's business, the qualification was added that the decision must be arrived at in good faith, and must be based upon the interests of all, and not on the private interest of the majority. This qualification was properly struck out of the Act, for the Court would assume it as a thing understood, and as exactly analogous to similar assumptions necessary to be made, although unmentioned, in applying every part of the Act. It is a knowledge of such rules as these, though this is, of course, a very obvious case indeed, that forms much of the equipment of a professional lawyer, and this no Code will ever replace.(*a*)

D. M. Kerly.

(*a*) It may be pointed out in a note that the Partnership Act extends to Scotland. So far as we are aware, it makes no change on the Scots law as it has stood hitherto, though in some instances rules have been formulated which, latent in the Scots system, had become established by the more extensive practice of England. The scheme of the statute has been in most cases to associate with the English technical words their Scots equivalents; as, for example, common property, cautionary obligation, heritable estate, and cognition of the insane. In other cases, a separate or separable provision is made. English lawyers have not been able to bring themselves to accept the Scots (and Roman) idea of a firm as a separate *persona*; but it has

been preserved as a Scots institution by the 4th section of the Act. Similarly, the divergence of view in regard to the liability of partners for the obligations of the firm is very neatly set forth in the 9th section. The Scots rules relating to bankruptcy are left untouched. The 47th section seems to imply that decree of *cessio bonorum* cannot issue against a firm. This view is contrary to practice, and to a judgment of Lord Trayner when Sheriff of Forfar (*Kennedy* v. *Hackney*, 1884, 1 Sc. L. Rev. 55). See also Goudy on Bankruptcy, p. 141.

LEGAL ASPECTS OF HYPNOTISM.

NOW that mesmerism, under its new name of Hypnotism, has been divested of the charlatanry which for so long obscured the subject, and its principles are being scientifically investigated and discussed, jurisprudence may afford to pay some attention to it. Recently the public mind has been startled by accounts of strange new powers, with mysterious and unknown possibilities, and by alarming hints of crimes of an entirely new class, more obscure, more terrible, and more difficult of detection than any yet known to medical jurisprudence. And therewith comes naturally an anxiety to know how the law will deal with this novel series of problems when they are presented to it; an anxiety which the recent trial of Eyraud and Bompard in Paris, more fully commented on hereafter, has probably accentuated rather than allayed. Grave dangers there manifestly are if only the half of what is written in professedly scientific works on hypnotism be true, and perhaps the gravest danger of all is lest on the sudden occurrence of some startling phenomena in this country the sentimental outcry should produce panic legislation. As yet there has been very little direct study of hypnotism in Great Britain. The books and articles that have been written are almost entirely founded on foreign investigations, and those of our own medical men who have studied the subject have for the most part gone abroad to do so. There is therefore no difficulty at present, so far as sensational rumours or agitations are concerned, in our calmly considering what the extent and limitations of this new power

are, and in what respects it is likely to be presented as a legal problem in the near future.

Broadly stated, the elementary propositions of hypnotism are startling enough to most minds. A summary of these propositions is contained in the *projet* to a Bill presented by the Belgian Government to the Chamber of Representatives on the 14th of April, 1890, which derives considerable importance from being the unanimous expression of opinion of the *Academie Royale de Médecine*.(a) Hypnotism, according to this statement, causes a disturbance of the mental faculties, depriving the subject of free will, and rendering him a passive agent of the ideas which the operator suggests. These ideas, suggested during hypnosis, will be faithfully carried out by the subject, either during the hypnotic sleep or after waking, with all the appearances of spontaneity and deliberate intention. In profound hypnosis the whole physical organisation is at the mercy of the operator, who can excite or repress the activity of the senses, and can produce hallucinations, and, further, can so master the will as to dictate irresistibly actions the most ridiculous as well as the most criminal. These effects are greatly increased by frequent hypnotising of the same subject by the same operator.

As might be expected the phenomena of hypnotism, as described in text-books such as Binet and Feré's "*Le Magnetisme Animal*" (which treats the subject from the point of view of Charcot and the so-called school of Paris), "*Der Hypnotismus*," by Dr. Albert Moll; or Liegois' work entitled "*De la Suggestion et du Somnambulisme, dans leurs Rapports avec la Jurisprudence et la Medecine Legale*" (which represent rather what is called the school of Nancy), are much more striking and sensational than those enumerated by the Belgian Academy of Medicine; yet there is fully enough in the moderate statement put forth by the latter to justify the conclusion that an alarming prospect is opened in criminal jurisprudence, and one calling

(a) See full text of Bill, *infra*, p. 61.

for legislative interference. Naturally the report of the Belgian doctors hardly touches the point most insisted upon in the text-books—viz., the therapeutic value of hypnotism; proof of this being unnecessary to support the measure proposed by the Government. It seems, however, to be proved by almost universal testimony that in hypnotism we have a power which in skilled hands is likely to be of very high value in medicine.

Roughly classified, the chief problems, from a legal point of view, appear to be—(1.) The possible undermining of the physical and mental health of the subject by frequent hypnotisation; (2.) The possibility of inducing the subject in the hypnotic state to sign documents, enter on obligations, &c., without the exercise of free will: (3.) The likelihood of crimes, such as robbery or rape, being committed on a subject in the hypnotic state, of the actual performance of which the subject would afterwards either have no consciousness, or, if suspecting the perpetrator, would make a false statement in order to screen him; (4.) The inducing of the subject to commit crimes in a waking state at the instigation of the operator, and in circumstances allowing the operator ample time to get out of the way: (5.) The possibility of tampering with witnesses, in so far as subjects may be made to fancy they have actually seen events suggested by the operator, and to describe them in very full detail: (6.) An indirect danger of real criminals pretending to have been acting under the influence of hypnotism, of women accusing perfectly innocent persons of having hypnotised and ravished them, and of pretended hypnotism in many other ways being made an excuse for crimes or for black-mail.

Of all or nearly all these enumerated dangers there are actual illustrations in the French and German works on the subject, and in the articles scattered up and down medical and scientific reviews and magazines. Thus, with reference to class (1.) Charcot, the greatest French exponent of hypnotism, writes, in a letter to Dr. Melotti, published both in the *Progrès Médical* and in the

Provincial Medical Journal, 1887, p. 463 :—"Hypnotism is closely allied to hysteria, and may in the same manner become contagious or epidemic." Moll, in *Der Hypnotismus*, and Professor Oberstein, in *Der Hypnotismus in der Pedagogik*, agree with this view, but consider that this danger will only arise in the case of faulty methods, just as grave risk may occur from the ignorant use of valuable drugs. The possibility of the class (2.) of the cases above enumerated is too obvious to dwell on, and is only an extreme form of undue influence verging upon force or fraud. Of class (3.) there are many instances, recorded in the text-books abovementioned, and also by Du Prel in "*Das Hypnotische Verbrechen*," and by other well-known authorities; class (4.) is illustrated by well-authenticated instances of imaginary crimes suggested by the operator, and carried out in full detail by the subject, and unconsciously, or at least without power of resistance by him. The suggested action was sometimes performed weeks after the subject had wakened, in obedience to an apparently uncontrollable impulse. An attentive perusal of these cases will indicate the reality of the dangers mentioned under classes (3.), (4.), and (5.). Of course those classified under number (6.), need no special illustration; the varied forms of black-mailing being sufficiently obvious to anyone familiar with criminal jurisprudence.

The defence that the accused person committed a crime involuntarily, being hypnotised by the real criminal, was brought prominently to public notice in the trial of Eyraud and Bompard, where it was alleged that the latter was hypnotised by Eyraud, and a demand was made by her counsel that she should be hypnotised in Court. In spite of a learned address by Dr. Liegois the demand was refused, and, much as one may desire that these novel and difficult points of jurisprudence should be thoroughly debated, it is doubtful whether the Court of the Seine, as constituted on that occasion, would have made any valuable contribution to the science; the rivalry of the schools of Paris and Nancy, national prejudices, and the theatrical elements of the case,

being all strongly opposed to calm discussion. The question of whether hypnotisation in a court of justice is allowable at present is ably treated by Moll, "*Der Hypnotismus*," p. 237, *et seq.* For the purpose of obtaining evidence either from the accused or from witnesses, it is, he considers, quite inadmissible, for very few persons can, in the first instance at all events, be hypnotised against their will, and it is not to be supposed that a guilty person or a lying witness would submit to the necessary conditions. Also, according to Dr. Moll's experience, a hypnotic subject does not necessarily divulge his secrets, but often invents even subtler webs of falsehood than he would frame when awake, the evidence therefore would be utterly unreliable. In two classes of cases, however, such hypnotisation might be of distinct value —(1.) To decide whether a person were hypnotisable or not, which was the point for the decision of which Bompard's counsel asked that she should be hypnotised in Court. (2.) If it is alleged that the accused or a witness has been the instrument, or the witness, or the victim of a crime in the hypnotic state, of which, in the waking state, he has no recollection. The leading authorities assert that on re-hypnotisation there is formed what the Germans term "*Erinnerungsbrücke*" (memory bridge), by which all that happened in the previous hypnotic state, is recalled in the waking state, although it might have been forgotten. If this position can be proved, there might clearly be a strong argument for the judicial use of hypnotisation. Taking the case of a crime committed in the hypnotic state, the defence probably would be that the crime had been suggested to the accused, that he felt a subjective constraint, and that he had been often hypnotised, but does not remember this particular suggestion, and this seems clearly a relevant defence. According to Moll's summary, p. 241, which agrees with the views of Dessoir's "*Das Doppel Ich*" (Leipsig, 1890), it will then have to be decided—(1.) Whether the accused was really hypnotised; (2.) Whether a suggestion was made to him in this state; (3.) Who made the suggestion; (4.) To what degree he was

'suggestible.' In determining these points Moll concludes that re-hypnotisation would result only in a certain degree of probability, since by his experience—(1.) There may be intentional falsehood in hypnosis; (2.) The assertions may be influenced by previous suggestions; (3.) The answers to questions may be readily influenced, if not directly suggested by the questioner; (4.) Previous hypnotic suggestions may make new hypnosis very difficult. It may here be suggested that, though hypnotisation in open Court is open to many obvious objections, a judicial use of hypnotisation may be made in the way now employed with regard to other expert testimony. A medical witness does not conduct his analysis or post-mortem examination in open Court. If the defence of hypnotism is set up, reference might be made to an expert to hypnotise the accused or the witness, if need be in the presence of the judge, and to report the result, being examined and cross-examined thereon as an ordinary medical witness. Such hypnotic examination of the accused was made in the case of Bompard by Dr. Voisin, himself an authority of considerable weight on the subject; but the result was not disclosed, as Dr. Voisin sheltered himself behind the principles of French jurisprudence, which regards communications between patient and doctor as confidential. The probability of the accused simulating hypnosis was much dwelt on in the Eyraud-Bompard case, but it may be pointed out that the medical authorities on the subject assert that there are signs of hypnosis recognisable by a doctor, and impossible to feign, such as—*e.g.*, the behaviour of the eye. It is highly desirable that the doctors should arrive at more perfect accord as to what are infallible tests of simulation; but there seems little doubt that such tests exist, and can be applied.

These remarks will probably be enough to induce the reader to agree with Du Prel, that "it is high time lawyers and medical jurists should commence the study of hypnotism, because new forms of crime which will be most difficult of elucidation will soon occupy their attention."

The absolute and unqualified prohibition of hypnotism, of which some even now express themselves in favour, would be a good example of panic legislation; yet it is not at all improbable that some day we may see a society formed for the "Suppression of Hypnotism," energetic and persistent enough to force the hand of the Government. One effect of such legislation, even though it succeeded in partially obviating the first five of the classes of dangers above-mentioned, would probably be to greatly intensify the sixth. Alleged hypnotism as an excuse for crime or a means of extorting black-mail would become dangerously frequent; and the practice of the art, which no legislation could ever hope to wholly suppress, would be relegated in great measure from the scientific and law-abiding to the lawless and mischievous of the community.

It does not of course fall within my province to discuss the medical problems which hypnotism raises. Remarkable cures seem to have been effected, and otherwise successful results attained, by Charcot and Luys in Paris, by Liébault at Nancy, by Liégois, Renterghem, Van Eeden, Ladame, Voisin, and others—all of them physicians of repute. Abundant examples will be found in Binet and Fère's Manual, and in Dr. Felkin's articles in the *Edinburgh Medical Journal*, now republished in a collected form The latest testimony in this country to the use of hypnotism as an anæsthetic was given by Dr. Milne Bramwell, at Leeds, on the 28th of March last, in the presence of some sixty medical men, detailed in the *British Medical Journal*, 1890, p. 801.

The problem, then, which is likely to confront legislators and jurists will be how to minimise all the evils above classified without intensifying any one of them in so doing, and yet to preserve all the benefits likely to accrue from hypnotism as a curative agent; while the problem before the practising lawyer will be mainly how to deal with this new and strange factor of evidence in criminal cases, so as to avoid punishing the innocent without furnishing false excuses for the guilty.

XUM

The more that light is thrown and facts are brought to bear on the subject the better. It is satisfactory to think that the most recent medical inquiries show that, in actual practice, the dangers are not so great as they appear from experimenters' note-books, and even that in skilled hands hypnotism itself may be used to counteract hypnotic dangers (a useful fact to bear in mind in view of panic legislation). For example, in regard to dangers of the first class enumerated on p. 53, most recorded cases of physical or mental evil resulting from hypnotism have been due to the attempts of ignorant experimenters, and usually for purposes wholly indefensible—*e.g.*, pure curiosity, making a public show, or attempting to gain an influence for even more questionable motives. Cases of this kind have been brought to doctors experienced in hypnotism, and have been successfully treated by them, when despaired of by the ordinary medical practitioner. This is analogous to the common case of abuse of a useful remedy. Many die yearly of morphia-poisoning, but we do not on that account forbid the use of morphia to doctors. The use of hypnotism as a means of detection of crime I have already commented on. It is also possible for a skilled hypnotist to render his patient inaccessible to the hypnotic influence of any person but himself; a very valuable therapeutic agent when employed by trustworthy and experienced doctors, often used with success on the Continent, and of great use in protecting weak and sensitive persons liable easily to fall victims to criminal hypnotism.

If these propositions be established, they will tend to bring hypnotism within a class of cases which have already engaged legal and legislative attention. Such as, for instance, the regulation of the sale of poisons, where the problem has been to protect the public from a very subtle and secret crime without unduly restricting medical science. So the laws relating to vivisection protect helpless animals from wanton and unnecessary cruelty, and from reckless experiment, yet allow scope for *bonâ fide* medical research.

So crimes committed by means of explosives constituted at one time a grave danger to the community, and one which appeared almost impossible of detection, yet the recent Acts on the subject have been successful in preventing the criminal without unduly interfering with the lawful uses thereof. It may be that these Acts do not fully obviate the dangers against which they are directed, and possibly they create difficulties in other directions; yet, broadly, the policy is right, and the effects have been beneficial: and on similar lines must any useful legislation concerning hypnotism be based. The conclusion of the Medical Faculty of Belgium as given effect to in the Bill above cited was that what they term "*la vulgarisation de pratiques hypnotiques*" by public exhibitions should be absolutely forbidden. In fact, such exhibitions have now no *raison d'être;* it might have been urged in bygone times that it was right that the attention of science should in some such way be called to the phenomena of the hypnotic state; but this has now been thoroughly done, and the chief effect now is to call the attention of possible criminals to a new power, and to cause serious, and sometimes lifelong, nervous injury to a subject for the amusement of a gaping crowd, or to satisfy the vanity of an irresponsible drawing-room amateur. For the further protection of the public safety the Bill proposes that no person under the age of eighteen years shall be hypnotised at all, except by an authorised medical man. The text of this Bill, the latest, and probably the best considered effort on this question, is given in the appendix to this article.

The regulation of hypnotism as a factor in the elucidation of crime in our Law Courts, or, as the originating cause of an entirely novel series of crimes, must be left to time and experience to work out thoroughly. Meantime, however, it will be well to bear in mind the opinion of De la Tourette and others, that however easy it may be to produce the appearance of a crime as a laboratory experiment, when the dagger has a sheath and the pistol is loaded with blank cartridge, and everything is specially arranged to favour the

success of the operator's suggestion, it would be a very different thing in ordinary life, for the subject would behave in a manner so different from ordinary mortals as to insure his arrest, and the hypnotist, however ingenious, could hardly escape detection. Moreover, medical authorities seem to agree that it is very difficult (though not impossible) to implant criminal suggestions in innocent-minded persons. Binet and Féré consider that "hypnotic criminals" ought to be treated like insane criminals, and Tarde shares this opinion. See Binet and Féré, "*Le Magnetisme Animal*," p. 376, and Alcan, "*La Criminalité Comparée*," p. 142. It should be borne in mind also that the criminal hypnotist runs the risk of detection by means of what may be called "accidental hypnosis." Thus extreme pain has been said to have the effect of producing a kind of new hypnosis, making what I have previously referred to as "*Erinnerungsbrücke*" (a memory bridge), recalling all that has passed. So, too, sometimes other forms of ecstatic excitement are said to produce re-hypnotisation, especially excitement of a religious character. Fervent devotion of an emotional character has been known to produce this result, and thus sometimes the emotion attendant on the confessional in Catholic countries, has enabled the penitent to recall to memory, by some process of re-hypnotisation, events utterly forgotten in calmer moments, and thus to disclose the designs or actions of a criminal hypnotist, whose victim the penitent has been, and has also enabled the confessor, albeit often unconsciously to himself, by the employment of hypnotic suggestion to counteract these designs.

Enough has been said to show that the subject of hypnotism deserves very serious and careful attention, both from lawyers and legislators, and it is to be hoped that such will be accorded before public clamour renders it difficult to give calm and unbiassed attention to the subject.

J. W. Brodie-Innes.

[*APPENDIX.*]

[No. 153.]

LÉOPOLD II.,

ROI DES BELGES,

A tous présents et à venir, Salut,

Sur la proposition de Notre Ministre de la Justice,

NOUS AVONS ARRÊTÉ ET ARRÊTONS :

Notre Ministre de la Justice est chargé de présenter, en Notre nom, aux Chambres législatives, le projet de loi dont la teneur suit :

ARTICLE PERMIER.

Quiconque aura donné en spectacle au publie une personne hypnotisée par lui-même ou par autrui, sera puni d'un emprisonnement de quinze jours à six mois et d'une amende de vingt-six francs à mille francs.

ART. 2.

Quiconque, n'étant pas qualifié pour exercer l'art de guérir, aura hypnotisé une personne qui n'avait pas atteint l'âge de dix-huit ans accomplis ou n'était pas saine d'esprit, sera puni d'un emprisonnement de quinze jours à un an et d'une amende de vingt-six francs à mille francs, alors même que la personne hypnotisée n'aurait pas été donnée en spectacle au public.

En cas de concours avec les infractions punies par les dispositions légales concernant l'art de guérir, la peine prononcée par le présent article sera seule appliquée.

ART. 3.

Sera puni de la réclusion quiconque aura, avec une intention frauduleuse ou à dessein de nuire, fait écrire ou signer par une personne hypnotisée un acte ou une pièce énonçant

une convention, des dispositions, un engagement, une décharge ou une déclaration. La même peine sera appliquée à celui qui aura fait usage de l'acte ou de la pièce.

Donné à Laeken, le 14th avril 1890.

LÉOPOLD.

PAR LE ROI :
La Ministre de la Justice,
JULES LE JEUNE.

Current Topics.

Agreement to Refer.—The *vis inertiæ* in matters legal is an extraordinary and persistent phenomenon. It is now ninety-one years since the case of *Buchanan* v. *Muirhead* was decided. In that case a contract of copartnery contained an agreement to refer all disputes to the chairman, deputy-chairman, and secretary of the Glasgow Chamber of Commerce for the time being, or any two of them. The Court held that the agreement was not binding because the reference was, not to an individual, but to a description of persons, who were necessarily indefinite at the date of the contract. In other words there was no *delectus personæ*. The Court were probably influenced by another consideration—viz., that "such clauses would virtually create a new Court." We know it is the first duty of a good judge to protect, if not to enlarge, his own jurisdiction. Ever since the case of Buchanan, judges have been wondering, and laughing at this idea of *delectus personæ*. How, in sense and reason, is there more *delectus personæ* in referring to John Smith, who may be profoundly ignorant of the whole business, than to the future holder of an office, which perhaps implies the highest qualifications in the subject matter of the reference? As Lord Mackenzie stated in Smith's case, 28th Feb., 1843, 5 D. 749, "the reasons why such submissions should not be effectual are nowhere very well explained." As Mr. J. M. Bell says in his learned work on Arbitration:—"It has been repeatedly observed from the Bench that the grounds on which this rule rests are of an unsatisfactory character." The strong dislike of the House of Lords for this principle of *delectus personæ* was shown in Lord Hatherley's speech in *Bremner* v. *Elder*, 24th June, 1875, 2 Ret. H. of L. 136. In that case, reversing the decision of the Court of Session, the House of Lords held that a reference by parochial boards of a poor law question to the Society of Inspectors of the Poor was perfectly valid. Now, again, in *Tancred, Arrol & Co.* v. *Steel Company of Scotland*, 7th March, 1890, 15 App. 125, although the House of Lords felt itself bound by the decisions, beginning with *Buchanan* v. *Muirhead*, to hold that a clause of reference to the engineer of the Forth Bridge for the time being was invalid, yet the learned Lords very plainly

indicated their opinion of the rule in question. Lord Watson said:—"If it had been open to us to consider what was styled in argument the principle of *delectus personæ*, I should have been disposed to hold that the selection of an unknown person, whose official and professional position afforded a guarantee of his fitness to discharge the functions of arbiter was as much within the principle as the choice of a known arbiter designated by name." But then he explains the opposite has been settled by authority for a century. Lord Bramwell tried hard to understand the Scots doctrine, but gave it up in despair. "Therefore one may take it on the sort of argument which was used when none other could be found, and say, according to the Norman-French maxim, 'C'est un ancien positive ley del Corone,' independently of all reasoning upon the matter." Why then is no attempt made to alter a rule which the judicial intellect rejects, and which must have caused great hardship and expense. Those who enter into large contracts will not be inclined to indorse the observations made by Lord Herschell and Lord Morris in the Forth Bridge case—viz., that when, now-a-days, contractors put such a clause of reference into their contracts, they must be doing so in the full knowledge that, according to *Buchanan* v. *Murrhead*, these clauses are invalid, and, therefore, to hold them valid would be really doing violence to the intention of parties. That may pass in the House of Lords, but it will hardly be accepted in the commercial world. When shall we have an experiment in the codification of some chapter of Scots law?

The Chinese Immigration into Australia.—For the moment, the problem of Chinese immigration absorbs the attention of the Australian Colonies, and "blocks the way" of Imperial Federation itself. The case of *Musgrove* v. *Chung Teong Toy*—an appeal from a decision of the Supreme Court of Victoria—affords a suitable opportunity for a cursory notice of the prominent features in this portion of contemporary colonial history. Early in the present century, a stream of Chinese emigration began to flow over Singapore, Java, and other islands in the Malay archipelago. The equable climate, the undeveloped resources, and, more especially, the gold mines, of Australia, attracted the favourable notice of the Mongols, and soon a broad current of population set in towards the shores of the Australian continent. At first, and speaking generally, the advent of the Chinese seems to have caused the colonists little concern, and the earliest taxes imposed on the immigrants were intended, not so much to limit numbers, as to form a reserve fund that would prevent them from becoming chargeable to the Colonies as prisoners, paupers, or lunatics. Gradually, however, the spirit in which the Chinese Immigration Acts were administered underwent a distinct change in all parts of Australia. We may take the colony of Victoria as an example. The immigration of

Chinamen into Victoria commenced in 1853; in 1854 there were 2000 immigrants in the colony, and by the end of the year 1859, in spite of statutory taxes and residence fees, their number was estimated at 42,000. Thereupon the Colonial authorities awoke to the consciousness that there was a Chinese problem before them which would have to be solved at no distant date. Not only were the Chinese labourers underselling the colonial, but no sympathy, no interchange of ideas, of religion, or of citizenship, and no intermarriage or social communion between the two races, were possible. The Chinaman came to Australia as an alien, and he remained an alien to the last. In all the cities and principal towns in the Australian colonies there was a "Chinese Quarter;" always distinct, and often notorious. Stimulated by these considerations, the Victorian Legislature imposed, by the Act, No. 80, of 1859, a poll tax of £10 on every Chinese immigrant, landed by any vessel at any port in Victoria This measure proved successful: by 1863 the number of immigrants had decreased to 20,000, and, accordingly, the poll-tax was suspended. In 1881, however, there was a fresh alarm. The colony of Western Australia had set about importing Chinese labourers. It was felt in Victoria that such a policy could result only in the whole continent being thrown open to a Mongolian invasion, and active steps were at once taken to neutralise it, so far at least as Victoria was concerned. The Chinese Act, 1881, on the construction of which the decision in *Musgrove* v. *Chung Teong Toy* in great measure depends, was passed with that view. The effect of this statute may be described very briefly. No vessel was to be permitted to land at any port in Victoria more than one immigrant for every hundred tons of its tonnage, under a penalty—payable by the owner, master, or charterer, of £100 for each immigrant carried in excess of the foregoing limitation. And no immigrant—not being a British subject—was to be allowed to land unless and until the master of the vessel carrying him had paid a penalty of £10 to the Collector of Customs. We hope to notice in our next number the decision of the Judicial Committee in the case of *Musgrove* already referred to.

Industrial Property—The Recent International Conference at Madrid.—By one of the Articles of the "International Convention for the Protection of Industrial Property" it is provided that, "with a view to introducing improvements calculated to perfect the system of the Union," Conferences should be "successively held in one of the contracting States by delegates of the said States" (Article XIV.). The first Conference was held at Rome in April and May, 1886; it was fruitful in discussions, but practically barren of results. The second Conference was held at Madrid in April of last year, and the delegates of the contracting States then arrived at a number of draft resolutions (*projets d'arrangement*) which are even now awaiting the verdict of the Inter

national Union. These provisional resolutions relate to—(1) the suppression of false indications of the country of origin, (2) the international registration of trade-marks, (3) the endowment of the International Bureau, and (4) the application and interpretation of the Convention. In connection with these, an admirable series of articles which well deserve perusal, has been appearing in *La Propriété Industrielle* — the official organ of the International Bureau. The following points may be noted:—

(1.) *The Suppression of False Indications of the Country of Origin.*—Goods bearing false indications of origin may be seized at the instance of the Public Prosecutor or a private individual, as the internal legislation of each State may direct. This seizure may be effected either in the State in which the false indications were attached or in that into which the goods bearing such indications are introduced. If the law of any of the contracting States does not permit *seizure* on importation, a *prohibition* of importation may be recognised as a substitute. This provision was introduced at the suggestion, and to meet the case, of the United States. American law does not, it seems, authorise seizure on importation, but it gives to the owner of a trade-mark a remedy not less effectual. It allows him to deposit specimens of his trade-mark at the Custom House, and authorises the Custom House officers to seize all articles to which any imitation of that trade-mark is attached, unless accompanied by evidence of the owner's consent.

The purchaser of goods often desires no other guarantee of their quality than the name of the vendor. The delegates of the International Union therefore propose that where the country of origin differs from the place of sale, the vendor shall be permitted to put his own name and address upon the articles that he sells. But in this case there must be added to the name and address of the vendor a precise and distinct indication of the country of origin. Count Hamilton, the delegate for Sweden and Norway, suggested that the words *fabriqué à l'étranger* would suffice, but the Conference held that these were too vague, and adopted the proviso above-mentioned. The tribunals of each of the contracting States are to decide what names by reason of their generic character, fall beyond the purview of these resolutions. But vine products (*vinicoles*) are excepted from the benefit of this provision. *La Propriété Industrielle* puts the effect of this exception in a clear light by a simple illustration. The word "Champagne" impressed upon the label of a bottle of wine indicates in France the country of origin. In other countries it may merely mean wine prepared by a special process. The latter use of the term will now be prohibited.

(2.) *The International Registration of Trade-Marks.*—The outlines of this most interesting scheme may be stated as follows:—Suppose that A is the owner of a trade-mark registered at the French Bureau. If the draft resolutions arrived at by the delegates are adopted by the Inter-

national Union, A, will be able to secure registration in each of the contracting States by the following procedure. The French Bureau will, at A's instance, notify the fact that A's trade-mark is registered at Paris] to the International Bureau at Berne. Thereupon the Internationa, Bureau will enter the trade-mark on its own register, and intimate such registration to the Trade-Mark Department in each of the States of the Union. At any time within a year after (the receipt of?) such intimation, the Trade-Mark Department in any of the contracting States may give notice to the International Bureau that under the provisions of its municipal law, A's trade-mark is not registrable. The said notice will be transmitted by the International Bureau, without delay, to the French Bureau, and (through its medium?) to A, who will have the same rights in respect thereof as if his application had been made originally to the Trade-Mark Department so refusing registration. Suppose, for instance, that England were the country of refusal. If the ground for rejecting A's application were that his trade-mark was immoral, the decision of the Comptroller-General would be final (Trade-Marks Act, 1883, sec. 86). If the ground of rejection were anticipation, A would have a right of appeal to the Board of Trade. Although *La Propriété Industrielle* disputes the construction given to this provision in the Madrid resolutions, it seems to be the only satisfactory one. There is at least one provision in the International Convention itself which binds the Crown, and yet for the enforcement of which the Trade-Marks Act of 1883 contains no adequate machinery (*in re the Californian Fig Syrup Co.'s Trade-Mark*, per Chitty, J., 1888, 40 Ch. D. at p. 627). A has now secured his international registration. It will last for 20 years without renewal, but may not be appealed to in support of the French registration if that has been legally determined. The *projet* under consideration contains several other articles of minor interest. The international registration may be renewed from time to time. All changes in the ownership, or in the character of the registered trade-mark, and any annulment, erasure, or abandonment thereof, will be notified to the International Bureau, and through its medium to the contracting States. The fees payable in respect of the international registration will be—(1) a sum (to be fixed hereafter) to the Trade-Mark Department in the country of origin, and (2) a tax, not exceeding 200 francs, to the International Bureau. The sums raised by the latter will, after defraying the working expenses of the new arrangement, be divided equally by the International Bureau among the contracting States, exclusive of the country of origin. States not acceding to the present arrangement at the time of its adoption may be subsequently admitted under Article XVI. of the International Convention. On receipt of a request for admission by any such State, the International Bureau will notify to it all the trade-marks then enjoying international protection.

(3.) *The Endowment of the International Bureau.*—The expenses of the

International Bureau are to be borne in common by the contracting States, and are not to exceed 60,000 francs a-year.

(4.) *The Interpretation and Application of the Convention.*—The resolutions falling under this head are of some importance. (*a*) Relatively to the European States of the Union, extra-European countries not bordering on the Mediterranean will be deemed to be "beyond the seas." (*b*) The "interdependence" clause, so common in the patent laws of foreign countries, will not apply to patents granted under Article IV. of the Convention. (*c*) The International Bureau is to be a medium for the transmission of new laws, statistics, and official papers relating to industrial property among the contracting States, and is to give information on matters relating to industrial property to the Trade-Mark Department in any of the States of the Union gratuitously and to individuals on payment of a franc. (*d*) In spite of the exertions of Great Britain, the United States, Italy, Sweden and Norway, Article V. of the Convention, in so far as it relates to *exploitation*, remains unmodified. Perhaps the next Conference, which meets at Brussels, may secure a better result.

A. W. R.

Reviews of Books.

Studies, National and International By James Lorimer, Advocate, Professor of Public Law in the University of Edinburgh; Dr. Jur. (Bologna); LL.D. (Glasgow); &c. Edinburgh: Wm. Green & Sons.

It was, as old students of Edinburgh University will readily remember, the custom of Professor Lorimer, throughout his tenure of the Chair of Public Law, to "spend the first hour of each session in discussing in a popular manner what seemed to be the leading public question or public event of the day." The "Studies" collected in this volume consist of these introductory addresses, arranged in chronological order. They are appropriately prefaced by two short biographical notices of the author—one by Professor Flint, reprinted from the pages of this *Review*, the other, from the pen of M. G. Rolin-Jaequenyms, extracted from the "*Revue de Droit International.*" The book is further enriched by a well-executed photogravure of the portrait of the late Professor, painted by his son—a portrait in whose rare truthfulness and delicate workmanship there find expression no less the affection of the son than the skill of the artist.

When these Studies are described as "national and international," their general character and contents are accurately indicated. The subjects treated are of considerable diversity, for the domain of Law and Politics, from which Professor Lorimer has chiefly selected his topics, is a wide one. "Jurisprudence," he reminds us, "is a science, every branch of which, an art, every exercise of which, brings us into contact with the whole range of man's interests and proves to us how intertwined are the threads of life." These pages are in themselves an apt illustration of this truth. Whether, however, the subject of discussion be an event in contemporary history or a question in contemporary politics, there are, throughout, conspicuous the same faculty of luminous thinking, the same command of close and vigorous reasoning, the same straight-forward eloquence and masterly power of clear exposition, which one has learned to associate with all Professor Lorimer's work. Though many of the questions dealt with have for years formed the theme of constant discussion in the press and on

the platform, yet so fresh and original is the author's treatment even of these well-worn topics, so kindled is it throughout with "the fire of living thought," that the reader, almost in spite of himself, finds his attention awakened and his interest unflaggingly arrested and sustained. Around not a few of the questions studied, the prejudices of class and the strife of parties surge tumultuously: yet the author never fails to preserve a calm judgment and an unbiassed mind. Unmoved by party passion, heedless of class interests, rising above professional and even national prejudices, he investigates each problem in the light of the far reaching principles of scientific jurisprudence. This consciousness that he is dealing with facts and principles, with unchangeable tendencies and laws, explains alike his unwavering reliance on his conclusions, and his fearlessness in uttering them. As, during his life, Professor Lorimer, with untiring devotion, freely bestowed his rich gifts on the elucidation of juridical principles; so, everywhere in the present volume, his design is apparent, to shed light on them, to illustrate their working, and to exhibit their mutual relations. Diverse as are their topics, this oneness of purpose, running through the studies, lends to the whole a certain unity.

Further, the method of treatment which is employed, is uniformly the same. Each of these studies is a contribution to the science of jurisprudence, and the method, consistently used throughout, is the one method known to science—the method of observation and induction. As very grave misapprehension seems to exist in some quarters on this subject, if one may judge from such an article as that of Mr. Hamilton Grierson, in the July number of this *Review*, it is not inappropriate to call attention to the genuinely scientific character of Professor Lorimer's work, as illustrated in this volume. He lived in an age, whose unwearied researches in every department have, as their grand result, vindicated the universal prevalence of law. The reign of law, which to previous generations had been somewhat of a far-off vision, has been brought home to us with irresistible force; it has been shown, by indubitable proof, to extend to regions where its sway had hitherto been undreamed of. Thus, the languages of the human race are found to have developed along lines no less fixed than those which are known to have determined the evolution of its life. The social and economic relations of men are discovered to be governed by laws no less certain in their action, than those which regulate physical phenomena. This great truth of the omnipresence of law, the peculiar product of the thought of his generation, was seized, in its full meaning and with characteristic earnestness, by Professor Lorimer, and it forms the keynote of all his teaching. In his early youth, when studying chemistry at Berlin under Mitscherlich, we learn that he was struck with "the dependence of physical phenomena, amidst all the changes which they underwent, on unchangeable and inflexible laws." Here, at last, amid all that was shifting, was one thing sure. Law ceased to be to him a mere abstraction: imponderable and intangible, it was, nevertheless, the

most real thing in the world. The study of natural science, in fact, wrought an entire change in his mental attitude. "I learned more law from the chemist than from the jurist, and my own ultimate theory of scientific jurisprudence was more influenced by the former than by the latter." Henceforth, he approached the study of jurisprudence from a new standpoint. "Social life, like life in general, is governed by fixed laws, which it belongs to science to discover, and which, when discovered, must be obeyed." It is the old maxim of Bacon, "*Natura enim non nisi parendo vincitur.*" It is the function of the jurist, not to make law, but to search for it, and, when he has found it, to declare it. Thereafter it is the province of the legislator to affix to it his official mark, in order that it may be more certainly known and authenticated. For, as Burke pro claimed, "All human laws are, properly speaking, only declarators"—declaratory of the conditions of social co-existence, in all its phases and forms.

Such is the burden of Professor Lorimer's teaching, and in it we find the secret of the method which he employs throughout these "Studies." Dealing with the fluctuating phenomena of social and political life, he traces the chain of cause and effect with the same unbiassed mind; registers results with the same open eye; in short, reads the tendencies and laws underlying the whole with the same faith and reverence with which Physicists investigate the secrets of the material universe. As event succeeds event, and situation follows situation in a perpetually varying series, each comes to him fraught with a rich meaning. They are the facts on which he bases his inductions, the experiments from which he makes his observations, the criterion by which he tests his conclusions, the illustrations which serve to exhibit his principles in a clearer light. It is by this method alone that advances have been made in any department of knowledge. Political economy first became a science when men, ceasing to "make" economic laws, were contented to search for and find them. Even after the birth of economic science, it has taken a hundred vain efforts to convince men that no Government can make that to be money which would not otherwise be such. It is the same with nearly all the general principles of legislative science; as Sir George Cornewall Lewis pointed out ("Observation and Reasoning in Politics"), they have been discovered by what really were a series of practical experiments made on society, combined with careful observation of the results. Some theories are at first sight so alluring and attractive, that nothing short of actual experimental proof of their evil operation is sufficient to convince mankind of their unsoundness. Such has been the theory of propagating religious truth by penal inflictions: such, as is probably now being illustrated in the United States, is the theory of commercial protection. There is a world of thought as well as a world of action, and Professor Lorimer's work was chiefly done in the region of thought. It may be too that parts of his teaching to some, in the pointed language of Lord Bacon, "give little light because they are

so high;" yet historical considerations of this sort should enable the least thoughtful in a measure to appreciate how great may be even the practical value of such work as his.

The first lecture in the volume deals with the Sphere and Functions of an Academical Faculty of Law, and the subject is one to which the author never wearies of returning. Passing by the higher view of Faculties of Law, according to which they exist for the advancement, no less than for the dissemination of knowledge—a view on which naturally Professor Lorimer lays much stress—we need speak only of his opinions on the purpose and scope of such faculties, considered as practical educational institutions. Looking at them from this practical standpoint, he points out that two views, a narrower and a wider, may be taken of their functions. In the narrower view, a University Faculty of Law is merely a law school for the training of legal practitioners—this and nothing more. Against this conception of its functions Professor Lorimer protests with almost passionate earnestness. With the vast majority of English lawyers, he holds that, "as a practical art, the profession of the law must be learned practically," and that little benefit can be obtained from studying it away from the Courts. "I have no hesitation," he writes, "in telling those who come here with the sole object of storing their memories with the details of positive systems of law, that they may accomplish that object better elsewhere. For this purpose, no lecture will ever be equal to the pages of the ordinary text-writers well conned over, the rubrics of the Reports, the practice of writers' offices, and the Courts of Law." In accordance with the wider notion of it, universally prevalent on the Continent, and vigorously urged in this volume, an Academic Faculty of Law should provide a liberal education in the different branches of social, jural, and political science, as well as instruction in the technical branches of positive law. In other words, our Faculties of Law should prepare their students not merely for the practice of the legal profession, but for every part of the broad field in which they may be called to lead and direct their fellow-citizens. All Scottish lawyers must sympathise with these aspirations, and hope that the time is coming when our Faculties of Law will offer as complete and various a training for all the activities of life, as can be found in the best schools of the Continent. No scheme could be devised by the legal profession more efficacious for producing a healthy and elevated tone in all its branches; no better guarantee could be found by the State, either for good legislation, for wise administration, or for efficient public service. It may, nevertheless, be questioned whether the time is ripe for the realisation of all Professor Lorimer's views, however correct in principle they may be. There is profound worldly wisdom in the reply of Solon, when asked why he did not give the Athenians the laws which were actually the best, "I gave them those which they were most fitted to receive." For years to come the most important function of our Faculties of Law must be to educate men who are about to enter on the practice of the law; and the old

custom in Scotland of studying the professional subjects in the Universities has, on the whole, worked well. Much depends on the mode in which these technical subjects are treated. The aim of a University is to educate, not merely to instruct. It is not the province of a University to heap up in the student's mind a heterogeneous mass of details, and "points," rather that province is, and such has been the tradition of the professional chairs in Scottish Universities, to give the student some knowledge of legal principle, to aid him in forming the details into a system, to exhibit the mutual relations of different rules, and to sketch the process by which the law in its present shape has been slowly developed. The student is thus put in a position to systematise, and so become really master of the mass of details, a knowledge of which, as he goes on in his profession, he must acquire. If to such a training there is added a liberal education, particularly in those subjects, such as history, jurisprudence, &c., which touch most closely a lawyer's sphere of work, then the student is equipped for the practice of his profession, so far as he can be within the walls of a University. For it is a well-stored mind and a disciplined intelligence—not such odds and ends of information on legal points as may be picked up in a course of lectures—that form the real equipment of a lawyer. Thus can the profession and the public best be assured that the lawyers of Scotland will be men who can discriminate between argument and fallacy; who will not abuse the judge's patience by arguing against settled principles of law, or by elaborately proving what has been definitely fixed for generations; who will not rob their clients by their blundering, or delay cases by their ignorance.

J. M. Irvine.

Erskine's Principles of the Law of Scotland. Eighteenth Edition. By John Rankine, M.A., Professor of Scots Law in the University of Edinburgh. Edinburgh: Bell & Bradfute, 1890.

The modest treatise in two volumes, which the then Professor of Scots Law gave to the world in 1754, has expanded under the hands of the present professor into a work of considerable dimensions; but it is still designed (to use the language of Erskine's preface), "by exhibiting a view of the principles and general system of our law, to prepare the reader for deeper researches into that study." There seems to be a general agreement among the teachers of Scots Law that the work is still the best text-book for students. "I know of, and can make no better," says Professor Rankine. It would seem that the book was produced at just the period in the development of the law of Scotland when it was easiest to seize and present its distinctive genius.

As to the method, however, in which the work is to be edited at the

present day, there has been considerable difference of opinion. In 1860 Mr. Guthrie Smith produced a very readable edition, but it was practically a new text-book. In the fourteenth edition, published in 1870 by Sheriff Guthrie, Erskine's text was left entire, and the law was brought down to date in footnotes, and notes appended to particular chapters. The book was adopted by Professor Macpherson as his text-book, and three subsequent editions were called for. The present edition is based on the principle that footnotes are "out of place in a student's manual." A continuous text is given to the reader, and matter, for which the present editor is responsible, is inclosed in square brackets. If we mistake not, this method was first employed with conspicuous success by the late Mr. Stephen in his first edition of Blackstone, published in 1841.

Needless to say the present work, like everything which has proceeded from the learned professor, is admirably done; but it is a relief to pass from the parts of the text which are interspersed with brackets to those entirely new chapters of law which have been developed since Erskine's day, and in which the editor's pen can run freely. These chapters deal with such subjects as "Personal Wrongs," "Nuisance," "Carriage," "Insurance," "Trusts," "Bankruptcy," and "Private International Law."

To brevity the editor sometimes sacrifices elegance and even sense. What is the unsophisticated student to make of this—"The effect of these Acts is that the franchise is bestowed on persons whose names appear on the Roll of Electors, and their qualification is—(1.) Both in counties and in burghs, household (occupancy of a separate dwelling), or occupancy (of a £10 tenement), or service (occupancy as servant of a dwelling-house), or as lodger (residence in £10 premises), or as owner (of £10 premises"? Is this sentence defensible:—"The substitute resides in the county, and since 1825 *has had* to be an advocate or law-agent"?

G. L.

English Constitutional History, from the Teutonic Conquest to the Present Time. By THOMAS PITT TASWELL-LANGMEAD, B.C.L. Oxon. Fourth Edition, revised by C. H. E. CARMICHAEL, M.A. Oxon. London: STEVENS & HAYNES, 1890. 8vo, pp. xli. 883.

This narrative treatise gives a clear and attractive bird's-eye view of the long series of events and forces which made the Constitution. The late Mr. Taswell-Langmead was evidently a scholar, with warm popular sympathies, deeply versed in historical literature, guided in every page he wrote by a desire of definiteness and fact, and so correspondingly distrustful of vague inductions as to popular tendencies. His work is strong in citations from law and statute and the rolls of Parliament; it seldom strays among literary hedges and by-paths in search of the social motives

of the time. This rigid adherence to the letter of his text makes the book all the safer as a guide. In spite of what Mr. Carmichael says to the contrary (p. 379), we do not see in it the product of the comparative method of study in any comprehensive sense. Parallels from other countries are few, and on minor points, so much so, that we believe the author himself must have pointedly avoided them. The *mall*, as it met under Charlemagne, compared with the folkmoot of the English, the long-successful effort of feudalism in France and Scotland to make jurisdiction run with the ownership of land, the result of this on the royal power and on the means by which, after much violent oscillation, a fair balance in the play of forces was restored, the varying hold and power of chivalry in the three countries long so closely related in war and peace—each of these was an effective and pertinent theme for comparison and contrast. Yet we are far from finding fault with the author for choosing to leave such tempting fields alone. Enough, and more than enough, lay nearer to his hand, and foreign analogies as often interrupt the reader as illustrate the theme.

In the vital historic quality of lucidity—distinct perception and statement of the bearings of things—this book excels, handling its subject with all-round accuracy and efficiency, presenting a firm yet vivacious and entertaining outline of a complex biography. The judgment it passes on debateable questions are well weighed and weighty. Its parts fit well together, and the story goes on with vigour and sequence. For interest and charm it trusts to the innate romance of an old eventful story, fitly told, and it does not trust in vain. It is an independent work of marked learning, inheriting as it were the achievements of all the great students like Hallam and Stubbs, and at the same time enriching its inheritance by not a little original research. If in supplement of general praise we are to point to particular merits and drawbacks, we would begin by commending the chapter on the Succession to the Crown, which, with succinct cogency enforces the historical fact of the elective principle. The author's views surely carry him too far when he states (p. 229) that on the death of Queen Elizabeth the claim of the House of Suffolk to the throne was legally indisputable and preferable to that of James VI., who thus, *stricto jure*, was a usurper.

The picture of the English Reformation appears cold and colourless. Too exclusive attention is paid to the technicalities. There can be no doubt, however, that there needed more than royal obstinacy and threats of *præmunire* to bring about a change so great. In the narrative of the Stuart period, on the other hand, the author is at his best. The swift progress made in Plantagenet days had ceased in the wars of York and Lancaster. Under the Tudors, astute and strong, popular rights, though seldom publicly outraged, were silently over-ridden and evaded. But they were not forgotten. "Freedom doth forge her mail of adverse fates." The Stuarts came at a time when the country was ripe for reaction. Carrying

the claims of royalty to an unheard-of height, they outwore the tolerance of the people; the end of Charles I. "Gart kings ken that they had a lith in their neck;" whilst the fate of James II. further vindicated the stern logic of Magna Charta—that the law was greater than the king. The machinery of the Constitution was now practically complete; it remained for post-Stuart statesmen to give Parliament thorough control of the machine. This momentous change was half-unconsciously effected under the first two Georges, and thenceforth the executive was chosen much more by Parliament than by the throne, which nominally exercised the power. Essential sovereignty was vested in the House of Commons. "Ministers are the King in this country," growled George II. When George III. threatened to retire to Hanover rather than accept a Minister he disliked, bluff Lord Thurlow drily hinted that his Majesty might go.

Whilst general accuracy and care are conspicuous, there are few slips. The Palatinate of Durham, named (p. 62) as the creation of William the Conqueror, is now believed to have been not so, but a composite later growth. "Rev.," on p. 318, applied to a 14th century priest, strikes us as a rather worse anachronism than the strictly exact "Sir," which it replaces. Adam of Usk is not, as said on p. 216, a historian of Edward II. Two notes on pp. 128 and 177 suggest that the editor is not aware that the abolition of the ordeal in England was directly effected not by the Lateran Council of 1215, but by Royal writ of 1219 (Rymer, Hague edition [1739], i, 76) which expressly states that at the time of granting, the question of the force of the Council's prohibition was in doubt—"*dubitatum fuit et non determinatum*." There is an error of 500 years in a print of a Scots document in the Appendix, p. 841, where IMC. does duty for 1600. Our little list of corrections has but one item more. It is stated on p. 73 that presentments of Englishry are not recorded after the time of Richard I. But the formula "*Englescheria est presentata*," occurring frequently in the Gloucester eyre of 1221, is conclusive to the contrary.

Mr. Carmichael has edited his dead friend's book not only with great knowledge and ability, but with much zeal. His added notes (often laden with recondite biographical and genealogical information) prove a culture as diversified as the author's own, and show him fully abreast of his responsibilities. He has enhanced the sterling worth of the original work by a mass of supplementary facts and authorities. We are particularly grateful for the numerous Scotch notelets. Amongst the acknowledgements in the preface is a warm and well-merited tribute to the memory of Dr. George Burnett, the late Lyon King of Arms. These allusions to things and institutions in Scotland, meagre though they are, enforce the proposition that that country had some legal and constitutional history worth while studying. To expect a perfect index were to ask what "Nor was, nor is, nor e'er shall be." We shall not illustrate the vanity of human wishes by telling Mr. Carmichael the deficiencies we find in his, well designed and comprehensive though it be. G. N.

The Patentee's Manual: A Treatise on the Law and Practice of Patents for Inventions. By JAMES JOHNSON, of the Middle Temple, Barrister-at-Law, and J. HENRY JOHNSON, Solicitor, Assoc. Inst. C.E., Past President of the Institute of Patent Agents. Sixth Edition Revised and Enlarged. London: LONGMANS, 1890.

The Law and Practice of Letters-Patent for Inventions. By LEWIS EDMUNDS, D.Sc. Lond., F.C.S., F.G.S., of the Inner Temple, Barrister-at-Law, assisted by A. WOOD RENTON, M.A., LL.B., of Gray's Inn, Barrister-at-Law. London: STEVENS & SONS, LIMITED, 1890.

Our old friend, Johnson's Patentee's Manual, which has long outgrown its original purpose and become a book of considerable utility, not only to patentees, but also to those who have to advise patentees actual or prospective, now appears in a sixth edition. The last edition appeared in 1884, very shortly after the passing of the Patent Act of 1883, and before there had been time for any large amount of judicial decision to gather round the provisions of that statute. Since that date we have had six volumes of official reports of patent cases, three amending or supplementary Acts, a new set of Patent Office rules, and a considerable amount of practice in connection with the International Convention of 1883. The leading results of all this activity have been collated and incorporated in this edition; and by dint of rearrangement, compression, and various typographical devices, the authors have contrived to retain the previous handy size of the book, while maintaining its clear and lucid style free from any appearance of patchwork. It has been admirably revised: as far as it goes it is a very satisfactory book; and it seldom fails to point the way even when it does not itself go to the end of the journey. Messrs. Edmonds and Renton's book is one whose aim is apparently higher than that of Johnson's Manual. It seeks to give an account of the General Patent Law, to annotate the statutes, and to give details concerning practice. Its aim is thus exhaustive, and the book fulfils its aim with a large measure of success. It is evidently written by practised expository pens; it is very readable; it contains on many points detailed information which it is difficult to find elsewhere, and it is plainly largely based upon actual reading of the cases which are quoted. It is excellent in its account of the development of the legal principles involved in patent law and practice; it is minute in its detail in regard to Patent Office procedure; and we think that no lawyer who has much to do with patents can very well afford to be without Edmonds and Renton. The book has, however, some faults. There is too much padding in it: we have for instance the Patents Acts, 1883-88, consolidated and annotated, occupying (exclusive of the schedules) pp. 425-528; then the complete Patents Designs and Trade-Marks Acts, 1883-88, consolidated but not annotated, occupy pp. 679-725; and after this the Acts of 1885, 1886 and 1888, are separately printed in pp. 725 736; all which is surely too much of a good thing. There are some defects also in the sense

of proportion: the authors' self-restraint towards the beginning of the book has made them unduly compress "Subject-matter" into 35 pages; further on they give themselves more scope, and the Action of Infringement takes up 102 pages, besides 27 pages of styles in the appendix; the book as a whole is thus made to bear a somewhat unsymmetrical character. Further, we might with a fair amount of reasonableness have expected that a book of this scope and size would not have been one for English use only: the Scottish or Irish lawyer will look in vain in it for an exposition of any peculiar features of the law and practice of his own country in matters relating to patents. Still, taking the book as a whole, it undoubtedly possesses a *differentia*, and presents many points of novelty and utility that make it a good and valid book, which every patent lawyer ought to possess.

ALFRED DANIELL.

Principles of Mercantile Law. By R. VARY CAMPBELL, M.A., LL.B. Second Edition. Edinburgh: W. GREEN & SONS, 1890.

A second edition of a volume of law lectures is rather a novelty. But Mr. Campbell's lectures on Mercantile Law, originally addressed to the Institute of Bankers, have attained this honour. As originally printed, they were almost in the exact form in which they had been delivered, and bore traces on every page of a lively and racy style of exposition, marked by clear statement and ample insistance on leading principles. It is probably these qualities that has made the book so popular both with the business public and with the legal student; it exactly meets the wants of those who desire a sketch, at once readable and reliable, of the existing law on any of the topics it deals with. Of course, the book (considering its method), can hardly be of much use to legal practitioners, nor would it be fair to criticise it as a legal text-book. What professes to be only light claret must not be criticised as if it were sound port. In this edition considerable additions and alterations have been made, notably in the chapters on Factors, Partnership, and Joint Stock Companies. Effect is given, in particular, to recent legislative changes, and the results of the chief Scotch and English cases, decided since the first edition was published, are embodied in the text. The author has had the assistance of Mr. L. T. Napier, advocate, and the task of re-editing appears to have been carefully done.

Foote's Private International Jurisprudence. Second Edition. STEVENS & HAYNES, London, 1890.

We are glad to see that Mr. Foote's useful handbook has reached a second edition. Some three hundred cases, which have occurred since it was first published in 1878, have been considered and commented upon,

and in consequence not a little of the text has had to be re-written. The scope of the book is, however, unchanged. It consists almost exclusively of such rules and questions of private international law as have been made the subject of express judicial decision in England. Such a work is of undoubted utility for the practising lawyer. This branch of law probably owes more to the text-writers than any other. For a long period the number of decided cases in any country was very small, and the method of attempting to extract rules from comparing English with American, French, or German decisions yielded very unsatisfactory results. The leading authorities were not to be found in the reports, but in the works of Voet, Huber, Boullenois, Rodenburg, and the other fathers of the science. Even comparatively modern works, such as Savigny, Story, and Bar, consist mainly of deductions which appear to the writers to flow logically from a few broad principles which have been widely accepted. When any authority is quoted, it is more often the opinion of a text-writer than the decision of a judge. The growth of modern commerce, however, has made it necessary for our Courts to apply themselves with ever increasing frequency to questions of private international law, and make it now possible to construct something like a reasoned system, of which every proposition has been laid down expressly or implicitly from the bench. The arrangement of Mr. Foote's book is simple and lucid. The concise summary of each chapter, and the continuous summary of the whole book which he gives at the end, though it necessitates the printing of thirty-five pages twice over, will add to the value of the book to the student. Indeed, a lecturer who compelled his students to completely master this continuous summary would give them a very good foundation for further studies. It was, perhaps, hardly necessary to review twice the cases of which *Sottomayor* v. *De Barros*, 3 P.D., is the most recent example, first under the head of "Capacity," and afterwards under that of "Capacity to contract." As it may be convenient to deal separately of contracts, it would have saved space to reserve the cases on capacity for that connection.

It is no doubt unfortunate for Mr. Foote that Mr. Westlake's admirable treatise, of which a third edition has just appeared, covers practically the same ground, and is an even fuller storehouse of recent authorities. It may, perhaps, be remarked, in parenthesis, how greatly Mr. Westlake has enhanced the interest of his book by his mode of citing cases, giving both the date and the names of the judges—*e.g.*, *Deck* v. *Deck*, 1860, 2 S. & T. 90; Cresswell, Martin, Willes. This plan might well be followed by other writers. But although Mr. Foote cannot claim that the field is now so open as when his first edition appeared, his book is a sound and useful manual, and no doubt will justify its existence in the future, as it has in the past. A misprint which frequently occurs is perhaps worth noticing. The case referred to as "*Sinonin* v. *Maillac*" should be *Simonin* v. *Mallac*.

F. P. W

The Sale of Goods. By His Honour Judge Chalmers. London: Clowes & Sons, 1890.

This little book has an importance much beyond its size. Its author, who is County Court Judge at Birmingham, and well known to the profession as draftsman of the Bills of Exchange Act, prepared the first draft of a Sale of Goods Bill in 1888. After a revision of the clauses in consultation with Lord Herschell, the bill was introduced in the House of Lords in the session of 1889, was read a second time and referred to the Standing Committee on Law, but made no further progress.

Mr. Chalmers has now reprinted the clauses of the bill, and annotated them with a full selection of the leading cases on which they are based, and with a valuable series of notes explanatory and illustrative of the principles involved. The book has thus an immediate interest and value, in so far as it supplies, in a convenient form, a complete apparatus for critically testing the adequacy and correctness of the draft bill, which will no doubt be reintroduced at an early date, and it is to be hoped it will be extensively used for this purpose. On the other hand, is will be of permanent importance when the bill is put on the Statute Book, as the earliest and most authoritative exposition of its principles, and its relation to the common law.

The first *crux* in a commercial code is to give such definitions as shall help and not confuse the lay mind which is to benefit by it. The commercial man, who turns for guidance to Mr. Chalmers' bill, expecting to find a simple criterion of the dealings which the law holds to be sale, will suffer some disappointment. The layman is often more enlightened by the clear and practical terms of a judgment, than by any abstract rule that can be embodied in a digest: take, for instance, the careful discussion by Lord Justice Mellish in *ex parte* Whyte (6 Ch. App. 397), of the difference between "sale and return" and *del credere* agency. Where such a plain and intelligible rule is laid down on the highest authority, it seems a pity it cannot be included in the text of the code.

The short discussions of principle are conducted with a breadth and fulness of information as to civil and foreign law too rare in English legal treatises.

J. M.

Notes on Decided Cases.

Company — Mortgage or Assignment of Uncalled Capital. — *Pyle Works, Limited*, L.R. 44 Ch. Div. 534. We have now, it is hoped, reached perfect certainty on the question whether a mortgage of uncalled capital is valid. After the Companies Act has been in existence for nearly thirty years, it can at length, we think, be safely affirmed that, when properly gone about, a mortgage of uncalled capital is a good security, and gives a preference over other creditors upon the capital when called up in a liquidation.

The financial world, however, had to a large extent discounted this certainty, and if the ground of their confidence were sought for, it would be found in a judgment of the late Sir George Jessel, M.R., fifteen years ago (*Phœnix Bessemer Steel Co.*, 44 L.J. (Ch.) 683), where a power to mortgage uncalled capital contained in a Company's Articles of Association, was sustained. The question has now, in the recent case of *Pyle Works*, been brought before the Chancery Division Court of Appeal, and the grounds of objection marshalled and disposed of.

First, it was said that the Companies Acts do not authorise the pledging of future calls, while the Companies Clauses Act, 1845, does. The answer was, that the Companies Acts neither expressly, nor by implication, prevent directors mortgaging uncalled capital, like any other part of their property, the Acts leaving the directors power to do in this respect what may be authorised by each company's articles. Besides, mortgaging in general is contemplated by the statutes, as the obligation to keep a register of mortgages shows.

But then, it was said, that calls made in a winding-up are not truly part of the capital or property of the company; for the liability "to contribute to the assets of the company," which is enforced by calls made by a liquidator, is entirely different from calls made by directors before the winding-up, being practically a separate guarantee fund, directed to be distributed among creditors *pari passu*. This view was described by L.J. Lindley as very paradoxical, and leading to the strange conclusion that shareholders were under two liabilities, and in a winding-up one of them became a substitute of the other. Besides, a critical examination of the

statutes showed the view to be unsound, and that the capital of a company is its nominal capital, as fixed in the Memorandum. It is true that under Sir Stafford Northcote's Act of 1879, a company may reserve part of its uncalled capital so as to be called up only in a winding up; and such reserved portion cannot be mortgaged by the directors. L.J. Lindley indicates this opinion (p. 586). So also in the recent *Edinburgh International Exhibition* case, 2nd December, 1890, Lord Stormonth Darling decided that in a company limited by guarantee, the guarantee fund which can only be called up in a liquidation, cannot be assigned so as to give preference to particular creditors.

But apart from such cases of reserve or guarantee capital, which are special, some countenance to the idea that calls made in a winding-up were different in character from calls made and paid while the company was a going concern, was derived from the language of M.R. Jessel in *Whitehouse Company*, L.R. 9 Ch. Div. 595, where he said, speaking of the liability to contribute to the assets of a company in a winding-up: "That is a new liability, . . . it is a new contribution It is a mistake to call that a debt due to the company. It is no such thing. It is not, as has been supposed, in any shape or way, a debt due to the company, but it is a liability to contribute to the assets of the company, . . . to be enforced by the liquidator." From this unguarded language it was argued that this new fund could not be the subject of a mortgage before it came into existence. The Court's answer to the argument was a repudiation of the late M.R.'s propositions, and an assertion, as a counter-proposition, that the right to require payment of uncalled capital "is vested in the company, and, when payment is required, the amount payable is a debt due to the company in all cases, whether the payment is required before or after liquidation."

The late Master of the Rolls had used the propositions he formulated in negativing a claim of set-off by one who was alike a shareholder and a creditor in a liquidation, by showing that, while the debt was due by the company, the call was not due to the company; hence there could be no set-off. Lords Justices Cotton and Lindley now explain that the disallowance of the set-off was right, but the reason he gave wrong; the true reason being, as put by the Court of Appeal in *Black & Company's* case, L.R. 8 Ch. 254, that the moment a winding-up takes place, the whole administration is carried on with a view to *pari passu* payment of creditors, and that the statute, properly construed, prohibited set-off in all forms of winding up.

The result is, that while the calls in a winding-up may be made by a liquidator, he will hold the fund, so far as realised from any capital mortgaged, for behoof of the mortgage creditors. The liquidator administers the assets of the Company, including uncalled capital, subject to all the burdens validly charged thereon.

Doubt, however, still lingers in the mind of Lord Justice Lopes, based upon the principle stated by Lord Selborne in *Black & Co.'s* case, that "it

is not competent for any person by any antecedent contract to alter the administration of the assets of a company under a winding-up, . because it would be an attempt by private agreement to get out of and over-ride an Act of Parliament," language which Lord Justice Lopes holds to mean "that there could be no anticipation of calls in any case so as to alter the administration of assets under a winding-up." But Lord Selborne's proposition is quite reconcilable with the present judgment, for a mortgage is something more than a mere *contract* or *private agreement*. It is a charge or burden registered, and so made public to all concerned, in terms of the statute, section 13. Lord Selborne was dealing with a simple trade contract, undisclosed to any third party.

It remains, however, to observe that in Scotland something more is required than entry in the company's mortgage register of a trust-deed for behoof of debenture holders, charging or assigning uncalled capital. That may be enough in England; but in Scotland the ordinary mode of completing an assignation must be adopted—viz, intimation to the debtors, *i.e.*, the shareholders. It is a cumbrous process, and in most cases is best accomplished by sending a copy of or excerpt from the deed, and getting an acknowledgment signed by each shareholder. Notice of the assignment should also be printed on each share certificate. This, it is believed, gives all the security necessary and possible in the circumstances, according to the law of Scotland. It has not yet, however, been brought to the test of a judgment in Court.

J. C. L.

Jurisdiction.—*Eglinton Chemical Company, Limited* v. *M'Jannet*, 28 S.L.R. 41.—In this case the right of the Dean of Guild to have the plans of a new building submitted to and approved of by him before its erection is proceeded with, has been, for the first time, expressly declared to extend to all buildings within burgh. Two judgments of the Dean of Guild Court of Irvine were brought under the review of the Court of Session by the Eglinton Chemical Company, who had proceeded, without the Dean of Guild's warrant, to erect a new tannery and rebuild a cart-shed on their own ground in Irvine, and had been fined by him in consequence. In the case of the cart-shed, which was situated within a few feet of a public street, the Company did apply for the Dean of Guild's warrant, and submitted plans for his approval, though they did not insist in their application; and the decision in the Court of Session, which ultimately proceeded upon the Company's acquiescence in the jurisdiction implied in their application, need not be further noticed here. In regard to the tannery, however, the Company maintained that the Dean of Guild had no jurisdiction whatever. It was situated at a distance, at the nearest point, of sixty-five feet from the boundary of their property, and they took the view that it was therefore of the nature of an internal operation, which they were

entitled to execute entirely at their own hand, and without the Dean of Guild's sanction or interference. They based this contention mainly on the authority of the cases of *Speed* v. *Philip*, 10 R. 795, and *Somerville* v. *M'Gregor*, 17 R. 46, and argued that the "decree of lining," as the Dean of Guild's warrant is called, was inapplicable to the circumstances. Now, no doubt the authority of the Dean of Guild in burghs was at first concerned mainly with boundary questions, as the name "lining" implies. It was invoked primarily for the settlement of questions of encroachment between adjoining proprietors, and the adjustment of similar differences. And in the two cases referred to when no such questions were involved, and in which the intervention of Deans of Guild was based upon other and purely public grounds, their jurisdiction was negatived. The case of *Speed* in particular has been regarded as authority for the general proposition that the Dean of Guild Court has no concern with internal operations which "not interfering with any boundary or street walls, do not affect conterminous proprietors or threaten danger to the public" (Rankine, Land Ownership, 2nd edition, p. 565). So put, the law would appear to bear out the Company's contention. Danger to the public from the erection of the tannery could not be averred, and its situation precluded opposition from conterminous proprietors. The Lord Ordinary (Wellwood), however, sustained the jurisdiction of the Dean of Guild upon the ground that *prima facie* it extended to all buildings within burgh, however situated, and that no reason had been shown to exist in the circumstances of the case for restricting it. He also pointed out that while in the case of internal operations upon existing buildings, a good reason for dispensing with the Dean of Guild's sanction existed in the fact that the original buildings must have been approved of by him, there was no dictum or decision limiting his duty and function at common law of, as Bankton, iv. 283, expresses it, "regulating buildings within borows, whether in repairing or taking down and rebuilding old buildings or erecting new ones." The Lord Ordinary's judgment was affirmed by the Second Division of the Court, the Lord Justice-Clerk, who gave the leading opinion, laying it down that "It is the duty of the Dean of Guild Court to act in all cases where new buildings are erected or where old buildings are altered in their structure, and it is the duty of the inhabitants to invoke the jurisdiction of that Court before commencing such operations." In commenting upon the case of *Speed*, his Lordship pointed out that its true import had been somewhat mistaken, and that the decision went no further than to hold that a party who had obtained the authority of the Police Commissioners to execute certain internal alterations upon his property in a burgh in which the Commissioners' jurisdiction was in conflict with that of the Dean of Guild, was not in the circumstances, guilty of defying the latter tribunal. The case of *Somerville* was not so fully explained by his lordship. There the Dean of Guild's interference with the proposed operations, which were solely internal, was based upon the powers con-

ferred upon him by the Edinburgh Municipal and Police Act, and was in the exercise of the powers thereby conferred upon him in regard to sanitary matters. His jurisdiction was negatived on the ground that these powers related in terms of the statute solely to alterations in the structure of buildings, and not merely because the alterations were internal and did not affect continuous proprietors. The effect of the present decision is thus to remove all doubt as to the general scope of the Dean of Guild's jurisdiction, and to establish his authority on principles of general application. It would be manifestly inexpedient in the highest degree, and would greatly limit the usefulness of that Court if the contention of the company had been sustained, and it had been held that any inhabitant of a burgh was entitled to judge for himself whether or not his operations required the sanction of the Dean of Guild. It is no doubt possible to figure extreme cases in which the approval of the Dean of Guild must be merely formal, and where his active interference with proposed buildings would be even outrageous. But a formal sanction ought all the more readily to be obtained, and any abuse of power on the part of the Dean of Guild or his officials can be speedily restrained.

G. W. B

Heritable Securities—Titles to Land Consolidation Act, 1868, Section 117.—*Hare*, 17 R. 105. The rule which may be considered as established by this case is, that where the right of a person to succeed to a heritable bond, not expressly excluding executors, is determined not by the 117th Section of the Titles to Land Consolidation Act, 1868, but by special destination in the bond or otherwise, the heir of provision under the destination may make up a title by service. The objection to the competency of this course taken by the Sheriff of Chancery, and supported by Lord Shand, was that the effect of the statute making all such bonds moveable *quoad* succession, must be to make them also moveable *quoad* title. But it might have been noted that it is only as regards the succession of the creditor that any change is made in the quality of these bonds, and that, as regards the debtor, they are still heritable: and, further, that, as pointed out by Lord Young, such bonds are still, in all cases, "estate in land," in terms of the interpretation clause of the statute. It follows, therefore, that the title by which they are held and transmitted must be in the form recognised as effective in dealing with land. It is true that under the provisions of the Act confirmation may be made a step in making up a title to a heritable bond both by an executor-nominate and by an executor-dative. But in neither case is the confirmation a complete title to uplift and discharge the bond. Nor is it, except in cases of intestate succession, indispensable. A disponee or legatee may complete his title without any reference to confirmation, and without the intervention of an executor. It is clear, therefore, that the statute does

not make the form of title required in the case of purely moveable estate in all cases essential, or in any case a complete title to bonds made personal *quoad* succession. It provides only for the special cases it creates. It does not deal with special destinations, and none of the forms prescribed by it apply to them, or could be adapted to them, without very considerable strain. Whatever change may have been made in the quality of the bond, it is still, so far as title is concerned, an estate in land, and the form of making up a title by service, formerly competent, is still available.

Even more noteworthy, however, than the judgment in this case was the opinion expressed in it by the Lord President, concurred in by the Lord Justice-Clerk, Lords Young, Adam, and Lee, and emphasised by Lord M'Laren—notwithstanding a strong argument to the contrary by Lord Shand—"that the 117th section of the titles to Land Consolidation (Scotland) Act, 1868, makes heritable securities moveable only in case of intestate succession." If this opinion be sound, several questions hitherto regarded as settled must now be regarded as doubtful. Thus, the case of *Guthrie*—(8 R. 34)—was one of testate succession. The deceased left a trust-disposition and settlement relating to his whole heritable estate of whatever kind or nature situated in Scotland, and a will in the English form, disposing of the residue of his estate. The question which arose was whether a heritable bond for £19,000, not excluding executors, was carried by the settlement as being heritage in Scotland, or by the will as being moveable estate. The First Division held that, "by the operation of the statute 31 & 32 Vict. cap. 101, the heritable bond for £19,000 formed part of the personal estate of the deceased" to be administered by his executor under the English will. It seems difficult to reconcile this decision with the *dictum* that "the Act of Parliament makes no change in the law of heritable securities except in relation to intestate succession." Further, in the instructions and forms to aid in the preparation of inventories issued by the Inland Revenue after the passing of the Act of 1868, and still in use, all heritable securities made moveable as regards succession are required to be given up as personal estate whether forming part of a testate or intestate succession. Previous to 1868, heritable securities had been subjected to inventory duty at the same rate as personal estate, and the duty could either be paid on a special inventory given up direct to the Stamp Office, or on the inventory of personal estate, provided the securities were appended under a separate heading, and not included in the sum of which confirmation was or might be craved (23 Vict. c. 15; 23 & 24 Vict. c. 80). After 1868, the special inventory and separate heading were held applicable only to money secured by Scotch bonds *excluding executors*. All other heritable securities, whether forming part of a testate or intestate succession, were regarded as personal or moveable estate. They were held to be no longer liable in duty under the special Acts relating to heritable securities, but under the earlier revenue statute which required that the inventory to be

given up by an executor in the Commissary Court must be a full and true inventory "of all the personal and moveable estate and effects of the deceased" (48 Geo. III. c. 149, § 38); and being included in the inventory as moveable estate, they fell also to be included in any confirmation following thereon, under the statute abolishing partial confirmation and enacting that "every person requiring confirmation shall confirm the whole moveable estate of a deceased person known at the time to which such person shall make oath" (4 Geo. IV. c. 98, § 3). Accordingly, all bonds not expressly excluding executors are, and it has hitherto been held must be, both in testate and intestate succession, included in an inventory and confirmation as personal estate. And the practice in regard to confirmation was believed to be sanctioned if not required by the Act of 1868 itself, which makes it competent not only for an executor-dative but for an executor nominate duly confirmed to complete a title to a heritable bond.

It seems clear that a rigid application of the opinion pronounced in this case of *Hare* would overturn a good deal of what has hitherto been considered sound practice. As not only matters of form and title, but important beneficial interests are involved, the subject will, it is hoped, receive further judicial exposition in the form of direct decision.

J. G. C.

Inadequate Consideration—Undue Influence—Parent and Child—*Menzies* v. *Menzies*, 10th June, 1890, 27 Sc. L.R. 721.—Of the many extraordinary decisions which of recent years have marked the career of the Second Division of the Court, none is stranger than this one. It was a judgment on relevancy, a refusal to permit investigation. The allegations, into which the Court thought it undesirable to inquire, may be briefly stated. Lieutenant Menzies is the next heir to the entailed estates of Rannoch, valued at £300,000. If he succeed, he will be entitled to deal with these estates in fee-simple. His age, in 1886, was thirty-one; the age of his father, Sir Robert Menzies, the heir in possession, does not appear, but is believed to be over seventy. Lieutenant Menzies entered the Scots Guards in 1874, and, prior to 1886, he had incurred considerable debt, not exceeding, apparently, £11,000, which had from time to time been paid out of money raised by his father, with the son's consent, on the security of the estates. In 1886, however, fresh debt had been incurred to money-lenders to the extent of £6000, and bankruptcy proceedings were threatened. The lieutenant was dependent on his father for an annual allowance, which had been slowly raised from £300 to £600. It was necessary that the debt should be paid, and he desired an increase of allowance to £900. In these circumstances, what happened was this. In 1868, Lieutenant Menzies entered into an agreement with his father

whereby, on the one hand, payment of the debt of £6000 and the increased allowance was provided for; on the other hand, the son consented to a disentail, the estates being re-settled on his father in liferent, himself in liferent allenarly, and the heir-male of his body in fee; whom failing, to the heir called by the entail. The lieutenant is unmarried. It thus appears that the consideration obtained for this agreement was about £16,000, that being the market value of a *post obit.* security covering the debt of £6000 and the increase of allowance. Upon the other hand, the value of the right renounced was the £300,000, representing the Rannoch estates, less the value of the next heir's life interest therein. That value does not seem to have been calculated, but it may be assumed that there was an enormous disproportion between the value received and the value renounced. Now, as observed by the Lord President in *Gray* v. *Binny*, 7 Ret. 342, it is certainly true that grossly inadequate consideration is not sufficient to set aside an agreement of this kind. It is conceivable that Lieutenant Menzies meant to give his father, say, £100,000. It is also conceivable that he was ignorant of his legal rights, and yet dealt with them in such a manner as to disentitle him to redress. But in cases of grossly inadequate consideration, the rule is that there should be inquiry. As Lord Young said in *Gray* v. *Binny*: "That a party has obtained from a dependent what appears *prima facie* to be an undue advantage is not in general (subject to some exceptions) conclusive, for the dependent, in the full knowledge of what he was doing, may have meant to give it him. In such cases a Court will only suspect some abuse of influence or confidence, *and will therefore investigate the circumstances of the transaction.*" This was the view taken by Lord Rutherfurd Clark in dissenting from the decision in the *Rannoch* case, and it is not very intelligible why that rule should not have been followed. Lieutenant Menzies was certainly dependent on his father for support, and there is, to say the least, a *prima facie* appearance of undue advantage when the fee of a great Highland estate is surrendered under the circumstances just described. Did he then make admissions on record which disentitled him to the benefit of the rule directing inquiry into such transactions? So far as appears from the report, the very opposite was the case. The pursuer made strong allegations to the effect—(1), that he had no independent professional advice; (2), that he relied on his father's solicitor, Jamieson; and (3), that his father and Jamieson permitted him to enter into the agreement in the belief that it was the only alternative to bankruptcy and the total loss of his interest in the estates, while they knew, and he did not know, that he might have protected himself in the *post obit.* market by a bond for £16,000. With respect to the want of professional advice, Lord Young observed in *Gray* v. *Binny*: "One very general rule of the Court (I do not put it more strongly), is that in a transaction such as is generally accomplished with professional assistance, the party from whom any considerable benefit is taken by one standing to him in a

relation of influence and confidence, ought to have the protection of independent professional advice, and that there is a presumption (which it will be at least hard to overcome) of unfair dealing, if he had not." And in summing up the facts in that case, his Lordship observed: "It is reasonably certain that he was not made aware of the whole state of the case, and in particular, was not informed that there was any alternative between refusing to afford any reasonable and efficient aid to his mother and signing away his inheritance altogether. He was thus kept ignorant of the very first and most important fact which a man of business charged with his interests would have represented to him, and of the course certainly open to him, and the most obviously proper for him to adopt." These weighty observations apply to the averments made by the pursuer in the case of *Menzies* v. *Menzies*. Their weight is increased by the fact that Lieutenant Menzies was under apprehension of immediate bankruptcy. If they truly represent the law of Scotland, they should have led in that case to an investigation of the singular transaction there attacked. It is obvious that the cases of *Gray* and *Menzies* cannot stand together, and it is probably not difficult to choose between them for authority.

Imprisonment for Debt.—Whether wisely or unwisely, the remedy open to a creditor for the recovery of his debt, by diligence against the person of his debtor, has almost wholly disappeared, under the influence of legislative enactment and judicial decision. The Debtors Act 1880, first took from creditors the compulsitor of imprisonment on decrees for civil debts, save in a few excepted cases; then the Civil Imprisonment Act 1882, abolished imprisonment on decrees for aliment, unless the failure to pay was wilful; and now, by the judgment of the Second Division in the recent case of *Hart* v. *Anderson's Trustees*, 28 S.L.R. 133, it is no longer competent for the creditor in an ordinary civil debt to apprehend his debtor on a warrant granted against him as being *in meditatione fugæ*. To most, if not all, legal minds, the decision must have come as a startling surprise, for it has hitherto been assumed, both in theory and in practice, that the granting of *fugæ* warrants was in no way affected by the Debtors Act; and there are many judicial opinions to this effect, notably in *Mackenzie* v. *The Balerno Paper Mill Company*, 10 R. 1147, and *Kidd* v. *Hyde*, 9 R. 803. The circumstances in *Hart* v. *Anderson's Trustees* were as follows:—Hart was apprehended on a warrant granted for his apprehension as being *in meditatione fugæ*, upon a petition which set forth that the sum of £60 was due by him as rent of certain subjects for a period which had elapsed; that under a lease of the same subjects for ten years (with a break at the end of three years), he had agreed to pay a rent of £125 annually; that he had refused to pay the former sum and to find

security for the latter, and was *in meditatione fugæ*. A note of suspension and liberation on various grounds, none of which, however, embodied the *ratio decidendi*, having been refused, Hart reclaimed to the Second Division. It was, fortunately, found unnecessary to decide the question whether a *fugæ* warrant could be granted for a contingent debt, although there were not wanting expressions of opinion that it could not, notwithstanding the contrary authority of *Gill* v. *Ferrier*, 16 S. 934 (a judgment of the whole Court); and the decision proceeded on the broad principle that, as at common law, imprisonment of a debtor on a *fugæ* warrant was only allowed "in order to enable the creditor to have *parata executio* for his debt, and thereby insure execution of *ultimate diligence* against his person" (*Marshall* v. *Dobson*, 7 D. 232), and that, as imprisonment could no longer follow upon decree for the debt due by Hart, in consequence of the provisions of the Debtors Act, the accessory diligence of imprisonment on a *fugæ* warrant was also incompetent.

The question is a difficult one. Had section 4 of the Debtors Act said nothing further than to abolish imprisonment for ordinary civil debts, then, on the authority of *A. B.* v. *C. D.*, 5 D. 1116, and *Marshall*, 7 D. 232, there could be no doubt of the soundness of the above decision. But the section also provides that "nothing contained in this Act shall affect or prevent the apprehension or imprisonment of any person under a warrant granted against him as being *in meditatione fugæ*," and the question therefore remains, whether the Act does not say, or, at all events, mean, that in any question relating to *fugæ* warrants, the Act shall simply be held to be non-existent. The respondents' argument shortly is: "Hart could have been imprisoned on a *fugæ* warrant for this debt prior to 1880; if he cannot be imprisoned now on such a warrant, it is because of something in the Act of 1880, and that Act distinctly provides that nothing contained in it is to prevent such imprisonment." If the words of the Act were—"nothing herein contained shall affect or prevent *the granting* of *fugæ* warrants and imprisonment thereon," this argument would be more difficult to meet. But that is not what the Act says: it provides that nothing contained in it shall affect or prevent the imprisonment of any debtor on a warrant *granted* against him as *in meditatione fugæ*. It is thought that these words can only, or, at all events, can reasonably, be held to mean "on a warrant competently granted against him as *in meditatione fugæ*," and that we are thrown back upon the old law to inquire in what circumstances such a warrant could competently be granted, which, of course, was only when imprisonment could follow on the decree. *Fugæ* warrants, as Lord Mackenzie tersely says, "are just to prevent debtors escaping from imprisonment, and wherever imprisonment is incompetent, they are also;" and to bring about such an essential alteration in the nature and object of these warrants as to allow them to be granted where no imprisonment could follow on the decree, would require an enactment much more distinct and unambiguous.

No doubt, this interpretation is not free from objection, for it is obvious that the same result would have been attained although the qualifying words at the end of section 4 had not been inserted in the Act, and they are, therefore, in this view, rendered useless and unnecessary. That is, however, a state of things which is not uncommon in recent Acts of Parliament. For example—the Employers Liability Act provides that a master shall be responsible for defects in ways, works, &c., if such defect arose from *his own* negligence, or the negligence of a person intrusted with the superintendence thereof, and this provision as to the master's liability for his own negligence was quite unnecessary, as it was already met by the common law; or, to take an instance still more like the present case—the Personal Diligence Act 1838, and the Bankruptcy Act 1856, both provide that nothing therein contained shall affect the landlord's right of hypothec, and this was plainly useless and unnecessary.

We do not think that the reclaimers derive much support from the argument, that to allow imprisonment on a *fugæ* warrant, where imprisonment cannot follow on the decree, is to furnish such an unequal remedy as to involve an absurdity in the use of diligence. Unequal remedies are not unknown to the law, for it has been expressly decided that an order for consignation of money during the dependence of a process may be followed by imprisonment, although no imprisonment could follow on the decree ultimately obtained (*Mackenzie, supra*, p. 89), which is to give very unequal remedies for the recovery of an alleged debt and a constituted one. We do think, however, that where two interpretations of the statute are permissible, as appears to us to be the case, that interpretation should be adopted which, we believe, not only complies with the spirit but with the letter of the Act, and which excludes the apparent incongruity and absurdity of allowing a debtor to be imprisoned for an alleged debt, but not for one duly constituted by decree.

The effect of this decision will be to raise the very important question whether *fugæ* warrants can competently be granted for aliment. Imprisonment is not now as matter of course competent upon a decree for aliment; for, by the Civil Imprisonment Act 1882, it can only follow where the Sheriff is satisfied that the failure to pay is wilful, and it would therefore seem that a creditor in such a debt would not now be entitled to apply for a warrant against the debtor as *in meditatione fugæ*. If, however, the result of this decision should be to induce Scotch legal members (Law Officers included) to watch, with more care than in the past, bills affecting legal rights and remedies, when introduced by irresponsible lay members, it will have served a most useful purpose.

J. G. S.

Trade-Mark — Registration — What are Special and Distinctive Words?—*Perry Davis & Son* v. *Lancaster Harbord*, 15 App. Ca. 316.—In 1877 the appellants registered under the Trade-Marks Registration Act, 1875, the words "Pain Killer" as their trade-mark. In 1883 the respondent moved under the Patents Designs and Trade-Marks Act, 1883, to amend the register by removing therefrom the entry of the words "Pain Killer" as a trade-mark. By § 10 of the 1875 Act to entitle any "special and distinctive word or words" to be registered as a trade-mark they must have been used alone as a trade-mark before the passing of the Act, and not merely in combination with other words.

In this case the House of Lords, affirming the Court of Appeal, held that the words "Pain Killer" must be struck off the register, on the ground that they had not been used alone. On the contrary, the bottles in which the medicine had been sold bore the words "Perry Davis' Vegetable Pain Killer." This in the opinion of all the judges would have been sufficient for the decision of the case. Lord Halsbury, L.C. and Lord Morris held also (as Fry and Lopes, L.J.J. had done in the Court below), that the words "Pain Killer" were not "special and distinctive words" within the meaning of § 10. This expression was held to mean not words which might distinguish the article from other articles of the same class, but which distinguish a particular person's goods from somebody else's goods. "Pain Killer" alone is not distinctive, because it does not distinguish Smith's "Pain Killer" from Brown's "Pain Killer." Lords Herschell and Macnaghten reserved their opinion on the point, the former suggesting that if the words had come to be applied solely to the preparations made by the appellant they might be held "distinctive words" as distinguishing that from any other medicinal preparation.

In the earlier case of *Palmer's Trade-Mark*, 24 Ch. D. 504, which was very analogous, it was held that the words "braided fixed stars" were not special and distinctive. The argument that such an expression might come to be attached exclusively to the goods of a particular maker, so that whoever saw "braided fixed stars" would at once think of "Palmer" as the sole maker, was rejected. It might happen to be true in fact, but could never give the maker an exclusive right to words merely descriptive. "Whatever is mere description is open to all the world." Lindley, L.J., seems to lay down the true test in saying, "If a man's only trade mark is a word or set of words descriptive of the patented article of which he is the only maker, it appears to me to be impossible for him ever to make out as a matter of fact that this mark denotes him as the maker as distinguished from other makers."

Even though the words "Pain Killer" were held not to be merely descriptive, and, on that account, open to all the world, they do not, strictly speaking, denote any particular maker. It must not, however, be assumed, whatever may ultimately be ascertained, to be the true construction of the words "special and distinctive" in the Act of Parliament authorising

registration, that this consideration would necessarily decide the further question—viz., whether at common law a trader had not established such a right of property in a particular word or words, though mainly descriptive, as would entitle him to challenge the use of these words by a rival trader.

Conversion—Heritable and Moveable.—*Brown's Trustees* v. *Brown*, 4th Dec., 1890, 28 Sc. L.R. 138.—It seems unfortunate that the Second Division of the Court of Session should insist in maintaining the principles on the subject of conversion which were condemned in *Sheppard's Trs.* v. *Sheppard*, 12 Rett. 1193. That case was sent to seven judges, because it was seen that in applying the words of Lord Fullerton in *Buchanan* v. *Angus*, 4 Macq. App. 374, a serious difference of interpretation had arisen between the two Courts of Appeal. On the one hand, the First Division, taking a strict view of this question, had decided against conversion in *Auld* v. *Anderson*, 4 Rett. 211; *Hogg* v. *Hamilton*, 4 Rett. 845; and *Aitken* v. *Munro*, 10 Rett. 1097. On the other hand, the Second Division, taking a looser and vaguer view, both of the authority of *Buchanan* v. *Angus*, and of the principles involved, decided in favour of conversion in *Boag* v. *Walkinshaw*, 10 M. 872; *Fotheringham's Trs.*, 11 M. 848, and *Baird* v. *Watson*, 8 Rett. 233. In *Sheppard's Trs.*, it was held by a majority of the seven judges (Lord J.-C. Moncreiff and Lord Young being the minority) that, as the exercise of the discretionary power of sale conferred on the trustees was not indispensable to the execution of the trust, and had not been exercised, there had been no conversion. Now it seems plain that direction to divide the residue of a trust-estate, which may contain both heritage and moveables, with equal shares, even among a considerable number of beneficiaries, is clearly not a direction to sell. Cases are conceivable in which an intention to convert might be implied without any direction to sell, but such an intention cannot be implied from the mere fact that a truster describes the shares as payable to the beneficiaries. Very much the same considerations apply as in determining whether or not a trust-deed contains an implied power to sell. It is familiar law that such a power has scarcely ever been implied except for the purpose of paying debts, and so far as necessary for that purpose. In fact, an implied intention to convert would probably mean an implied direction to sell. But, if the express power of sale be discretionary, how can there be an implied direction to exercise it? Notwithstanding these difficulties, in the case of *Brown's Trustees* v. *Brown*, the Second Division appear to have gone back to the erroneous principles on which, prior to *Sheppard's Trustees*, they were proceeding. There was a direction to hold the residue, heritable and moveable, for behoof of children in equal shares, but the power of sale was expressed to be "if the trustees thought proper." Lord

Young says that reading the whole will he infers there was an intention to convert, but he declines to submit this inference to the tests sanctioned by the Court. It would appear that Lord Rutherfurd Clark was almost prepared to dissent from the judgment in *Brown's Trustees*, which he thought to be, at least in the view of the majority, inconsistent with *Sheppard's Trustees*. He contented himself by saying, in the classical words of Lord Fullerton, that conversion was "indispensable and necessary to the due execution of the settlement." But this expression was itself authoritatively construed in *Sheppard's Trustees* and the previous decisions which it adopted and approved of.

COLONIAL CASES.

La Banque d'Hochelaga v. *Murray* (1890, 15 App. Cas., 414).—In this case—an appeal from the Court of Queen's Bench for Lower Canada—a point of considerable interest, viz.:—Can letters patent be partially annulled by *scire facias?* was raised and left undecided. The defendants and others had been incorporated by letters patent issued under the Great Seal of the Province of Quebec, upon a fraudulent representation that they had petitioned for the same. A writ of *scire facias* was issued on an information by the Attorney General against the Company, its liquidator, and its judgment creditor, to show cause why the letters patent should not be declared fraudulent, null, and void, "at least in so far as the said defendants were concerned." The Superior Court for Lower Canada dismissed the application for annulment. This decision was reversed by the majority of the judges in the Court of Queen's Bench, who directed the letters patent to be partially repealed in accordance with what they conceived to be the prayer of the information. The Judicial Committee of the Privy Council have now varied this order, and decided that the letters patent must be entirely cancelled and repealed. The *ratio decidendi* may be stated thus—(*a*) Their lordships construed the prayer of the information to mean "that the Court should declare that the letters patent were fraudulent and void; but that, if the Court "should think fit to declare anything less, the least that should be declared should be that the letters patent were fraudulent and void in so far as the defendants were concerned." The prayer was not therefore restricted to the partial annulment of the patent. (*b*) Articles 1034 to 1037 of the Code of Civil Procedure for the Province of Quebec, which regulate the annulment of letters patent, do not authorise a partial repeal "in such a case as the present." "To annul the letters patent," said Sir Barnes Peacock, who delivered the judgment of the Privy Council, "as to some only of the members of the corporate body would be to alter the constitution of the corporation created thereby. If it could be annulled as to eight or ten of the shareholders, it might be annulled as to all but five, and then the amount of the capital of the corporation, as intended by Her Majesty to be constituted, might be, and would be, materially diminished. In fact, by such a partial annulment a corporation might be created quite contrary to Her Majesty's intention, and such a one

as would be incapable of carrying into effect the objects intended by the letters patent." It will be observed that this decision leaves the broad question, whether letters patent can in any case be partially repealed by *scire facias* unanswered. The authorities bearing upon this point are both meagre and conflicting. On the one hand, it is true, as Sir Horace Davey urged in his argument for the appellants, that "the old practice was to order on *scire facias* that the letters patent should be brought in (to Chancery) to be cancelled, and then followed the ceremonial of cutting off the seal." The prayer of the information, too, "*Quod litteræ patentes vacentur*," seemed to contemplate a total repeal, and in the three cases mentioned by *Coke* (4 Just. 88), in which "the Chancellor by his ordinary power may hold plea of *scire facias* to repeal the King's letters patent," a similar result was in view. On the other hand, the *Sackvile College* case (Term. Pasch., 21 Car. ii. ; Sir T. Raym., 154, 177), is a direct authority for the proposition that letters patent containing independent clauses may be partially annulled.

It may be regretted that the decision in this case did not travel a little beyond the issues. But the practice prevailing in Privy Council appeals, whereby only one judgment is delivered, and no dissentient voices are heard, is distinctly inimical to *obiter dicta*.

A. W. R.



Professor Rudolf von Jaurt

XUM

THE RECENT PROGRESS OF CODIFICATION.(a)

THE subject of codification having been so frequently before the public of late, everyone knows the idea which it is intended to convey. I, therefore, only premise that codification, according to my understanding of it, signifies the reduction of the law to a clear, compact, and scientific form. It means the extraction from the countless volumes of statutes and decisions, where the law lies shapeless as it grew, of the propositions which regulate the relations of man to man, and it provides for their statement in orderly form according to their subject. It is the substitution in law of the simple for the complex, of the clear for the obscure, of the systematic for the chaotic. The idea does not necessarily involve that of the uniformity of the law over the whole area subject to the government which enacts the code. The rule which guides on this point is well set forth in the words of Macaulay, which have been adopted as the motto to Whitley Stokes' edition of the "Anglo-Indian Codes":—"Our principle is simply this—uniformity when you can have it; diversity when you must have it; but in all cases certainty."

The older history of codification is too well known to require repetition. As the reader knows, the beginning of the movement towards codification dates from the middle of the 17th century. It is true that before that time, and even in very ancient times, pieces of codification of law are to be found, but the idea of the deliberate reduction of the whole

(a) This article has been recast by the author from a lecture given in Aberdeen, at the request of the Bankers' Institute of Scotland.

body of the law to a code dates only from the time of Louis XIV.(a) That great monarch, with the aid of his still greater statesman, Colbert, had the happy thought of reducing the whole mercantile and maritime law of France to a code; and the famous "Ordonnance" of 1673 is really the precursor of all modern scientific legislation. It had the good fortune to be interpreted by distinguished lawyers, some of whose names—Savary, Pothier, Valin, and Emerigon—still endure; and these men made the French work famous wherever the principles of law were cultivated. The next noteworthy attempt at codification was due to Frederick the Great, of Prussia, who made, or rather caused to be made, the code known as the "Allgemeine Land-Recht," dating from the middle of the 18th century. From the close of that century—though it was long before that in preparation—dates the completion of the next great European code—that which codified the law of the German portions of Austria. All these codes, however, were eclipsed by the code which, under Napoleon, was made for France; and from that time forth the success of codification grew till it came to be undisputed; and it has gradually extended its sway, till now codes which embody the whole law have either been made, or are in process of making, for every portion of the civilised world, with the only notable exceptions of our own country and the United States.

In our country our first code, that of Bills of Exchange, dates only from 1882. It was drawn by Judge Chalmers, it may be remembered, as applicable to England only, and was subsequently extended to Scotland. It is a piece of work of distinguished clearness and ability, and its success has been great. During the eight years which have passed since it was enacted there have only been four cases of any importance, so far as I can remember, that have arisen upon its

(a) [However, there is strong reason to believe that both the emperors, Theodosius and Justinian, had this in contemplation—viz., to fuse the *vetus* and the *novum jus*,—but they found the task beyond their powers.—Ed. *Jurid. Review*.]

construction—three in England and one in Scotland—a fact which, when one considers the amount of transactions in which bills of exchange are involved, shows the remarkable benefits which codification can give. After that bill was passed, it occurred to the Associated Chambers of Commerce of the United Kingdom that it might be possible to have for Great Britain and Ireland a code embodying our whole mercantile law. They passed a resolution to that effect, and they sent in support of it a deputation to the Government, which was received by Lord Chancellor Selborne. The deputation cannot be said to have been fortunate. The Lord Chancellor seemed not greatly satisfied about the value of codification at all, sympathising apparently with a school of lawyers now disappearing. He did not object, however, to codification altogether, but counselled the merchants to proceed gradually, and not to attempt what he thought would be the hopeless effort of making a code of the whole mercantile law, but to codify that law bit by bit, and with this suggestion the Chambers of Commerce went away satisfied. Of Government help even to the bit-by-bit codification there was no promise. The proposal made to the Lord Chancellor was, I venture to think, an exceedingly moderate one, because the mercantile law is in itself a mere fragment of the whole law of the country, and a proposal to sub-divide it into other fragments seemed to me the postponing of the making of a mercantile code to an indefinite period. The result has been what, I think, any one might have expected.

Nothing was done for seven years, and then the law of partnership was codified, unfortunately in a somewhat incomplete form. The bill as originally drawn, now some twelve years ago—there has been no indecent haste—by Sir Frederick Pollock, who has been justly described as the greatest legal writer of the day, was very complete, but owing, it is said, to inability in high quarters to agree upon what the law should be, or, indeed, rather upon what the law was, certain important subjects, such as the rights of the creditors in case of dissolution, and the right to good-will,

had to be omitted. The code, like the Bills Code, was drawn originally as applicable to England only, but was adjusted in Parliament so as to make it applicable to Scotland also. The important difference between English and Scots law in regard to the legal person, which is created by the firm, remains, and along with it all the numerous consequences which flow from it. This, however, was inevitable, and is not a serious blot upon the measure, because the law in the two countries is nevertheless perfectly clear.

Proceeding in the same way on the bit-by-bit principle, a bill has been brought forward to codify the law as to the sale of goods. It has been drawn by the draftsman upon whom the Bills of Exchange Code reflected so much credit, and was introduced in 1889 to the House of Lords by Lord Herschell. It made little progress, but that is not due to any want of merit in the measure, but solely to the fact that other measures are considered by the British public to be more pressing. It has again been introduced in the present session. Like the Bills Code, it is drawn with singular clearness. It embodies the existing law of England, and merely as an exposition of principles, its merits are great. It is intended by its promoters to be so altered in Committee as to suit both England and Scotland. On looking at it, with the view of seeing what changes would be required for this purpose, one is struck by the large number of points on which the law in the two countries still differs, and on which the law is still unsettled. It is a thing hard to be credited that the inhabitants of Great Britain, forming by far the greatest commercial nation in the world, should be content that the law upon so comparatively simple, and yet so enormously important, a matter as that of sales should be different in the different parts of the United Kingdom, and should to a large extent, be unsettled. To give some examples, the well-known Statute of Frauds, which requires certain contracts of sale to be in writing, applies to England only; and this is a thing which no Scotsman will regret, because the statute has been fertile in nothing except in

producing on the part of merchants and lawyers ingenious and tolerably successful attempts at its evasion. It is alike strange and inconvenient that the law as to warranty should be different in the two ends of the island, and it does not seem to be even certain that a sale by sample has entirely the same effect in both England and Scotland. There is a difference also as to when the property passes from seller to buyer—it passing in England at the time of sale, and in Scotland not till the time of delivery. Then the law as to the damages which may be recovered for breach of contract of sale differs also upon one very important particular, the Scots law not containing a restriction of, I think, an unreasonable kind which the English law contains. Some will be surprised at all this, there being a prevalent belief that practical uniformity had long since been attained in mercantile law. This is certainly a mistaken belief. The attempt made in 1856 to assimilate the commercial laws of the two countries has met with little success. It proceeded upon an altogether wrong principle. The framers of the Mercantile Law Amendment Acts of that year were of opinion that, so long as the practical results of the law in the two countries were made the same, it was not necessary to alter to any extent the principles from which those results proceeded. The effect was that they made certain changes securing an identical operation of the law upon the points immediately in view; but, as they left the fundamental principles different, the subsequent working out of the law upon points which were not in view has diverged. One clause of the Scottish Act of 1856 has, I am afraid, operated a good deal of injustice—I mean the clause which abolishes implied warranty except where a thing has been sold for a specified and particular purpose. This clause gives rise to many anomalous decisions; but the point I wish particularly to direct attention to is that that clause which was introduced to make the Scots law agree with the English has, in point of fact, left the Scots law quite as different from the English as it was before, and that the English

lawyers apparently do not recognise it as setting forth the rule applied by their Courts.(*a*) Equally surprising it is to find that there are many points in the law of sale which are still unsettled. For instance, in England it is still an arguable point whether a seller is held to guarantee the title of the property which he transfers, and it is doubtful whether, if goods be subject to encumbrances or charges at the time of sale, the seller is bound to clear them off before delivery. In Scotland there is room for doubting upon so small a point as whether, if the buyer be in arrear with the payment of the price, he is bound to pay interest upon it, it being laid down by such authorities as Professor George Joseph Bell, the greatest Scottish commercial lawyer of this century, and in the report of the Mercantile Law Amendment Commission, that interest is due; while, on the other hand, there are lawyers who seem to think that we are bound in this matter to follow the example of England, where, according to a specialty of the common law, damages for the detention of a debt are merely nominal, and interest is not due, and can only be given to a limited amount in certain cases, in virtue of a special statute. And in both countries there are very important questions still open as to the effect of a breach occurring in a contract to deliver goods by instalments. Those differences which I have mentioned could be reconciled, and the doubts could be cleared up, were the Sale of Goods Bill passed. Possibly it is only a lawyer like myself, to whom it has fallen to decide many thousands of cases in the law of sale, who can thoroughly realise the misfortune of there being points occurring in daily practice upon which it is often impossible to find any rule which is stated by any two lawyers in precisely the same terms or, indeed, upon which it is often impossible to find any rule at all. The Sale of Goods Bill at present has gloomy enough prospects, little or no attention being paid to it by the persons for whose benefit it is mainly designed. The

(*a*) See Judge Chalmers on the Sale of Goods, pp. 21-23.

progress of codification in the United Kingdom is thus exceedingly slow. In fact, I have doubts whether I am at all entitled to use the word "progress" in connection with it. Compared with the speed at which we are progressing towards codification, the proverbial tortoise urges on a wild career. It is difficult to calculate how long, if we do not improve our pace, it will be before the whole body of the law of the United Kingdom is codified. I have been trying to calculate roughly, and I make out that somewhere between three and four hundred years will be requisite at the present speed. Truly the nation which can lead all others in every kind of material enterprise, where courage or endurance is required, lags far behind on the intellectual field of the law-giver.

It must not be inferred, however, that the British Legislature, if it has been almost entirely negligent in the matter of codification proper, has entirely neglected the improvement of the form of the law. On the contrary, very great and praiseworthy progress has been made in one direction—namely, in the consolidation of the statute law. The Statute Law Committee of Parliament dates from 1868, and its objects are to clear the statute books of all obsolete matter, and to consolidate the remaining enactments in such a way as that each statute shall contain the whole of the provisions applicable to some separate and distinct subject, and shall contain nothing else. With this view, Acts repealing a very large number of obsolete statutes have been passed, and the first revised edition of the statutes at large was issued. That edition revised the statutes from Magna Charta to 1878 with such signal success that it reduced their bulk from about fifty quarto volumes to eighteen volumes—a very remarkable success in itself, though nothing further had been done; but, in addition to that, the Select Committee has initiated and encouraged very important legislation in the way of consolidating the statutes. Such subjects as Weights and Measures, Municipal Law, Mutiny, the law as to Lunatics, County Courts, Arbitration, and

Foreign Jurisdiction, are all now (as regards England, at least) embraced in a single statute for each. When one considers the multifarious statutes which had formerly to be read before any of these subjects could be mastered, one can conceive the immense improvement that has been made. The consolidation has as yet dealt mainly with subjects connected with administration, but the work of the Statute Law Committee is still being carried on (and, if I may venture an opinion), intelligently and industriously in both departments. The second revised edition of the "Statutes at Large" began in 1887, and merely by deleting further statutes that have become obsolete, there will be a gain of at least two volumes over its predecessor, and the further consolidation of many of the old Acts will result in a much larger condensation. When such subjects as Civil Procedure, Justice of Peace Law, the Poor Law, and the Companies Acts have been consolidated, the gain will really be enormous. Civil Procedure Acts, for example, in England are very voluminous. In point of time they extend from the fourteenth to the end of the nineteenth century, a period of some 600 years, and in point of number their abbreviated titles alone fill in the index two large imperial 8vo pages of closely printed double columns. It is little wonder that in such a state of the law of procedure, cases in England on points of practice should be almost innumerable, and I notice that the mere rubrics of those cases fill annually somewhere about ten closely printed pages of the digests. The consolidation of the procedure statutes could not fail to clear away a vast number of the occasions for this most futile species of litigation. The work of the Statute Law Committee, though done quietly and unobtrusively, is probably the most beneficial work which Parliament is at present doing for the law of the country, and to Lord Thring, Mr. Malkin, and the others who co-operate with them in carrying it out, our debt of gratitude is great.

Unfortunately comparatively little of this benefit has as yet been extended to Scotland. It is only when British

statutes have come to be consolidated that we have shared in the profit, little attempt having yet been made to consolidate the exclusively Scottish statutes. The field in Scotland for both consolidation and revision is large, and the Statute Law Committee have made well-considered proposals for occupying it. The Scottish statutes fill when printed at full length in the folio edition nine volumes. Of these statutes by far the larger part is obsolete, though scarcely one has been actually repealed, and a question as to each of them is almost always left open for argument whether it is in force or not. The proposals of the Statute Law Committee are to revise all the ante-union statutes and repeal all those that are now useless.(*a*) The vast majority of the statutes would thus disappear. There would then remain a small number of statutes which would require consolidation, and these it is proposed in the meantime to reprint by themselves. The most important statutes left would be those dealing with prescriptions or limitations, and some provisions as to bankruptcy and trusts. Those are in such antiquated language, and have all been so overlaid with a mass of interpretation, that they stand greatly in need, not only of consolidation, but of being translated into modern English, so that they may be intelligible. The ante-union statutes being thus treated, the committee propose to go over the exclusively Scottish statutes since the date of the Union in the same way. Nothing but good could ensue from the carrying out of the Statute Law Committee's proposals as to Scotland, but though they were submitted in 1876, nothing, so far as I know, has been done to carry them out.

From the progress of codification in the United Kingdom I turn to foreign countries. Naturally the first country to consider is India, because it is—curiously enough—from India that British codification has been imported. At one time it was difficult to get information as to the Anglo-Indian codes. If there were cheap popular editions of them they

(*a*) [It is only fair, however, in this connection, to refer to Mr. Alexander's collection of the Scots Acts of practical utility.— Ed. *Jurid. Review*]

did not find their way to this country, and information about them could be got only in somewhat expensive individual treatises, and even these were not readily accessible. The work of Mr. Whitley Stokes, who was himself a distinguished contributor to Indian codification, has removed this difficulty in everything except, as regards expense. It gives in the fullest manner desirable all information on the subject. Codification in British India began so far back as 1829, and the name of Thomas Babington Macaulay is associated with its origin. A commission, of which he was a member, prepared a draft penal code so early as 1834, though the code seems not to have passed till 1860. It was the first of the Indian codes, and is remarkable for the simple construction of its language. Its general provisions are substantially the same as the criminal law of England, the only notable exception being that which makes a breach of the Seventh Commandment punishable with five years' imprisonment. The next codes for India were those of criminal procedure, civil procedure, and limitations, passed about the same time. Then in 1865 there was given to India the great boon of a code laying down the law of succession. It would hardly be possible to overrate the benefits which would accrue to this country if the law of succession in England and Scotland could be assimilated, for in these days when persons are passing from the one country to the other so frequently questions are for ever recurring as to which law of succession is to govern. Then followed in 1872 the Indian law of contracts, which is practically a code of commercial law, dealing as it does with such subjects as the sale of goods, mercantile guarantees, and the law of principal and agent. Unfortunately, Mr. Whitley Stokes says that the revision of this particular code was ill executed and that it leaves much to be desired. About the same time the law of evidence was codified. Then ensued a considerable pause. The intervention of Lord Salisbury, then Secretary for India, in 1875 insured the continuation of the codes. In 1881 and 1882 there followed rapidly the codes for negotiable instru-

ments, transfer of property, trusts, and easements or servitudes.

Between that and the present time there has been another long pause, nothing having been done except the revision of some of the former codes. Whether this pause is connected with the fact of the British attempts at codification, having been to a certain extent modelled on the Indian codes, I do not know, but codification has still in this country a few avowed and many unavowed opponents, and it is possible enough that if they have begun to recognise that English law is first to be codified for India, and that then the Indian code is to be a model for home use, they may think that it is high time that some difficulties were placed in the way of further progress in India. With a public in Britain which is indifferent, the opposition of such persons may be sufficient to stop the way. The obstacles can hardly come from India, because with all classes there codification is popular. As evidence of native opinion on the subject Mr. Whitley Stokes quotes the words of a venerable native judge, Sayyid Ahmad, to the following effect:—"So far as I am aware the native public has never raised its voice against codification. To them codifying laws mean the introduction of certainty where there was uncertainty, precision where there is vagueness. Nor can it be said that codification is unpopular even amongst the most conservative sections of my countrymen. I must have lived to declining old age amongst them in vain if I am not even at this time of life in a position to say confidently that among all the innumerable blessings of the British rule, the one my countrymen esteem most is justice; that justice in their eyes means peace and order, which in other words mean security to life and property—the sole aim and end of government. At present [he was speaking at an early date] whilst a splendid penal code and a splendid criminal procedure code regulate criminal matters, the civil law is regulated on the somewhat vague though noble principle of 'justice, equity, and good conscience'—a principle much of whose beauty is practically spoilt by the fact that individual

judges in similar cases do not take the same view of that noble maxim. The result is an uncertainty as to rights which reduces litigation to a form of pecuniary speculation, and from which springs that most deplorable class of suits in which the parties, agreeing as to facts, have no authoritative means of ascertaining the law. Codification, and codification alone, can remedy the evils which arise from uncertainty of the law. Codification alone can enable the public to know their exact rights and obligations. Codification alone can enable proprietors and litigants, advocates and judges, to know for certain the law which regulates the dealings of citizens in British India. Codification alone will enable the deliberate will of the Legislature to prevail over the opinions of individual judges." The conclusion of the venerable judge is very Oriental—"Litigants with codification," he adds, "will be more anxious before going into Court to consult the statute-book of the land, than the mental proclivities of the individual judges before whom their disputes have to go for decision."

From the preceding account of Indian codification, it will be seen to what a large and important extent it has been carried out, and what an amount of satisfaction it has given to the Indian public. The Indian method of proceeding being the one most likely to be followed here, it may be useful to give a statement of its principles. The Commission on Indian codification which reported in 1879, made among others the following specific recommendations (*a*) that the process of codifying well-marked divisions of our substantive law should continue; (*b*) that the eventual combination of those divisions as parts of a single and general code should be borne in mind; (*c*) that the English law should be made the basis in a great measure of our future codes, but that its materials should be recast rather than adopted without modification; (*d*) that in recasting those materials, the form which those materials should assume, should, as far as possible resemble those rules already accepted, or that in other words the propositions of our codes should be broad, simple, and readily

intelligible; and (*e*) that uniformity in legislature should be aimed at, but that special and local customs should be treated considerately. A peculiarity of the structure of the Indian codes deserves mention, namely the use of illustrations. While other codes dispense with these, there there are given in connection with many clauses of the Indian codes, illustrations showing exactly how the code would work in a concrete case; and there can be no question but that the examples have the effect of making the rules of the code readily intelligible to persons who are not lawyers.

From India I turn to the position of the British Colonies. They do not appear to have made any great progress as yet in codification. In 1833 when Burge wrote his great work on Colonial laws there were no codes, and even now there are few. There are, I believe, several colonies which have partial codes. Of these I may instance the Province of Quebec in the Dominion of Canada. The fact of the speedy adoption of the Bills of Exchange Code by the whole Dominion of Canada and by two Australian Colonies, shows that if Great Britain would only lead the way in codifying, the example would soon be followed, and that we should before long have a code containing, at least, the whole mercantile law governing the British Empire.

In the United States of America we find a keen desire for codification, accompanied by great practical difficulties in the way of attaining it. In 1889 I had the advantage of hearing in Chicago an address on codification delivered by the veteran Mr. David Dudley Field, one of the most distinguished of American lawyers, as well as one of the strongest friends of codification. He brought out the position of matters very distinctly. A democratic nation like the citizens of the United States, possessed as they are of the brightest and quickest intelligence, and of a perfectly insatiable appetite for knowing and understanding everything for themselves, could not but be expected to be alive to the benefits of codification. It is the enormous difficulties in the way which prevent it. There are forty-two states

(besides five territories), and each state has a perfectly independent legislature, and no code can pass for the United States without the consent of every one of them. In this way the inducement of any single state to codify its laws is not great, as the effect of the codification would be to stereotype any difference which there might be between its laws and those of its neighbours. Accordingly of the states, only five—among which California and Louisiana are the leading—have complete codes. Several more have partial codes, among which may be mentioned the State of New York, which has civil and criminal codes of procedure. What we call statute law consolidation is, however, in a very advanced position in the United States, and the statute law has been consolidated in almost every one of these states so effectually that there is scarcely a state in America in which the statute law cannot be found embodied in one or two convenient and well-arranged volumes, revised and brought up to date every few years. In this respect the United States are far in advance of the United Kingdom, and it must be admitted that this statutory consolidation is a very necessary thing.(*a*) Mr. Dudley Field mentioned that a single year of the sittings of the State Legislatures produced something like 10,000 statutes. The large proportion, in fact nearly all, of those statutes were, no doubt, what we would call local and personal Acts; but still there would be many general Acts which would require to be inserted in their place in the consolidated statute-book. The amount of case law added every year in the United States is beyond calculation. I am not able to state the exact number of volumes of reported decisions of the various state and federal courts which are issued annually, but it cannot be far, if anything, short of something like a hundred. The bulk of the case law has, in fact, become so great that an American legal writer says that it is now obviously beyond the power of the human intellect to be familiar with the cases, or with any considerable

(*a*) See article by Mr. Dudley Field contributed to this Review, Vol. I., p. 18.

proportion of them. Many lawyers, and those not the worst he adds, do not even attempt it. The reading of the American reports has, to some extent, become a separate branch of business, and busy lawyers nowadays, instead of reading the reports themselves, may apply to an agency, which sends them at once a set of all the cases from any mentioned date bearing on the particular point in which they happen to be interested. It is clear that if the United States could get over the difficulty caused by the multiplicity of Legislatures, it would soon codify its law. Proposals have been made with that view. The law of divorce in the United States, says Mr. Chauncey M. Depew, with characteristic terseness, is a disgrace to jurisprudence and a menace to the family; and it has been proposed to have an alteration of the Constitution, and to give to Congress the power to codify the whole law of marriage. With the rest of the laws, the proposals have not gone further than that the States should appoint a joint Commission to draw up a draft code, to be laid before and adopted by each Legislature—a proposal evidently of an impracticable kind. The method in which difficulties of the kind which bar the way in the United States have been overcome in Switzerland and Germany, seems the only practicable method, and probably political reasons prevent its adoption.

It is to Germany that we owe the greatest work of codification of recent times, and, perhaps, indeed, of any time. Germany, it will be remembered, was the theatre of the classical contest in which, once for all, was settled the question whether codification of law was right or wrong. The dispute broke out when the peace of 1815 left men with time to think of other things than war. It was directly raised by the immense importance which the French Civil Code had then obtained. The contest was a memorable one, and it lasted many years. On the one side were all the learning and talent of the legal profession, headed by the illustrious Savigny; while, on the other side, there was nothing but strong popular feeling, led by an obscure teacher of law

named Thibaut. Savigny fired off brilliant attacks on the Austrian and French Codes, denouncing the latter as nothing but a political misfortune. His writings were eloquent and learned, full of talent and juridical insight, and the fame of the contest extended through Europe. It is strange that men whose names, like that of Thibaut, have been almost forgotten, should have been so entirely the victors in this contest, that it is now hardly possible in Germany, any more than it is in the rest of the civilised world outside of Great Britain, to find a lawyer—educated or uneducated—who will raise his voice against codification. In recent times codification fills a mass of literature in Germany, but so utterly dead and gone are the views which the illustrious Savigny advocated, that the literature hinges entirely, not on the question whether there should be codification, but upon the questions when and in what manner it can best be carried out. While Savigny converted the world to the abstract doctrines held by what is called the historical school of law, the particular practical deduction against codification which he insisted must be made from those doctrines has been universally admitted to be erroneous. So utterly extinct is the old objection to codification that I find one German writer on the subject who says that even though a code were for the first generation to double the number of law suits, it would yet be a benefit and a necessity; and this writer, although he admits that he expects,—I hope erroneously,—that the new German code is to have this effect, does not on that ground object to it.

Although the contest over codification was long since decided in its favour, the political obstacles to it in Germany were so great, that for many years the desire for it was followed by no result. The great popular rising in 1848, and the strong outburst in favour of German unity which accompanied it, so far led towards codification that there resulted a code on commercial and maritime law, and a code of the law of bills of exchange, being those codes which in a movement towards codification usually come first. There the matter rested until the foundation of the German Empire in 1870.

At that time came the opportunity for carrying out the long delayed hope of the German nation, and all classes, including especially the jurists, set energetically to work to bring about codes of the whole German law. The Penal Code was the first result, and then, in consequence of steps which began in 1873, there followed in 1877 codes settling the jurisdiction and procedure of the Courts, and the law of bankruptcy for the Empire. But the great work of codification for Germany, the German Civil Code, was not begun till 1874. In that year a statute consisting of a single clause was passed by the German Imperial Parliament, resolving that there should be a Code of Civil Law for the Empire. At that time, I may remind the reader that the difficulties in the way of codification of the German law were still far greater than any difficulty that could confront a British Legislature. There were four leading systems of law in use. In some parts of Germany codes based almost entirely on the French Civil Code ruled. In other parts of Germany there was the Prussian Code already mentioned. Then there was the Saxon Code, and in some other states there were other codes. In addition to all this there were large portions of Germany without codes, where the system known as the German-Roman Law dominated, and while the Roman part of the law was over those different portions tolerably uniform, the parts of the law which owned a German origin were far from being so.

Our German neighbours, when they undertake anything, are laborious and systematic, full of forethought, perseverance, and power, and the difficult task before them has at length been so far overcome that ultimate success is certain. It took more than thirteen years of toil to prepare the draft code. As there are many people in this country who fancy that a code, if it is to be done at all, is a thing that can be left alone for years, and then taken up at convenience and passed in a single session as easily as a railway or canal bill, it is worth while mentioning in brief outline how the Germans set about and carried on their work. First of all, they appointed a Commission of five eminent men (containing

amongst them the commercial lawyer Goldschmidt) to decide upon the best mode of drawing up the code. The Commission was appointed in 1874, and reported in the course of the same year in great detail. The German Imperial Parliament, on the motion of the Government, approved substantially of the method suggested, and the next step was to appoint a Commission of eleven persons to prepare a draft. The persons selected were eminent statesmen, judges, professors, and advocates; and great care was taken to balance as fairly as could be the different schools into which German law was divided, and, in particular, fairly to represent the Roman and German sections respectively. The first duty of the Commission was to map out the subject, which they did into five leading parts—namely, an introductory part, laying down general principles; a part dealing with contracts, another with property, another with the family relations, and a last part dealing with successions. These different parts were then entrusted to draftsmen, and the work of drafting occupied some six years. During this time the meetings of the Commission itself were comparatively few, as it seems to have been called together only when required to settle questions of doubt as to the department to which any particular subject was to be assigned when it stood on a boundary line between the great divisions or when any of the draftsmen applied for instructions. The drafts were completed in the end of 1880, and then began the regular sittings of the Commission. For seven years, with the exception of annual holidays, the Commission sat four days a-week. On the first three days of the week the Commission discussed principles, voting when necessary, and on the fourth day they settled the protocol of what they had done. It will give some idea of the extent of labour and of the minuteness with which the Commission examined everything when I mention that those protocols filled more than twelve thousand folio pages of writing. This work of revision was completed in 1887, and then the Commission occupied a few months more in again going over the draft with the view of seeing that the language used through-

out it harmonised. The result of their labours is a code of upwards of 2000 clauses, which has now been published, and is at the present moment under the criticism of the German nation, and, in particular, of the professional and commercial classes, before being presented to Parliament with a view to enactment. Five large volumes accompany the code, and give the reasons upon arguable points for the rules which have been adopted. The code itself goes over a very wide field, the special divisions which I have already named embracing almost the whole domain of private law. Still there are some notable exceptions, which have been left for the future codification. In particular, the laws as to mining, the forest and game laws, the laws as to water rights and as to peasant estates have in the meantime been left over. These subjects, being special, it is thought will be better treated after the passing of the general code.

The discussion of the code is proceeding with unusual fervour, it having been made the subject, on the one hand, of elaborate praise, and, on the other, of as vigorous condemnation. The main faults found with it are that it is said to possess too much of a doctrinaire or scientific character, that it is not sufficiently practical, and that it is founded too much on the Roman law and too little on the German law. Its language, also, is denounced by some as wanting in that idiomatic clearness which some Germans have been able to discover in their native tongue. It is difficult for a foreigner to venture to pass an opinion, but so far as I am capable of forming one, it seems to me that the objections stated to the code have little substance. German is a language that is fearfully and wonderfully made, and a stranger is rash who ventures to express an opinion on a question of its style, but so far as I can judge the language of the code is for a German law treatise singularly simple and intelligible. One finds it broken up into sentences of a reasonable length, and remarkably free from the involved periods for which our neighbours have a fondness. The objection that the language is too technical and scientific,

seems ill founded, because Roman law expressions are not to be seen in the code at all. So well have the draftsmen adhered to ordinary language, that it has not even been necessary to have an interpretation clause. The authors of the code have done what no English draftsman ever succeeds in doing, and require no other means of interpretation than the ordinary dictionaries of the German language. The objection that too great weight has been given to Roman law is one concerning which, without reading the whole code, no one could judge. It may have been chance, but in the parts of the code that I have examined, I find that the Roman law has almost been disregarded, and that German principles prevail. I refer to the treatment of the law of sale, and to the book on the law of succession. I am glad to see, for I think it would be a misfortune if the great labour taken were to be thrown away, that the general public feeling and that of the Government is, on the whole, entirely in favour of the code, and that there is every prospect of its becoming law within a comparatively short period, and probably with comparatively few alterations. Even the opponents of the code admit that their criticism will have no result and that the contest is already decided against them. One can scarcely help feeling amused at the energetic language in which some of them have deplored this result.(*a*)

In the other countries of the Continent there is comparatively little to say upon the recent progress of codification, for the good reason that there has been singularly little for them to do. Italy completed in 1882 the revision of her Commercial Code. The only change in it of any importance for us was the adoption of the principles of the German law of bills of exchange in place of those of the French law; and I may here interject that upon that matter there can be no doubt that the German system is the one which must ultimately prevail, though as a Scottish lawyer I suppose I ought to say that I would rather it had been the other way,

(*a*) See article by Professor Felix Dahn, of Breslau, contributed to this Review (Jan. 1890).

because when it does prevail the effect will be that we shall have to surrender in favour of England the one point of difference in the law of bills which we so carefully guarded in the Bills Code. Italy has also completed a revision of the Penal Code, and in the country of Beccaria it may well be expected that that code has now a form as well adapted to the requirements of humanity and legal science as it is possible to give it. Italy has thus completed two very important works of revision. There are many people who seem to fancy that one of the evils or benefits of codification —as the case may be—will be that the law will remain stereotyped over a very large number of years, if not for perpetuity. That is not so. No code can be more enlightened than the age in which it is written, or can prevent the further advance of science and humanity, and of everything which requires law to be altered. The great advantage of a code in this connection is that it lends itself to revision with the utmost ease, and that every alteration falls into its place at once. No doubt, with codification, there is an end of that eternal cobbling which is the torment of the lawyer of this country, and the changes proceed by way of revision at stated intervals, and settle what is to be the effect of the law once for all, possibly for the next generation. In Italy, of which I was speaking, although there is not more to relate in the shape of direct work of codification than I have mentioned, there have been important supplementary codes given to the public. For instance, the law regulating public health, the law regulating the public safety, the law regulating the work of young persons, and supplementary parts of maritime law, such as the law relating to pilots, have all been made the subject of separate and distinct statutes. It may interest some to learn that the Italian tribunals of commerce have been abolished as relics of Middle Age jurisdiction ill-suited to our times. Italy has adopted the principle that the best way of settling mercantile disputes is to put the ordinary Courts of the country into proper order.

Switzerland, which began its work of codification in 1874,

and carried it so far as to make, in 1881, a complete code of the law of contracts or obligations, has since made two valuable additions. The great obstacle formerly in Switzerland to codification was that, which at present, is the obstacle in the United States—namely, the number of independent Legislatures, each canton having formerly had power to make its own private law. That obstacle was so far got over, in 1874, by giving to the Swiss Federal Legislature power to make codes on certain subjects—namely, the law of contracts or obligations, the law of execution for debt and bankruptcy, and the law of patents and copyright. The law relating to copyright was codified in 1883, and that relating to execution for debt and bankruptcy in 1889, and there the matter rests for the present.(*a*)

I by no means pretend that I have given a complete catalogue, in the preceding paper, of all that has recently been done for codification. I think, however, I have done enough to justify me in saying that, at no distant time, the friends of codification will see for it a triumphant conclusion in every country in the world except our own. It is in our own country only that progress is slow, and, as yet, almost imperceptible. If one asks for the reasons of this, they are not difficult to find. It is customary for the layman, when the laws are bad, to heap the blame upon the lawyers—a proceeding which, in the present case, is more soothing to the lay conscience than true. It was at one time true that the lawyers, as a profession, were opposed to codification, and I do not profess to say that there are not many British lawyers still who are of Savigny's way of thinking. They have been driven completely from Savigny's proposition that no law can be properly codified,

(*a*) For works and information concerning Switzerland and Italy, I am indebted to Professor Schneider of Zurich, Professor Marghieri of Naples, Herr Renward Meyer, Advocate in Lucerne, and Signor Salvatore Sacerdote, Advocate in Turin, all valued contributors to commercial law, the first two being specially well known in connection with the codes of their respective countries. The rest of the information given in the paper is taken solely from published sources.

and they are now forced to admit that for the confused laws of the vast majority of the world, codification has been found to be a successful and popular remedy; but they shelter themselves in the plea that there is something special in the English law and in the Scottish which exempts them from the capacity of being codified. In particular, men are found, who maintain that the immense mass of case law which we have is incapable of reduction to anything like an orderly code. This is pretty much like saying that the more a law requires codification, the less it is capable of it. The complete answer to these lawyers is that we have already codified two branches of law—bills of exchange and partnership—in which the case law was very bulky, and that in India the very many other departments already named of English law have been reduced to codes with satisfaction both to scientific and to practical men. But these lawyers who still object to codification in our country are a minority in the profession, and a great majority of the profession are, I believe, quite satisfied of the practicability of it. Many of our greatest lawyers have even been strong advocates of codification. Among those who have gone, I need mention no other names than those of Sir Henry Sumner Maine among the men of science, and Lord Westbury among the practical men. Among the living, I need only mention such names as Lord Herschell, Sir James Stephen, Sir Frederick Pollock, and Mr. Justice Lindley, the last of whom says pointedly, that it is matter of amazement that the English are content to leave their laws in the inaccessible state in which they are to be found. The fault is not with the lawyers, nor is the fault with our statesmen. Our leading statesmen, it is true, contrive to go through their careers without a word on a subject of which they would be full if they lived in any country but our own, but that is not their fault. A statesman is confined to the sphere of what he calls practical politics, and although we find that men like Lord Salisbury, when holding the office of Secretary for India, can lay down in the strongest possible manner the benefits of codification, and can, with firm grasp

and vigorous mastery of detail, direct the means for carrying it out, we find that in this country the subject hardly interests them. Nor can it be said that the fault lies with Parliament. Be it assumed, for the sake of argument, that Parliament has any number of faults; and that its methods of procedure are cumbrous and complicated, and specially calculated for the making of laws as bad in point of form as it is possible to wish. But Parliament, like the statesmen, takes interest in those things only which interest the electors. The fault lies with the public. If the intelligent classes, the professional men, the bankers, and the merchants, who ought to lead the other voters, who form the huge democracy which now-a-days wields political power in this country, were to ask for the formation of codes, the boon would be granted without delay. Why they do not ask for it must be best known to themselves. It is to me, as it is to most of my profession, unintelligible.

J. Dove Wilson.

POSSESSION IN ENGLISH LAW.(a)

THE absence of a systematic work on Possession in English law has often been remarked. Bentham went so far as to say that it is in vain to look for any solution of the problem—"What is it to possess?"—in books of law: "the difficulty has not even been perceived." In a purely theoretical writer like Bentham, the mistake was not unnatural. It is quite true that there is no chapter in Blackstone dealing with the subject, and no title "Possession" in Bacon's Abridgment; but the reports are full of cases turning entirely on the question of possession; the difficulty has been very fully perceived by every practical lawyer. In refusing to look upon possession as a subject capable of separate treatment, like ownership or contract, English lawyers have in reality shown good judgment. To deal with possession in relation to the law of trespass, or of larceny, or of sales of goods, or of the limitations of actions, is one thing; to evolve a theory and terminology which will include all these varieties of possession is another. No doubt, the student of Roman law will point to the title "De acquirenda vel amittenda Possessione" in the Digest, and to the works of Savigny, Bruns, and Ihering, or to the title "Besitz" in any "Lehrbuch der Pandecten," or "Juristische Encyclopadie," and ask, if the Romans and their German commentators had a theory of possession, why should not we? The answer is that, in the first place, the Romans themselves had no theory of possession

(a) Possession in the Common Law, by Sir Frederick Pollock, Bart., Corpus Professor of Jurisprudence in the University of Oxford, and R. S. Wright, Esq., Barrister-at-Law. Clarendon Press, 1888.

in the abstract; they treated it in exactly the same way that English lawyers have done; they dealt with possession as an incident to the law of interdicts, tradition, usucapion, and the *actio Publiciana*. There is no title "De Possessione" in the Institutes, and it seems probable that there was no such title in the Edict, and that the commentators dealt with the subject, not systematically, but in any way which happened to suit their own convenience. In the second place, the kinds of possession required for interdicts, usucapion, and the *actio Publiciana* were so similar that most of what is said by the commentators on each of them could, without much inconvenience, be consolidated under one head; where there was any difference, it was specifically pointed out.(*a*) Accordingly, it will be found that modern treatises on possession in Roman law deal with it chiefly as a form of provisional or equitable ownership, and the difficulties which arise are due rather to historical causes than to questions of principle. In English law, on the other hand, possession is in some respects less, and in others more, important than in Roman law; the causes which in Roman law made possession a matter of importance are either wanting or have led to different results,(*b*) while in other departments English lawyers and legislators have treated possession as a source of rights and liabilities in a manner wholly foreign to the principles of the Roman law. It may therefore be said that, taken as a whole, possession in Roman law throws little light on possession in English law, and it must always remain a problem how Austin could have supposed that, in analysing the right which arises from adverse possession, he could derive any material aid from Savigny's treatise; unfortunately he never reached this stage in his course of lectures. A clear account

(*a*) For example, Paulus says: "Per servum corporaliter pignori datum non adquirere nos possessionem Julianus ait (ad unam enim tantum causam videri eum a debitore possideri, ad usucapionem), nec creditori," &c.—Digest, xli. 2, fr. 1, § 15.

(*b*) Compare the analogy and differences between uses and trusts in English law and prætorian ownership in Roman law; also between the *jus plenum* of Gaius and the *dreit dreit* of Bracton.

of the general principles of possession as developed by Savigny was given by Mr. Justice Markby in his "Elements of Law;" but it is to Judge Holmes, of Massachusetts, that is due the credit of having perceived that English law contains a store of materials for a theory of possession at least as rich as that contained in the Corpus Juris Civilis, and now we have in the work of Sir Frederick Pollock and Mr. R. S. Wright the result of many years' study of the subject, by two writers who are probably more adequately fitted for the task than any English lawyers now living.

In his introduction Sir F. Pollock points out the causes which have obscured the doctrine of possession in English law. Possession was of practical importance in questions of trespass, larceny, and ejectment, and the old writers dealt with possession under one or other of those heads. Moreover, "the learning of possession disguised itself by its very importance. The common law never had any adequate process in the case of land, or any process at all in the case of goods, for the vindication of ownership pure and simple. So feeble and precarious was property without possession, or rather without possessory remedies, in the eyes of medieval lawyers, that possession largely usurped not only the substance but the name of property; and when distinction became necessary in modern times, the clumsy term 'special property' was employed to denote the rights of a possessor not being owner." The result of these and other causes is that the doctrine of possession has to be sought for under many aliases, and in places which at first sight appear unpromising. Equally clear is Sir F. Pollock's analysis of the physical and mental elements in possession, and his statement, in the form of rules, of the consequences which result from possession. The statement with regard to the effect of an interrupted adverse possession will no doubt be modified in accordance with the decision in *Agency Company* v. *Short*,(a) reported since the passage in question was

(a) Law Reports, 13 App. Cases, 793.

written. In Part II., Sir F. Pollock deals more in detail with possession considered chiefly with reference to the rights of a possessor against trespassers and other civil wrong-doers, and the leading cases on the subject are collected and examined. A few cases appear to have escaped the author's notice. For example, on the question of the actual, constructive, and adverse possession of mines, reference might be made to the cases of *Earl of Dartmouth* v. *Spittle*,(*a*) *Low Moor Co.* v. *Stanley Coal Co.*,(*b*) *Smith* v. *Stocks*,(*c*) *Davis* v. *Shepherd*,(*d*) and *Ashton* v. *Stock*(*e*) The question what kind of acts amount to adverse possession in the case of rivers and "land covered with water," is also worthy of mention; and in reference to the question of possession by tenants in common, in addition to the rules relating to trespass, the doctrine of constructive possession by tenants in common with reference to the operation of fines and the Statutes of Limitation,(*f*) is not without interest. On the other hand, the difficulty of drawing a hard and fast line between questions of possession and questions of ownership has led to the citation of some authorities which have only a remote bearing on the theory of possession. For example, in the case of the pre-historic boat, discovered by a lessee of land in digging for the foundations of a building, the real question was, whether by granting a lease for years the owner of the land granted to the lessee the right to a chattel embedded in the soil, of the existence of which both parties were ignorant. The difficulty—one of common occurrence—was in dealing with a state of facts not contemplated by the parties, just as in the case of *Lord Provost of Glasgow* v. *Farie*,(*g*) the question was whether the Water-

(*a*) 19 Weekly Reporter, 444.
(*b*) 34 Law Times' Reports, N.S., 186.
(*c*) 10 Best & Smith, 701.
(*d*) Law Reports, 1 Chancery Appeals, 410.
(*e*) Law Reports, 6 Ch. Div. 719.
(*f*) Burton's Comp., §§ 100, 395; *Culley* v. *Taylorson*, 11 Adolphus & Ellis, 1008; *Woodroffe* v. *Daniell*, 15 Meeson & Welsby, 792; 2 House of Lords Cases, 811.
(*g*) 14 Rett. 346; Law Reports, 13 App. Cas. 657.

works Clauses Act, 1847, intended to include common clay in the reservation of "mines of coal, ironstone, slate or other minerals" under lands sold for the purpose of constructing waterworks. The doctrine of possession throws little or no light on a question of this kind. Further on Sir F. Pollock deals with questions connected with the transfer of possession, including so-called symbolic delivery, the delivery of goods by attornment, the effect of title, intention, and mistake in determining questions of possession, the old doctrine of disseisin at election, &c., and with possession as a root of title. Many readers will probably consider this the most valuable part of Sir F. Pollock's share of the book, and they will perhaps be disappointed that he did not add to their obligations by discussing two or three topics of interest connected with this branch of the subject. One is the question (incidentally referred to on p. 75) of the change of possession by mere intention. *Winter* v. *Winter* (*a*) shows how the question may arise in the case of goods, and *Lyell* v. *Kennedy* (*b*) in the case of land. The question how far delivery is essential to the validity of a gift of chattels has recently been settled by the Court of Appeal.(*c*) Another subject which Sir F. Pollock does little more than allude to, is the modern doctrine of adverse possession under the Statutes of Limitation in the case of lessees, mortgagees, joint-tenants, &c. This doctrine is interesting, historically as well as practically, in showing the tendency of what may be called the statutory common law, and we hope that in a second edition Sir F. Pollock may find it consistent with the scheme of the book to give a short statement of the changes in principle introduced by the statutes of 1833 and 1874.

The third part of this book was written by Mr. Wright, and deals with possession and trespass in relation to the law of theft.

(*a*) 4 Law Times' Reports (N.S.), 629; 9 Weekly Reporter, 747.
(*b*) Law Reports, 18 Q.B.D. 796; 14 App. Cas. 437.
(*c*) *Cochrane* v. *Moore*, Law Reports, 25 Q.B.D. 57.

As might have been expected, there is little for the critic to say with respect to this part of the work, except to admire the thoroughness with which the subject has been treated. Particularly interesting is the discussion on the effect of fraud and mistake in questions of larceny. We do not notice any reference to *R.* v. *Hamilton*,(*a*) *R.* v. *Thomas*,(*b*) and similar cases, where a distinction is drawn between stealing from a dwelling-house and stealing from the person, which depends on whether the goods were "within the protection" of the house or of the person; this is really a question of possession.

We have reserved for the last a criticism which is in the nature of a preliminary objection, inasmuch as it applies to the vexed and difficult question of terminology. Possession is one of those unfortunate words which have no definite technical meaning, because they are used to express a number of different ideas, and if we wish to have a clear notion of what possession is, we ought to bear in mind the purpose for which it is in question. Unless we do this, confusion is sure to follow. Take for an example one of Bentham's well-known illustrations:— "A street-porter enters an inn, puts down his bundle upon the table, and goes out. One person puts his hand upon the bundle to examine it; another his to carry it away, saying it is mine. The innkeeper runs to claim it in opposition to them both; the porter returns or does not return. Of these four men, which is in possession of the bundle?" No lawyer would attempt to answer this question without being told for what purpose it is asked. He would inquire whether one of the rival claimants desires to sue some one for infringing his right of possession, or to prosecute him for larceny, or whether he himself is threatened with an action for defending his alleged possession with force, or whatever the question may be. He would then know what kind of possession was in question, and might find it necessary further to inquire why the porter brought the bundle to the inn, why he left it on the table, and what eventually became of it.

(*a*) Carr. & Payne, 44. (*b*) Carr., Suppl., 295.

To state half the case and ask who has possession of the bundle, is like asking whether misrepresentation constitutes fraud. English law has been praised for its wisdom in not attempting to define fraud; it is entitled to equal credit for not attempting to define possession.

Another example of the ambiguous meaning of the word may be found in a recent case,(a) where obsolete authorities, dealing with the question of seisin for the purpose of descent, were cited as bearing on the question whether a person who had received the rents of some property, as to which the title was in dispute, received them on behalf of the unknown owner, or on his own behalf, adversely to the true owner. Seisin for the purpose of descent, and possession for the purpose of an action of ejectment, are two distinct things, and nothing but confusion can result from treating them as identical.

The truth is that no complete definition of possession is possible. It is a compendious term for certain combinations of fact to which the law attributes certain consequences. If A is walking along the king's highway, carrying a bundle, and a stranger wrongfully attempts to take it from him, A is justified in using a reasonable degree of force in preventing him. The law does not inquire whether the bundle belongs to A, or whether he is a servant carrying it for his master, or whether he has acquired it wrongfully; for the purpose of justifying the force used by him, A has possession of the bundle. If the stranger takes away the bundle, then it may be important to consider in what character A held it; if he was a servant or bailee at will, the owner can sue the wrong-doer; not so, if A was bailee for a term; in the one case, the owner has the rights of a possessor; in the other case, he has not. If I employ a man as driver of my stage-coach, and he steals goods intrusted to him in that capacity, he may be indicted for stealing them from me, because, as between him and me, I have the possession, and he has merely the custody of the goods; but if a stranger steals the goods from the

(a) *Lyell* v. *Kennedy*, Law Reports, 18 Q.B.D. 796, 14 App. Ca. 437.

coach, he may be indicted for stealing them from the driver, because, for this purpose, the driver has possession of them. If I buy a bureau at an auction, and find that it contains bank notes or other valuables, not referred to in the particulars of sale, they are not in my possession, and if I appropriate them I may be guilty of larceny; but if, before I discover them, I deliver the bureau to a carpenter to repair, and he wrongfully appropriates the valuables, I can sue or prosecute him, because they were in my possession as between him and me, although not as between me and the true owner. If I grant a lease of land to a tenant who enters into occupation, I cannot go on the land during the lease without lawful cause, or sue a stranger for trespass, because, as between me and my tenant, he has the possession; but if a person, alleging himself to be the true owner, serves my tenant with a writ for the recovery of the land, I am entitled to defend the action, because, in order to prevent collusion between a claimant to land and a tenant for years, the law says that I am in possession by my tenant. If my tenant refuses to pay rent, or pays it to someone else, during a certain number of years, I may lose my right to the reversion, not merely as against my tenant, but against all the world, because the law says that in certain cases non-payment of rent, or payment to a wrongful claimant, converts the possession of my tenant into such a possession as will, in time, divest the property from me, and vest it in some one else. No useful definition can be framed to cover all these cases, because what is possession for one purpose is not necessarily possession for another.

The same remark applies to the adjectives used to qualify possession. What is actual possession for one purpose is not actual possession for another, and circumstances which give constructive possession of a field do not necessarily give constructive possession of a piece of waste land.(*a*)

(*a*) See *Ex parte Fletcher*, Law Reports, 5 Ch. Div. 809; *Coverdale* v. *Charlton*, 4 Q.B.D. 104.

It is for this reason that, as it seems to us, the authors of the present work would have done well to deal separately with the various kinds of possession without attempting to frame a terminology of general application. For example, a distinction is drawn between physical possession and possession in law; physical possession is described as physical control; when physical control is "coupled with a legal claim and right to exercise it in one's own name, against the world at large, we have possession in law as well as in fact," and possession in law is described as sometimes existing without physical control. There is, no doubt, a precedent for this distinction in the *detentio* or *possessio naturalis* and the *possessio civilis* of the German school, but in English law it is impossible to draw any distinction between physical and legal possession; certain legal results flow from physical possession, and to that extent it is "possession in law." We may see this by the illustration of the groom exercising his master's horse; at the most, says Sir F. Pollock, the groom has physical custody, not possession in law.(*a*) We find the same statement in an even more absolute form in a standard work(*b*)—viz., that "possession is wholly absent" in the case of a servant who is intrusted with his master's property. Now, it is quite true that, from the point of view of the criminal law, a servant is not considered as having the possession of property with which he has been intrusted by his master,(*c*) and it is also true that a master can sue his servant for trespass to goods in his custody;(*d*) but is the proposition true in any other sense? It is not by any means clear that a servant cannot sue for a wrongful interference with property of his master in his custody; indeed, in some cases it is clear that he can(*e*); he is justified in defending his possession with force, and if he has the custody of his master's goods, and the master makes him a gift

(*a*) Page 18. (*b*) Holland on Jurisprudence, 162.

(*c*) As to some apparent exceptions to the rule, see Pollock and Wright, 139.

(*d*) Holmes' Common Law, 227.

(*e*) See *Moore* v. *Robinson*, 2 Barn. and Ad. 817: *Hopkinson* v. *Gibson*, 2 Smith, 202.

of them, this changes his possession from that of a servant into that of an owner, and no delivery is necessary.(*a*) Again, Sir F. Pollock lays down the rule that "a person having the use of anything by the mere license of the owner, generally has not possession."(*b*) Here also it is necessary to ask for what purpose possession is in question. Staundford says that if a taverner puts a vessel before a guest to drink out of, and the guest carries it away, this is felony, "co que il naver le possession de ceo, eins le use," and so stated the rule is correct; but the guest may have possession for other purposes, even as against the innkeeper himself, and (it is submitted) without doubt against a wrongdoer,(*c*) just as a person in possession of a seat in a public vehicle or place of public resort may defend his possession against a mere wrongdoer. It is, therefore, difficult to understand Mr. Wright's dictum that "merely physical possession, as such, involves no rights," followed as it is by the important qualification that "a person who is in apparent possession has all the rights and immunities of a possessor as against strangers."(*d*) If a person who has merely physical possession of things is considered as having "possession in law" as against strangers, surely he has a possession which involves rights.

In the first edition of his work on Torts, Sir F. Pollock uses the expression "*de facto* possession" in the sense of "actual legal possession,"(*e*) as opposed to the constructive possession of a person who retains what is often called the right of possession. In the present work he uses "*de facto* possession" in the sense of "detention." The phrase "*de facto* possession" has long been used in the sense of actual, as opposed to constructive, possession, and the confusion in terminology which Sir F. Pollock himself laments is not likely to be decreased by using the phrase in another and unfamiliar sense.

CHARLES SWEET.

(*a*) *Winter* v. *Winter*, 9 Weekly Reporter, 747.
(*b*) Pollock and Wright, page 58.
(*c*) See the argument in *Dean* v. *Hogg*, 10 Bingham, 345.
(*d*) Pollock and Wright, page 147. (*e*) Page 301.

UNE BATAILLE DE LIVRES: AN EPISODE IN THE LITERARY HISTORY OF INTERNATIONAL LAW.(*a*)

Part II.

IN 1618 an embassy from the States-General was sent to England, and at the same time proceedings were instituted in the United Provinces against Oldenbarnevelt, Grotius, and Hogerberts, a pensionary of Leyden. Sir Dudley Carleton then represented the King of England at the Hague. The learned translator of his correspondence, Gaspard-Joel Monod, of Geneva, mentions a circumstance in Carleton's life which deserves to be noticed. He was, it appears, the last English minister who had the honour of a place at the Council of State of the United Provinces, a privilege obtained by Queen Elizabeth when she took these provinces under her protection, and which was attached to the possession of the "*villes de seuereté.*" It was continued to Carleton, as a favour, during his residence at the Hague, even after the towns had been restored. An enemy of Oldenbarnevelt and of Grotius, Carleton has not left us a favourable account of them. Grotius, it seems, in the course of the proceedings against him, ventured to boast, in presence of the Prince of Orange, of the services he had rendered in settling past difficulties between England and the United Provinces, and to hint how useful he might be in similar circumstances again. But, says Carleton, his wings were clipped too much to allow him to fly so suddenly over the seas, although, for

(*a*) Translated from the French, by J. J. Cook, LL.B., Advocate.

the satisfaction of the States, he offered to confess not only all he knew, but also all he believed probable against Oldenbarnevelt. The English ambassador also tells us, that after the condemnation of Jan van Oldenbarnevelt and his companions in misfortune, the Princess of Orange came to him to ask him to intercede for Grotius, so that his imprisonment might be changed to banishment. "I excused myself," he writes, "as having no instructions from his Majesty." And he justifies himself in this fashion:—"It would have been," he says, "a useless persistence, for they feared his tongue and his pen, which he might employ freely when he was out of the country; while, so long as he was in their hands, the fear of death would keep him in submission." A passage from another letter tells us of his removal to the castle of Loevestein, where "the prisoners were allowed twenty-four Dutch sous a-day, and it has been resolved to make a representation in their favour against the sentence of the judges after the lapse of six years." It must be admitted that Grotius is not remarkable for his dignity. The Sloane collection in the British Museum contains his letter to Lancelot Andrews, Bishop of Winchester. It is dated 19th November, 1619, *ex carcere Louvestein.* The first lines are trenchant; but one regrets to read this passage with reference to James I.:—"Would to heaven that the most learned of kings would deign to call me to some little literary labour, in accomplishing which I might live among you, waiting till calm succeeds the storm, or that it might please his Majesty to employ some other means—I care not what—of delivering his humble servant."

The difficulties arising out of maritime affairs were endless, embassies succeeded embassies, and matters threatened to take a still more serious turn on the accession of Charles I. The new king's aim was to secure the complete supremacy of England on the seas, and the schemes which are attributed to him occupied public attention in the United provinces to such an extent, that Boswell, the king's resident at the Hague, felt it necessary to submit an explanatory

memorandum to the States-General. It emphasises the peaceful spirit of the king, but adds that, simply in order to maintain peace, he finds it necessary to preserve his ancient and indisputable right to the sovereignty of the seas, and to permit no one to encroach upon his territory. He is vested, he insists, with the sovereign power in these waters, and he demands that there be paid to his admirals and ships of war the homage and recognition which have been awarded to them in time past.

While these incidents were taking place, Sir John Boroughs composed his work on "The Sovereignty of the British Seas proved by Records, History, and the Municipal Laws of this Kingdom." It was not published, however, till 1653. But a more important work saw the light in 1635—the *Mare Clausum* of John Selden. The author relates how, since 1618, he had been occupied in the preparation of a treatise, "*De dominio maris*," how the work was submitted to King James, who approved of it, but was afraid of displeasing the King of Denmark if he allowed it to be printed as it stood, and how the author, after having modified his work, in accordance with the king's demand, refused to allow it to be published. In 1635, Charles I. became aware of the existence of the book, and it was by his order that it was ultimately published. In the eyes of the king, the *Mare Clausum* was equivalent to a proclamation of the royal policy, and copies of it were sent to the Court of Exchequer and to the Court of Admiralty, while a third copy was kept for the use of the Privy Council. A royal proclamation announced that the *Mare Clausum* had been published by the express command of His Majesty, and on 10th May, 1636, a new proclamation, superseding that of James I., forbade strangers to engage in fishing in the seas surrounding England without having first obtained a license.

All this, however, is somewhat beside the mark, in view of our present purpose, which is a sketch of the literature of this epoch in the history of international law. War should never be made except with the pen, and the States-General

showed their appreciation of this proposition, by betaking themselves speedily to a very intelligent linguist, Pierre van der Cun, and requesting him to make a critical examination of Selden's book. Some time afterwards, Graswinckel prepared a book, for the purpose of showing that, in the author's view, the distinguished Englishman had fallen into error. Graswinckel was a relative of Grotius, and had, indeed, acted for some time as his secretary. Thomas Crenius had it from Graswinckel's mouth that he had written the original of the treatise, *De jure belli ac pacis*, to the dictation of the author. "*Ex ore dictantis Grotii excepisse et in ordine demum redegisse.*" The book written by Graswinckel, in answer to Selden, is *Maris vindiciæ adversus virum clarissimum Johannen Seldenum.* The States-General did not dare to order its publication, and it was decided that it should be carefully preserved, and be sent, ultimately, to the ambassadors who might have to deal with the question of the property of the seas. In point of fact, the *Vindiciæ* was deposited in the *secrète casse* of the States-General, and Graswinckel attempted in vain, sixteen years later, to obtain authority to print his manuscript.

The question is often asked, why it was that Grotius did not, himself, descend into the arena. But he helped Graswinckel by his advice, and an additional explanation is found in the treatment to which his compatriots had subjected him. He, himself, makes yet another excuse, saying that, as a Swedish resident in Paris, he could not, with propriety, oppose a policy which that country might have an interest in supporting. It would have been folly, says he, in one of his letters, to offend other nations in order to curry favour with those who have always treated me as an enemy. Perhaps, also, the circumstance that in the *De jure belli ac pacis* he departed a little from the attitude maintained in the *Mare Liberum*, is not without significance, in considering his conduct. But another author entered the lists—Jan Isaac Pontanus. He was born in 1571, at sea, in view of Elsinore, his parents being Dutch; he lived for some years

with Tycho Brahe, then became doctor of medicine of Basle, and afterwards professor of physics and mathematics at Harderwyk, in Gueldres. The King of Denmark and the States of Gueldres appointed him their historiographer. The title of his book, published in 1637, is "*Discussionum historicarum libri duo quibus præcipue quatenus et quodnam mare liberum vel non liberum clausumque accipiendum dispicitur expenditurque.*" In 1652, Graswinckel attacked the work, after Pierre Baptiste Borgo, the historian, publicist, and soldier, had posed as the champion of Genoese pretensions in the Ligurian sea. The title of Graswinckel's book is "*Vindiciæ Maris liberi adversus Petrum Baptistum Burgum Reipublicæ Genuensis in Mare Ligusticum dominii assertorem.*" It provoked a violent rejoinder from Selden, because in it Graswinckel had incidentally attacked the *Mare Clausum*, alleging that Selden had written his "fables" with the sole aim of being agreeable to the king, and of getting out of prison.

At this point, the war of books came to an end. After the revolution of 1648, the hostility between the English and the Dutch Governments again revived, and the States-General refused to accept the advances of Cromwell while he was attempting to form alliances with the various countries of Europe. One of the reasons for their attitude is to be found in the alliance contracted by the House of Orange with the Stuart family. William II. had married the Princess Maria, daughter of Charles I. But William II. died on 6th November, 1650, and on the 14th of the same month, there was born the future supplanter of James II. on the throne of England. The anti-Orange party in the United Provinces took up the question of naval supremacy, and there was a strong manifestation of public opinion in favour of an understanding with England. Commercial considerations even induced the States of Holland to send a commissioner to Cromwell, in defiance of the very principles of the confederation.(*a*)

(*a*) *Sirterma de Grovestins.* Histoire des luttes et rivalités politiques entre

Cromwell believed the moment to be favourable, and an English embassy arrived at the Hague. The aim of the English policy was the union of the two republics in order that they might in future form one State; but the ambassadors did not succeed. The populace at the Hague, excited by the partisans of the House of Orange, even went the length of maltreating them.

In 1650, the Long Parliament forbade foreign vessels to engage in commerce with the American colonies; and, in 1651, Cromwell produced, and carried into law, his celebrated Navigation Act. Thereafter, foreign nations could not import into England anything which was not a product of their own country, or did not come direct from their manufactories. The Dutch felt that they were specially injured by this measure, for they were really the brokers of Europe. They were on the point of sending an extraordinary embassy to London, under the pretext of discussing a question of damages sustained by English merchants at the hands of the Dutch; but Parliament caused letters of marque to be issued, and ninety Dutch ships were captured, and declared to be prizes. War broke out, with alternate success and defeat on either side, but it came to an end after the authorities at the Hague became convinced that a reconciliation was absolutely necessary. The States of the province of Holland made the first advances, and the States-General followed. The English programme was unfolded anew. The two republics were to constitute a single State, ruled by a supreme council, composed of representatives of the two nations. The Dutch would not consent: but, meantime, Cromwell was declared Protector, and, on 5th April, 1654 (old style), the Treaty of Westminster was signed. The Act of Navigation was maintained; the Dutch were forbidden to traffic with the English colonies of America; commerce with England was subjected to innumerable restrictions; the States-General undertook to give no

les puissances maritimes et la France durant la seconde moitié du XVIIe. siecle. Paris, 1851.

assistance to the Stuart family; and, finally, it was stipulated that the Dutch ships, both of war and of commerce, when meeting any ships of war of the Republic of England, Scotland, and Ireland in English waters, should dip their flags and lower their topmasts in token of homage. An agreement was executed, embodying those stipulations, but it remained for some time secret. The States of the province of Holland further bound themselves to prevent the re-establishment of the Prince of Orange in his offices of *Stadhouder*, Captain-General and Admiral. And he who was to be one day William III. of England was not then four years of age!

ERNEST NYS.

THE LAW OF RIOT.

UNHAPPILY in this country, as in most others, the Law of Riot has demanded frequent consideration. Scarcely a year now passes without disturbances which are, in the eye of the law, nothing short of riots; and in one county the Riot Act has been read four times within little more than ten years. Nor have the results been much less serious than formerly. No calamity, indeed, has occurred like the notorious Gordon riots of 1780, when three hundred persons were killed, and it is over forty years since a life has been lost in Scotland. But at Manchester, about twenty years ago, a police-sergeant was killed and three rioters were executed for the murder; and in the last Belfast riots twenty-seven persons were shot.

The law is well settled, and ought to be widely known; since riot is a crime in which persons, usually law-abiding, may be sometimes unexpectedly, and even unintentionally involved. The rules on the subject are practically identical in England and Scotland, but in Ireland there is a considerable amount of special legislation, chiefly by way of precaution.

A riot may be defined as a tumultuous assemblage combined against public order, and to the alarm of the lieges.(*a*) Its elements are combination, breach of the peace, and causing reasonable alarm. It differs, on the one hand, from a mere brawl, and, on the other, from treason, which latter crime

(*a*) The definition in the Draft Code of the Criminal Law Commissioners is: "A riot is an unlawful assembly which has begun to act in a tumultuous manner to the disturbance of the peace."

involves the element of attempt at the subversion of the National Government. Riot is directed to local, not national, concerns. Hume says, the "Shawfield and Porteous mobs were proper riots." What is of special importance to be known is, that an assemblage, however harmless its origin, or lawful its object, may degenerate into a riot, and that all parties taking part, by their presence, in it, are held to be guilty. It is the duty of those who wish to avoid responsibility at once to withdraw from the assemblage. The only exception to this presumption of responsibility, is where grave crime, such as murder or fire-raising has taken place; mere presence not inferring participation in such cases. It ought also to be known that it takes no great number to make a riot; in England three are sufficient(*a*) —a rule which prevails also in the United States. Under the Riot Acts, however, twelve persons must be participant. Further, there may be a riot without violence; any demonstration of force or numbers may be riotous. Thus, where a crowd merely stood still and by passive resistance prevented a Presbytery from inducting a clergyman,(*b*) and where a crowd was numerous enough to intimidate the keepers of a deer forest, while members of the crowd shot the deer,(*c*) it was held that a charge of mobbing and rioting was relevantly made. On the other hand, there may be a mob without a riot; a meeting, however illegal its object, not being riotous so long as it is conducted without disorder.

In aid of the common law of riot various statutes have been passed; the best known being the Act of George the First, commonly called the Riot Act.(*d*) It applies to England and Scotland; Ireland having a later Act of its own. This statute was considered of such importance, that, in England,

(*a*) This is the number mentioned in the English definition of "unlawful assembly." Hume observes (i. 416), that "the tumultuous convocation of the lieges," the old phrase for mobbing, includes the English terms "riot, rout, and unlawful assembly."

(*b*) *Robertson*, H.C., 24th March, 1842. 1 Broun, 152.

(*c*) *H.M. Advocate* v. *Macrae*, 18th Jan., 1888, 16 Rett. 33.

(*d*) 1 Geo. I. c. 5, and for Ireland, 27 Geo. III. c. 15.

it was originally directed to be read at Quarter Sessions, to ensure that the Justices were familiar with it. Its extreme severity—one penalty being death (*a*)—is explained in the preamble, from which it appears that His Majesty and his administration "had been traduced, with an intent to raise divisions and alienate the affections of the people." The Act was, in it first section, directed against the destruction of churches and dwelling-houses; and this law was by 52 Geo. III. c. 130, extended to factories; and by 24 & 25 Vict. c. 97, § 11, to machinery. But, so far as recent practice is concerned, the valuable provision of the Riot Act is that which directs the reading of a proclamation, calling on persons tumultuously assembled, to disperse, and, if they fail to do so within an hour, giving power to disperse them by force, and indemnifying the magistrate and all assisting him. It is this clause which still distinguishes the statute law of riot from the common law, there is little difference otherwise, as the penalties have been mitigated. The magistrate is a Justice of the Peace, Sheriff, or Under-Sheriff of a county, or the Mayor, bailiff, or other head-officer, or Justice of the Peace of a city or town corporate. He shall, "where the nature of the case requires it among the rioters, or as near to them as he can safely come, with a loud voice command, or cause to be commanded, silence, and after that, shall openly, and with a loud voice make, or cause to be made, proclamation." Care must be taken to read the whole proclamation. Where the words, "God save the King," were omitted, the Act was held not to have been put in force. If the proclamation is read twice, the hour dates from the first reading.

On one point only has any dubiety arisen. Some think that armed force cannot be used until the hour has expired, and others that it may be used at any time under the Act. Both are erroneous. If a crowd proceed to violence,

(*a*) Now penal servitude for life, or not less than fifteen years, by imprisonment for not more than three years, 7 Will. IV., and 1 Vict. c. 91, and 20 & 21 Vict. c. 3.

or there is obvious danger in delay, the magistrate must disperse them at once, and with whatever force is required; but this is under his common law powers, such protection or increase of power as the Act gives, not commencing until after the expiry of the hour.

It is when we come to the suppression of a riot that we get on delicate ground. There are no rules for the guidance of the magistrates but firmness and moderation. The powers are ample—the whole force of the district, civil and military, being at the command of the authorities. The magistrate must call the citizens to assist, and every citizen is bound to respond. But no injury must be done to life or person, unless the riot cannot be otherwise suppressed. Examples of all these powers are in the books. The Mayors of London and Bristol were tried for not calling in assistance in the London and Bristol riots; a citizen was tried for refusing to assist, without good excuse; and police-officers have been sentenced to long terms of imprisonment for exceeding their duty. A strange illustration is found in the case of soldiers. Under the Mutiny Act and Articles of War, they are bound to obey their officers, but they are liable to be tried as citizens if the order is illegal.(*a*) One writer instances firing into a crowd of women and children. The law is undoubted, but has not, and probably will not, receive practical illustration. It must not be thought that reading the proclamation removes the responsibility of the magistrate. Under an Act of Edward the Fourth, after having read it, he could fire on the crowd merely for not dispersing. But this would not be tolerated now, and he is only protected, whether before or after the reading, if he proceeds with "due humanity and discretion."

In one respect innocent persons injured by riots are more

(*a*) See Pollock on Torts, p. 108 and Art. 202 of Stephen's Digest of the Criminal Law, where it is stated that the fact that the panel acted under orders apparently lawful is relevant to the question whether he believed on reasonable grounds in the existence of a state of facts which would have justified what he did apart from such orders.

fortunate than those injured by other crimes, as under several Acts, burghs and counties must pay the damage.(*a*) The obligation covers most of the property liable to be injured in riots, but it is by no means universal, and, in particular, does not include personal injury.

Recent legislation in this country has done nothing for the prevention of riots; it has rather inclined towards encouragement. The right of open-air meeting and procession, which frequently leads to riot, is freer than at any former time. There is an Act of James the Sixth, 1606, c. 17, held to be in force so recently as 1882, (*b*) authorising magistrates to forbid unlawful conventions within burghs. But the power has been sparingly used, and public opinion would not sanction it otherwise. That statute followed up the Act of James II., 1457, c. 77, prohibiting leagues or bunds within burghs. There is no such power in counties, and the Act probably does not apply to police burghs. On one point, however, there is a general call for an authoritative exposition of the law, and if necessary, an amendment. What is called in trade disputes "picketing" as too often practised brings trade-unionism into disrepute, and is an illegitimate means of attaining the ends of combination. It has sprung up between the lines of the Conspiracy Act of 1875, within the intention but apparently outwith the letter of its prohibitions. The difficulty arises from the 7th and 3rd sections which declare that "attending" near a house to obtain or communicate information is not "besetting," and that a combination to further a trade dispute is not a conspiracy if the act done by one person is not a crime. Were the law settled, experience has shown it would be kept.

There is an omission, I may mention, in our Scottish law, which it would be well to supply if the opportunity occurs. In England and Ireland magistrates may close

(*a*) See 3 Geo. IV. c. 33, and 25 & 26 Vict. c. 101, sec. 85.
(*b*) *Deakin* v. *Milne*, H.C., 27th Oct. 1882, 10 Rett. 22.

public-houses on apprehension of a riot, but there is no such power in Scotland. Public-house keepers do generally close from considerations of safety, but it might be otherwise.

The best weapon for the suppression of the ordinary riot is the baton; it disables effectually at the time, but seldom inflicts permanent injury; and the best force to use it is the regular police. But except in the large towns, the number of police available is rarely sufficient for serious disturbances. In one or two counties this difficulty will have to be faced, and there seem only two solutions—viz., either the maintenance of reserves similar to army reserves, or a more ample power of demanding assistance from neighbouring counties. The objection to the first is the expense, and on this score it is not likely to be adopted. As to the second, the police as to one-half of their up-keep is a national force, and power might be given to some authority —probably the Secretary for Scotland—to require assistance when refused without sufficient cause, and to fix the cost. On a recent occasion such assistance was obtained only by the casting vote of the chairman of a police committee. Special constables occasionally do good service, and what they could do was shown in the late railway strike, when one of the companies had upwards of a thousand of their servants watching their property at night. But the Acts relating to Special Constables are imperfect. They may be appointed in burghs, and for certain purposes in counties, but a power once existing in the latter of appointing them "on the reasonable apprehension" of a riot was inadvertently repealed, and it has not been re-enacted in Scotland, as it was in England. The result is that a magistrate in a county must wait until the riot has actually commenced. Where possible, special constables ought to act with regular police, and some magistrates refuse to appoint them unless they are to do so.

The best support to police is cavalry; the mob like them, and they usually manage to keep the peace without doing much harm. But they are to be found in so few places that

mischief is frequently done before they arrive. The worst support is infantry, their weapons being so deadly. They suit well enough to preserve order where there is little risk of collision, but are practically useless in any but the most serious riots. The army reserves, militia and yeomanry, may be utilised in riots, but not the volunteers. They can only be called out in case of actual or apprehended invasion.

J. B. L. Birnie.

THE ADMINISTRATION OF JUSTICE IN THE LEVANT.

I.

IN Turkey, as in every country outside Christendom, one is struck at first glance by a characteristic fact, that the political and moral homogeneity, which lies at the foundation of every civilised State, is completely lacking. The non-Mussulman subjects of the Ottoman Government, who are called "Rayas" ("the subject"), are not placed on a level with the Turks, but far below them. We find ourselves confronted by a distinction both *de jure* and *de facto* between the conquerors and the conquered, which runs back to the rise of the Ottoman rule in Europe. Throughout it has had a religious as well as a political side. It is this radical difference between Islam and Christianity which makes impossible any amalgamation of the dominant with the subject races—*Doris amara suam non intermiscuit undam.* Thus in Christian countries peace is the rule, but with the Mussulman war against the infidel is the rule, peace is the exception.

The differences in religion, morals, manners and customs between the Christian and the Mussulman subjects of the Sultan have led to the establishment, in favour of the first, of a separate *régime* with exceptional guarantees. It is only by giving in this way that security for their persons and goods, which is an essential condition of social life, that it has been possible to retain the Christians on the territory of the Ottoman Empire. Thus the Sultan Mehmet-el-Fatih granted to the Greek nation various privileges and immunities, the chief of which were the free exercise of their

religion, and of their civil and religious laws. So foreigners who are settled in one of the "Echelles du Levant,"(a) or are there only as travellers, fall by a kind of artificial isolation under a judicial administration completely alien to that of these Mussulman countries. This last-mentioned exceptional situation depends upon "Capitulations" concluded between the various Christian States and the Porte, which determine the legal status of such foreigners in the Levant, and their position with respect to the people of the country. Thus, while in every country of Christendom it is in the national Courts that foreigners must seek redress in any question that may arise either among themselves or with the inhabitants, in the Levant they are only responsible to the authority of their consul. Accordingly, every nationality in Turkey forms a little state within the state, completely distinct and independent, with its own organisation, its administration, its laws and its tribunals. The embassies and consulates are inviolable by the ordinary theory of ex-territoriality, but, over and above that, every house or shop occupied by a European is an asylum beyond the reach of the native authorities. This privilege of ex-territoriality, which foreigners in Mohammedan countries have enjoyed for three hundred years, is a great anomaly, if we consider it from the point of view of absolute theory, or of the fundamental principles of public and international law.

We shall see, however, that this anomaly has its *raison d'être*. Ever since the Ottoman Empire entered the concert of European powers, the question has presented itself whether it was not time to put an end to this right of consular jurisdiction, which had been stipulated for and guaranteed in the "capitulations." The question was raised,

(a) This name is given to a number of towns or commercial stations scattered along the shores of the Mediterranean, towards the Levant, such as Smyrna, Cairo, Alexandria, &c. *Faire échelle*, is a rarer equivalent for *faire escale*—to "put in" or "touch" (of a ship), and the Echelles correspond therefore to our phrase "ports of call." In French it is, however, specially appropriated to the East. "*Echelles barbaresques*" is also used of the ports of Barbary.

but not solved, at the Congress of Paris in 1856. The Ottoman Government made, on its side, successive attempts to shake itself free from the burdens of the "capitulations." It styled them, quite wrongly, "gracious concessions," and invoked the principles of equality, reciprocity, sovereignty, and local independence. In addition, it always put prominently forward the pretended reforms which it claimed to have introduced in its own legislative, judicial, and administrative spheres. Such reforms then existed and still exist only on paper,—there has never been any conscientious execution of them. To speak only of the judicial office, the Courts present a spectacle fit to alarm the suitor for justice. I do not shrink from affirming that justice is sold, and goes to the highest bidder. Such a state of judicial anarchy is not calculated to justify any claim from the Porte which aims at the abrogation of the *status quo*. As I have already indicated the fundamental differences in religion and in law, civil and criminal, constitute a sufficient reason for waiving the principles of reciprocity and local government. These differences will exist so long as the religion and legislation of the Turkish empire rest on the Koran. This concurrence of jurisdictions ought to continue, for one cannot imagine a native magistracy dealing judgment impartially, and on the merits, between the native and the foreigner, the Mussulman and the Giaour. A proof of my contention is presented by the fact, that directly after the liberation of Greece, the Christian States spontaneously surrendered in favour of the new kingdom the privileges to which they were entitled by the "Capitulations." Greece, as a Christian and independent state, offered to foreigners settled within her territory, and amenable to her jurisdiction, all necessary guarantees. Now, the consular system, as it works to-day in the Levant is, in fact, necessary, and infinitely preferable to native justice. Only a partisan, indeed, would assert that the system is perfect; and I cannot but affirm that the consular jurisdictions are by no means free from inconvenience. The consular Courts exercise jurisdiction over the subjects of

their respective nationalities in accordance with the old maxim — *actor sequitur forum rei* — the question of the competence of the Court, and of the law applicable to the particular case, is solved by the nationality of the defender. This theory, as I have frequently had the opportunity of observing, in the exercise of my profession as an advocate at Constantinople, gives rise, in practice, to many complications. Especially is this the case on account of the various incidents which may arise in a process by appeal, the intervention of a new party, counter-claims, relief against a cautioner, &c. Another cause of complication lies inevitably in the fact that each Court applies a different law, and has a special procedure. Thus among other inconveniences, it results that, where the parties to a contract in the Levant are of different nationalities, they cannot tell, when they enter into the contract, before what jurisdiction they will have to plead in the event of any dispute, and according to what rules of law or procedure the question will be determined. A further great inconvenience is that the plaintiff, who is compelled to call several defendants of different nationalities, must raise as many actions as there are defendants.

On the subject of consular jurisdiction in the Levant, the English works to be recommended are:—Mr. J. C. M'Ewan's "Consular Jurisdiction in Turkey and Egypt," and the work by Mr. Charles James Tarring, British Consul, at Constantinople, entitled, "British Consular Jurisdiction in the East." Mr. Tarring's book deserves to be consulted, and it is particularly agreeable to me to take this opportunity of paying a public tribute to a learned and upright magistrate, whose high legal capacity, and profound knowledge of men and things in the East, command respect.

In addition to these introductory remarks, I may say that, in Egypt, the principle of the sole jurisdiction of each foreign country over its subjects has been modified, by fusing into one the different national jurisdictions. But the essential principle of the "Capitulations" has been maintained. The reformed Courts in Egypt, in fact, include

native judges, and these present a fusion as complete as possible of the Western and Eastern elements. In return, the local government gives over to these Courts jurisdiction in all questions between natives and foreigners.

According to authoritative historians, the Turks are of Tartar or Scythian origin. Originally they formed numerous dynasties, and it was not till towards the 14th century, under the rule of Osman, that a genuine empire was founded. In 1355 the Osmanli set foot in Europe. In 1415 they penetrated to Bavaria. In 1453, led by the Sultan Suleiman, they conquered Constantinople, which thenceforth became the capital and final centre of the Ottoman empire.

The government of Turkey is an absolute and despotic monarchy. The sovereign takes the title of "Padichah," but his chief prestige lies even in our time in his religious title of "Kaliph." He unites and identifies in his own person the religious pontificate and the temporal power. The Sultan is the sole depositary and representative of the law; he alone is responsible for its execution. The decrees which he issues are called Hatti-Houmayoun (august writ), or Hatti-Cherif (illustrious writ).(*a*)

The Sultan as Kaliph is protector of the Mussulman religion. He is accountable to no one, and his person is sacred. Among the prerogatives attached to his sovereignty may be noted his right to declare war and make peace, to command the forces by land and sea, to appoint and depose ministers, to confer ranks and offices, to conclude treaties with foreign powers, to see to the execution of the Cheri and the laws in general, to make regulations as to public administration, and to remit or commute penalties imposed by the criminal courts. This twofold authority of the Sultan, namely, the legislative and the executive, is exercised by means of two functionaries who are placed at the head of the

(*a*) These decrees bear at their head the Tougra, a kind of signature depicting the open hand of the Prince (a tradition which goes back to the year 1365, in the time of the Sultan Murad), and afterwards the formula of execution written in the Sultan's own hand,—"Let it be done accordingly."

government hierarchy. The first of these is the Sadrazam or Grand Vizier, the second, the Cheik-ul-Islam. The Grand Vizier, whose office goes back, it is said, to the year 1327, is the head of the administrative government of the empire, as well as of the executive, which he exercises in name of the Sultan as his delegate. All the other ministers as regards their several administrative functions are immediately dependent on him. He is the channel by which everything must pass which requires the sanction of the sovereign. The Cheik-ul-Islam is the head of the Ulemas,(*a*) a body judicial and religious at the same time. He is charged with the interpretation of the sacred law, and is the sovereign's delegate in the spiritual domain. He shares in the exercise of the religious authority inasmuch as his "fetva"(*b*) is necessary to validate every decree emanating from the sovereign authority.

Before approaching the study of the leading features of the legislative and judicial organisation of the Ottoman Empire, it is necessary to understand its administrative system. The Ottoman Empire is divided for administrative purposes—1st, into Vilayets (Provinces or Departments); 2nd, into Livas or Sandjaks (Arrondissements); 3rd, into Cazas (Cantons); 4th, into Nahiyés (Communes).

At the head of each Vilayet is placed a Vali or Governor appointed by imperial decree. He resides in the capital of the province, and is the representative of the executive authority, excepting the judicial and military branches of it. He has under his immediate authority the heads of the various administrative services, the six ministers of finance, police, justice, public works, education, &c., who form with him a Council or Medjliss, including also four chief men selected from each of the communities, Mussulman and non-Mussulman. The Sandjaks or Arrondissements have an exactly similar organisation to the Vilayets, the Council

(*a*) The word "Ulema" is derived from "Ilme," which means in Arabic "science." The institution of the Ulemas bears a close analogy to that of the Mandarins.

(*b*) "Fetva" may be translated "edict."

representing both religious elements, being chosen partly by the people and partly by the ministers of religion, partly by the authorities. At the head of each Caza or Canton is placed a Caïmakam, who has for his colleague a Muavin; he is likewise assisted by a Medjliss, composed of four members, elected by the people, by the Mufti, by the religious heads of the non-Mussulman communities, by the Mudiri, or head of the Finance, and by the Minister of Correspondence. Lastly come Nahiyés or Communes, which are administered by Mudirs or Mayors, elected annually by the people, subject to the approval of the Vali. The duties of the Mudirs include administration, police, and finance. They collect the taxes, and conduct preliminary inquiries as to crimes and offences.

Such, in its main lines, is the present organisation of the Ottoman Empire for administrative purposes. I have already indicated above that the power of the Sultan is absolute and despotic; but this power was exercised, formerly at any rate, by means of Ministers, who took a more or less active part in the administration and the government of this vast empire. This is no longer the case under the rule of the present Sultan. The Ministers are deprived of all initiative and of all freedom of action, and I do not think it would be an exaggeration to describe them as mere clerks, whose function it is to execute, without discussion, the commands of the Sovereign. In fact, the Sultan Abdul Hamid directs exclusively, at the present time, the affairs and public fortunes of his dominions. From him everything proceeds, to him everything is finally referred. Ministerial orders hardly exist, everything is done by imperial decree. As to the Sublime Porte, it continues to be sublime but no more, every order or decision emanating from it being deprived of executive force until it has been sanctioned by the Sultan in the form of a decree or iradé. But if all power is thus concentrated in the hands of the Sultan, on the other hand the execution of the Sovereign's wishes is split up among thousands of hands—a result which inevitably flows from absolute personal power. Moreover, administrative corruption

exists in the highest possible degree, and is as profoundly rooted among the officials of the provinces as in those of the capital. To effectually regenerate the administration of this empire would be impossible, except by means of local and provincial institutions in harmony with the needs, the traditions, the individual character of each province. It cannot be done by a centralisation carried as it is, to the most extreme limits. Europe has always been agreed that the existence of the Ottoman Empire could not be prolonged, except by reforms. And the Turkish Government has hardly ever refused to comply with the reforms demanded. On the contrary, if the European Powers asked for one reform only in favour of the Christian populations, the Sultan straightway decreed ten, offered forty, promised effusively as many more as they pleased. But be it understood, he offered, promised, decreed, on paper. There was no serious and conscientious execution of its promises or application of its decrees. This was one of the stratagems of the Porte by which Europe has often been deceived, and the whole meaning of which she has not even yet mastered. As a matter of fact, by the "Constitution" of 23rd December, 1876, the Porte proclaimed the inviolable personal liberty of their subjects, their equality before the law, freedom of religion and association, and property, the inviolability of the house, the responsibility of ministers, the independence of judges, the civil and political equality of all the subjects of the Ottoman Empire, without distinction of race or religion. But all this was merely a dead letter; it had been promised since 1839, and already promulgated with great solemnity in 1856, by the Hatti-Cherif of Gulhané.

D. Démétriadés.

THE CRIMINAL.

'MID the hush of the tribunal
Cowers the prisoner in the dock:
Soon from sight and life to vanish
Past the prison's giant lock.

As I scan these typic features,
And that poor misshapen head,
Charity and thoughtful pity
Mingle with a mystic dread.

Had at birth his ermined Lordship
Got this thin perverted brain—
Bred and reared in such surroundings—
He had just been "him again."

Shall we strike such things with vengeance?
That were meanness, void of sense!
Though we justly seize and hold them,
In a righteous self-defence.

Yes! the criminal is fashioned—
Not by demon's power outside—
Nature, mother of all living,
Moulds him in her teeming side.

CHAS. SCOTT.

HIGH COURT OF JUSTICIARY,
March, 1891.

Current Topics.

The Licensing Laws.—The case of *Sharpe* v. *Wakefield*, decided in the House of Lords, on 20th March, 1891, is more remarkable for its supposed relation to the political question of compensation to publicans than for the legal principles involved. The Bow Bridge Inn, Kentmere, in Westmoreland, was a duly licensed house. On its license coming up for renewal in 1888, the Justices refused to renew the license, on the grounds established to their satisfaction and reported by themselves, of "the remoteness of the inn from police supervision, and the character and necessities of the neighbourhood." The Quarter Sessions also, after hearing evidence on these subjects, upheld the order of the Justices refusing to renew the license. The publicans had got it into their heads that a license once granted could not be taken away, except for personal fault of the holder, which was not in this case alleged. The case was accordingly taken to a Divisional Court, to the Court of Appeal, and lastly to the House of Lords; in all with the same result of supporting the action of the magistrates. It is undoubted that at the original application for a new license—*i.e.*, for premises not previously certificated, there is an absolute discretion in the magistrates as to granting or refusing the application. If they are, at that time, satisfied as to the suitability of the premises and the need for the house, and, by licensing it, induce the new grantee to expend his capital and time upon it, he is entitled to just and reasonable consideration before he can be refused a renewal in subsequent years. When there is no personal fault, or misconduct on his part, the grounds of the original grant are not to be lightly re-considered. Furthermore, and this is the main doctrine left untouched by the decision, though a discretion exists as to renewals, this discretion is not an arbitrary one, and it must be exercised judicially. The magistrates are not to refuse renewals capriciously; as, for instance, because they have become aggressive teetotallers, and desire to have all sale of intoxicating drink, by retail, prohibited. Their discretion is that of judges administering honestly the licensing statutes, and proceeding regularly to hear and determine a cause upon objections and answers and upon evidence. The Lord Chancellor's remarks upon the proper attitude of conscientious magistrates are worth quoting: "Discretion means,

when it is said that something is to be done within the discretion of the authorities, that that something is to be done according to the rules of reason and justice, not private opinion; according to law and not humour. It is to be not arbitrary, vague, and fanciful, but legal and regular, and it must be exercised within the limits to which an honest man, competent to the discharge of his office, ought to confine himself." Lord Bramwell is equally emphatic. "The Legislature has most clearly shown that it supposed, contemplated, that licenses would usually be renewed; that the taking away of a man's livelihood would not be prosecuted cruelly or wantonly." The decision does not give the publicans protection against every contingency but that of misconduct; but it does, on the other hand, recognise that their vested interests in licenses are not to be taken away on applications for renewal, except by the judicial action of a Court, proceeding upon evidence and administering, but not making, the law.

Saisie Foraine.—It may not be without advantage to direct public attention to a proceeding peculiar to French law, which is daily being put in practice against foreigners travelling in France, causing them infinite worry, inconvenience, and loss of time. The proceeding in question is technically known as a *saisie foraine*, and its effect is as follows:—An English lady, let us suppose, orders goods on credit from a fashionable milliner or dressmaker in Paris. On the eve of her departure she receives an exorbitant bill, greatly exceeding anything she had anticipated, and often charging for each item nearly double the price agreed upon. She naturally refuses to pay the amount demanded, and, at the very moment of her departure, without having received any further intimation whatever from the milliner, she finds, on returning to her hotel, a *huissier* (or sheriff's-officer) in possession of her baggage, making an inventory of her wardrobe, emptying her drawers and cupboards, and fingering her private wearing apparel.

This is a matter of almost daily occurrence in Paris, and the *modus operandi* is simplicity itself. The trader makes a purely *ex parte* application to the president of the tribunal, under article 822 of the Code of Procedure, stating (not on oath) that he is a creditor of Madame So-and-so, for such-and-such a sum—often giving a purely fancy estimate—that his debtor is only temporarily resident in Paris (*foraine*), and is on the eve of departure, and praying that he may be allowed to seize her goods and chattels as security for his debt. Permission is granted, almost as a matter of course, and the scene above described is the result.

Now, what is the best course to pursue under these circumstances? Of course the object of the tradesman is generally to force the unwary foreigner to pay a preposterous bill in order to recover possession of his baggage, and to be enabled to depart in peace. And this scandalous

"try-on" is frequently successful. It is, perhaps, of extreme importance, to the unfortunate party to be able to start at once. He is probably wholly ignorant of the mysteries of French law, and has no time to consult a lawyer. He, accordingly, pays the bill and departs, uttering curses, not loud, but deep.

There is, however, a very simple means of checkmating this species of blackmailing—one, indeed, which is pointed out by the judge's order authorising the seizure itself, but this document the victim has possibly not read, and, probably would not understand, if he did.

It is simply to deposit the sum claimed, or as large a portion thereof as can be conveniently spared, either with an *avoué* (the hotel manager can always give the address of one of those gentlemen, who are officers of the Court, and whose integrity is insured by a heavy pecuniary guarantee), or at the Caisse des Dépôts et Consignations, Rue de Lille, getting a proper receipt for the money. The creditor, when he realises that this is the intention of the party, will generally forthwith capitulate, and accept about half the amount claimed. For, once the money is in the Caisse des Dépôts, or lodged with an *avoué*, he must commence ordinary proceedings against his debtor to obtain payment; and, as it takes at present from a year and a-half or two years to obtain a final judgment from the Tribunal of the Seine, this course does not usually commend itself to the rapacious milliners and *modistes* who chiefly set in motion this particular engine of the law. Should the creditor, however, still refuse to release the debtor's baggage, the latter must employ an *avoué* to summon him before the president of the tribunal, by means of a *référé*, to have the deposit declared good and valid, and the seizure annulled. Still, even this will take two or three days, during which the debtor will be unable to recover possession of his baggage. So that, as long as this iniquitous means of oppression and extortion remains at the disposal of every unscrupulous tradesman who cannot immediately obtain payment of a preposterous bill, the best advice that can be given to English people temporarily resident in Paris is invariably to pay ready money for everything they buy, at any rate in shops where they have not previously dealt; and should the application of the *saisie foraine*, which is becoming more and more frequent, induce English ladies to purchase as few bonnets and dresses in Paris as possible, it will be by no means the only case in which French law has proved antagonistic to the best interests of French commerce.

MALCOLM M'ILWRAITH.

The Clitheroe Abduction Case.—The matrimonial rights, or wrongs, of Mr. Jackson, of Clitheroe, have lately been the subject of much discussion. The decision of the Court of Appeal, reversing that of the Divisional Court, negatives the right of any husband, whether or not he

holds, as Mr. Jackson did, a decree for restitution of conjugal rights (or for adherence, to use the Scots Law term), to compel his wife to live with him. He may not detain or imprison her in his house against her will. She is free to leave him at her sole will and pleasure, and the law of England affords no remedy. The decree ordering her to live with him cannot now by statute be enforced by imprisonment, and it is said to be doubtful in England whether the husband would not still remain liable for the aliment of the recusant wife. The decision may be accepted as of high authority, though Mr. Jackson is to try an appeal. It seems contrary to the well-known judgment of Mr. Justice Coleridge in *Cochrane*, 8 Dowl. P.C. 632, where the order was pronounced, "let her be restored to Mr. Cochrane;" and also to the former English practice, as in *Lakin* v. *Lakin*, 1 Spinks, 274, where the husband lay three years in prison rather than take back his wife. It is certain that the position is simple to Scots lawyers, who (in spite of the well-known dictum of Lord Stair, "he hath right to recover her person"), have not for centuries of practice resorted to coercion in matrimonial disputes. A spouse, whether husband or wife, who, without reasonable cause, capable of being judicially established, refuses obstinately to implement the primary duty of matrimonial cohabitation, will be divorced, and, if a wife, will not get any aliment. The Scots law requires four years' persistence in this obstinacy. It may be said that four years is a longer period than is necessary to evince the resolution of the recusant spouse to live apart, and the desire of the other to live together as married people. Two things, however, appear to be certain—(first), that if the deserted spouse has no right to compel a return to duty, he should have some right to be free of the contract by divorce: and (second) that the Scots statute which for three centuries has allowed divorce for clearly proved desertion and breach of duty, provides a fairly guarded solution for such matrimonial difficulties as those of the unfortunate Mr Jackson. Meantime, the decision in this case, following upon recent legislation which has made married women independent in property, is regarded by some as a triumph for the social cause of the rights of women. On the other hand, it is retorted, not unnaturally, that if a wife is absolutely independent, both as to her choice of residence and her goods, so that she may leave her husband immediately, and at pleasure, with all that belongs to her, the like privilege must be given to the husband to make himself an equally independent person, by divorce immediately, and at his pleasure. Fortunately, the sense of duty is still strong enough to prevent any undue laxity in divorce arising, to the grave injury of the weaker sex, in the first place, and of civilised society generally in the second. To give a remedy for such cases as that of Mr. Jackson, nothing more is required than the adoption in England of the Scots law of divorce for malicious desertion as a breach of the contract of marriage.

XUM

Building Feus and Leases (Scotland) Bill.—For every malady there is a quack medicine, and for the redress of every hardship there is a Brummagem legislative proposal. One of the coolest and calmest of such proposals is that embodied in the Buildings Feus and Leases (Scotland) Bill, a bill containing provisions, contrasted with which the crofter legislation of Scotland and the land legislation of Ireland display a scrupulous regard for sacredness of contract. The bill is short, having but four operative sections. Its main provision is that, where land shall be or has been feued or let upon the condition that buildings are or were to be erected thereon, any contract or agreement is to be void, which purports—(*a*) to entitle the superior or lessor to do any act whereby the buildings may be injured, which, but for such contract or agreement, he would not have been legally entitled to do, or (*b*) to release him from any obligation to pay damages for doing injury to such buildings, which but for such contract or agreement he would have been liable to pay. An alternative is allowed to the superior or lessor of lands so feued or let prior to the passing of the Act, to take back the lands and buildings within six months after the passing of the Act on payment of their value. The value, if disputed, is to be fixed by arbitration, and is to be estimated "as if no such contract or agreement had been made." These are the whole provisions of the bill.

It is easy to foresee what grotesque results such a measure, if passed, might bring about. Some of the most ordinary servitude rights might become illegal and void; and employers of labour, who, having works productive of damage by noxious fumes or vibration, had feued out workmen's cottages adjoining their works on the express condition that the occupiers should have no right to complain of the works or to claim damages for injury done to the cottages, might speedily find their occupation gone. It is not to be assumed that the framers of the bill contemplated such results. The truth seems to be that in their anxiety to provide a remedy for a special grievance they have invented a cure of supposed general utility, but in truth quite as deadly as the disease.

The grievance to be coped with is this. In Lanarkshire and elsewhere, where there are extensive coal and iron fields, many feus have been given off under reservation to the superior of the subjacent minerals and the right to work them. It has been quite conclusively decided that such a reservation does not deprive the feuar of the surface of his right to vertical and lateral support. Now it is easy to see that the necessity for leaving such vertical and lateral support may mean to the mineral owner a very considerable loss of valuable mineral, because it implies that pillars must be left unwrought in the strata under and adjacent to the feu of sufficient dimensions to prevent subsidence of the surface. Hence a practice has arisen of granting feu-rights, wherein the feuar contracts himself out of his right to support, and agrees that he shall have no claim of damages against the superior for any injury done to the surface by the subjacent mineral workings. In the case of *Andrew* v. *Buchanan*,

1871, 9 M. 554, reversed H.L. 1893, 11 M. 13, which is the leading case on this subject, it was held in the House of Lords, following the opinion of Lord Justice-Clerk Moncreiff, that not only was such a surrender of claims of damage perfectly lawful, but also that it barred the right of the feuar to interdict the superior from mineral operations which endangered the surface.

The object of the present Bill is to annul the House of Lords decision in the case of *Andrew* v. *Buchanan*. It assumes that the contract of superior and feuar, in excluding claims of damages, is unfair to the vassal, and proposes to treat it as null and void. The proposal receives some slight countenance from the opinions of the Court of Session Judges in *Andrew's* case, who, being informed that the town of Coatbridge was built on such contracts, were staggered by the idea that a whole town might be left to sink into the ground. But a calm, unbiassed view of the situation was taken by Lord Moncreiff, and was unanimously adopted in the House of Lords. "An estate in minerals," says his Lordship, "is often more valuable than an estate in the surface, and equally requires, and is entitled, to be protected by the law." This was indeed well illustrated by *Andrew's* case, where the feu-duty was £5 per annum, and the capitalised value of the superiority therefore only about £125 in all. The feuar's villa cost about £900. The subjacent minerals, within 100 yards of the buildings (that being the area considered necessary to preserve the surface), were doubtless worth many thousands of pounds. It is very comprehensible that a mineral owner should be willing to feu on such moderate terms to a feuar prepared to take his risk of the minerals being wrought out without affording him a claim for subsidence, while the owner would not for a moment sacrifice his minerals for the small benefit accruing from the feu. Lord Moncreiff said: "The essence of the complainer's case in reality is the supposed hardship which the plain words of the contract are said to imply, and some views of policy or expediency which are more suited for the Legislature than for a Court of Law. I cannot say that I am impressed by either consideration—I greatly doubt if there be any hardship. Building over mineral wastes is no novelty, and in this case an existing danger was disregarded, while the risk of future danger was foreseen and undertaken. Nor have we any evidence that the bargain, even under the most stringent construction of the clause, was not a good one for the feuar. I look on these obligations to the mineral owner as part of the consideration for the feu, and I can see no reason for permitting the complainer, while he retains the benefit, to repudiate the conditions, of his right."

We are far from supposing that Messrs. Donald Crawford, Bryce, Munro-Fergusson, and Phillips, who back this Bill, see a reason any more than did Lord Moncreiff; what they do see is the interest which some of their constituents have in getting as cheaply as possible out of the pit which they have veritably dug for themselves. So it is deliberately proposed to annul the stipulations in the superior's favour, and to throw on

him the consequences of the feuar's bad bargain. The superior is to be absolutely debarred, at the feuar's pleasure, from working his minerals within, say, 100 yards of the feuar's house, and this irrespective of the relative importance of the minerals and the feu. He may not even work on the footing of paying damages. And it has not even been thought meet that, if such aspiring towns as Coatbridge are (like the aspiring blood of Lancaster) to sink in the ground, the principle of "betterment" or a local, or even a national rate should be resorted to, to keep them on their legs, supposing they are worthy of being kept there. Why distribute the burden, say these astute gentlemen, if it can be all thrown on the broad shoulders of the landowner?

No doubt they will protest that they are perfectly fair to the landowner, for do they not give him the option of taking back the feus and buildings at valuation? But the valuation clause is really the most inequitable part of the whole affair. It provides that the value is to be estimated as if the feuar had *not* contracted himself out of all claim of damage. That is to say, if the value of the feuar's buildings has sunk from £900 to £600, in respect of actual or impending injury from mineral workings, the superior may have them back on payment of the £900, he bearing the whole depreciation in value. It is a graceful act to offer a man such attractive alternatives; and it is hard to say whether the more fitting title for the Bill would be, "A bill to legalise plunder," or, "A bill to insure fools against the consequences of their own folly." One or other of these titles it certainly deserves.

J. F. M'L.

The following is a fac-simile of a card that has been sent to us. It shows the attention that is being paid by our fair American cousins to the practice of the law :—

SPEAKS
ITALIAN, SPANISH,
FRENCH AND GERMAN.

KATE KANE,

ATTORNEY, SOLICITOR, COUNSELOR AT LAW & ADVOCATE.

116 E. MONROE ST., ROOM 7. Chicago, Ill.,
U. S. A.

Practices in
Probate, Criminal, Civil, State and U.S.
Courts, and all Continental
American Courts.

Reviews of Books.

La Criminologie: Etude sur la Nature du Crime et la Theorie de la Penalité Bibliotheque de Philosophie Contemporaine. Par R. Garofalo, Agrégée de l'Universite de Naples, Vice-President du Tribunal Civil. 2ième Edition entierement refondue. 1890.

There is little doubt that Italy is at this moment, in philosophic jurisprudence, at the head of all civilised States, and is, through its great writers, busy laying deep and wide a solid basis of criminal and penal law. In ancient times, the Romans were beyond rivalry as lawyers, and the Pandects will ever remain an indestructible monument of their industry and genius. Their successors have now resumed the march of legal progress, and it is not unlikely that the blood of their ancestors may yet work off the foreign elements which have mingled with it, and restore the masculine purity of the race as it was in the days of Cicero, and before it was corrupted by Eastern vices and superstitions. The other Latin nations and the Germans are also labouring hard at the new jurisprudence. Great Britain is absolutely nowhere; her so-called jurists are mostly mere lawyers or antiquarians. Crime with them is simply an act which the law forbids. A criminal is one who commits it; punishment is the infliction of pain or discomfort on the criminal to prevent him and others from doing the like. This view has, no doubt, the merit of extreme simplicity, but it is cursed with eternal barrenness, and throws no light on the nature of crime, the characteristics of the criminal, or the true object or effect of punishment. There are no judges in the world who are superior to those of England and Scotland in freedom from corruption, unselfish labour, and high culture; but yet what has been the ideal of a "great lawyer" on the benches of their Supreme Courts? Has it not been the man who is able to string skilfully together a mass of more or less conflicting decisions, and to emulate the ingenuity of a professional conjuror in endeavouring to extract consistent principles out of a heap of hopeless inconsistencies? On the other hand, the judge who has mastered the principle underlying a legal question, and lights up the whole difficulty with a flash of genius, has, like Lord Jeffrey, been put aside, to use the common expression, as "no

lawyer." It was only to be expected that men so trained should take no interest in the philosophical investigations of the Continent, but, on the contrary, should receive the results with mingled incredulity and dislike. Yet in one view, it is somewhat strange, for England, in its physiological science, is unquestionably in one direction the real parent of the incipient system. Darwin is a near ascendant; Maudsley and Spencer close collaterals; and Haeckel, Darwin's "son of thunder," its unconscious nurse; but, notwithstanding, English lawyers have never managed to see the necessary consequences of English physiology upon their theories of law. The only way of accounting for such obscurity of vision is, that the metaphysical "bogie man" of Free Will has intervened and blocked the way.

The present author, Garofalo, is the vice-president of the Civil Court at Naples, and a trained and practised judge and lawyer. He has now been for some time before the continental public. He traced the first lines of his criminal system in some essays published at Naples between 1876 and 1878: his "Criterio Positivo della Penalita," produced in 1880, was his first attempt at a new theory of repression; and his "Criminologia," published at Turin in 1885, completed his plan. The present work is a French edition of the "Criminologia," but so added to and altered as to be substantially a new work. Several of Garofalo's ideas were supported in the Congress of Criminal Anthropology held at Rome in 1885, and the succeeding Congress at Paris in 1889, and his theories made their way into the first "International Congress of Penal Law" held at Brussels in 1889. The present work is not so much the product of an individual author, as an entire new system of Criminal Law, crystallised in a single book. At its outset Garofalo wisely declines to discuss the abstract problem of individual moral responsibility, and brings the question back to the practical purposes of social necessity. It is, he says, universally admitted that the responsibility on which the existing system of punishment depends is more or less mitigated by individual circumstances as, for instance, by the bad examples received in childhood—by the contagion of the surrounding medium—by rooted habits—by temperament, and by heredity. Assume, for the sake of argument, that the free will of the criminal is always able to overcome these influences, yet who can define the part of an action which must be attributed to them and the part which must be assigned to free will? This alone shows the old principle to be impracticable. If it were practicable, the logical result would be that repression should act in an inverse proportion to the perversity and incorrigibility of the criminal. "One may protest," says Garofalo, "against the acquittals of juries and the indulgence of magistrates. It is, after all, the triumph of logic, only it is at the expense of social security and morality." He gives in a footnote the terrible effects of crime upon society in the case of murder. "From 1881 to 1887 the average annual number of murders in the principal States of Europe (Russia excepted) was 9208, thus distributed:—Austria, 689; Hungary.

1231; Spain, 1584; Italy, 3606; Germany, 577: France, 847; Belgium, 132; Holland, 35; England, 318; Scotland, 60; Ireland, 129. If we add Sweden, Denmark, Norway, Portugal, Roumania, Servia, Montenegro, Bulgaria, Russia, Greece, we shall certainly reach the cipher of about 15 000. As for America, of which I have no statistics, I read in an American journal that the United States alone give more than 3000 murders a-year." Thus 18,000 murders are committed annually in Europe and the United States. "Who is the enemy who has so desolated the land?" asks Garofalo. "It is an enemy mysterious, unknown to history: his name is the criminal. What has society done to prevent such evils? Nothing; or very little." He then sketches the course of our system of punishment till the criminal emerges from prison, and continues: "We pretend that he has expiated his crimes, that he has paid that which he owed to society, that henceforth he must be presumed honest. All this is but empty rhetoric. The truth is, the criminal has paid nothing; it is, on the contrary, the State which has disbursed expenses for his entertainment, thus placing a new burden upon the ratepayer, and so adding more damage to that already produced by his crime."

Garofalo, in his search for a philosophical definition of crime, then enters into a long inquiry whether there are any acts which have been condemned alike in all ages and countries, but is obliged to confess that there are none. All crimes now forbidden have been approved at some other time and place. Conscience and morality have thus been growths, and he, therefore, turns away for a definition from the outward facts to the inward sentiments. Further, he confines his investigations to those civilised nations which resemble ourselves, and finally defines crime to consist in those acts which are not only mischievous, or supposed to be mischievous, to society, but which violate those sentiments of pity and probity in the average degree in which they are possessed by a whole population. Individuals who either do not possess those sentiments, or cannot refrain from violating them, though they might have suited a different age or place, are incompatible with the actual society in which they live, and must therefore be either adapted to it, or if they cannot be adapted, must be eliminated, either partially or entirely. Elimination, and not punishment or expiation, is the true object of the criminal law. These points are treated at great length, and are illustrated by the most interesting and striking details. Garofalo then proceeds to describe the physical and mental anomalies of the criminal; but, as I recently discussed these at some length in reviewing "Ellis' Criminal," I will not repeat them here, but rather notice some matters which may be of interest to English readers. I may, however, mention that Garofola's experience has completely confirmed the fact that these anomalies or monstrosities exist to a much greater extent in convicts than in individuals not found guilty of crime, and he only enumerates those which he has himself observed. "My work," he says, "will

thus contain but few data, but in return they will have more certainty." "Do we wish to demonstrate by our own experience the statements of the anthropologists? We have only to visit a prison, and by the aid of the description which I have given, we shall distinguish at a glance those condemned for robbery from those condemned for murder. I declare, on my part, that I have scarcely been mistaken more than seven or eight times per cent." This will be the experience of all who can look carefully about them. He then discusses the effect of certain agencies upon crime as he has defined it. With regard to alcohol, he says, "Comparative statistics prove that drunkenness is very little spread among nations who occupy the highest place in the statistics of murder; that this vice, on the contrary is very common amongst other nations where murder is comparatively rare. Without doubt intoxication easily excites the feelings; it is often the cause of quarrels and disagreements; but it is only the drunkards of criminal temperament who come to blows and kill or wound each other. . . . My personal experience has always shown that drunkards who have become murderers were almost all known beforehand by their violent character, and that often they had already suffered punishment for such offences."

The author is disposed to attribute little influence to education after the child has reached the age of four, and very little to elementary or literary education at any time. The child's nature, like its physiognomy, is fixed in its early infancy. And by the child's education he does not signify pedagogic and alphabetic training, but the continuous training of habit or example, which, so far as it is domestic, is simply the continuation of heredity. On the other hand, a bad training can entirely stifle the moral nature. The evil genius, or anti-social instincts, correspond to the primitive age of man, and are thus the most deeply rooted in the spiritual organism. "The savage instincts," says Verri, "are not only never entirely stifled; but no sooner does the surrounding medium and the circumstances of life favour the expansion, than they explode with violence, 'because,' observes Carlyle, 'civilisation is only an envelope under which the savage nature of man burns with infernal fire.'" The Latin races seem to have had an unfortunate experience in this matter. From 1860, when education began to be largely spread, crime also increased in a very threatening manner. In France, in 1826, amongst 100 accused, sixty-one were illiterate, and thirty-nine had received a more or less developed education. When Haussonville wrote in 1887, the proportion was reversed —seventy literate, in the most modest sense of the word, to thirty eight illiterate. In the same way, recidivism increased among those nations. Thus, in France, recidivism increased from twenty-one per cent. in 1851 to forty-four per cent. for delicts in 1882, and thirty-three to fifty-two per cent. for crimes. In Italy, from 1876 to 1881, recidivism amongst those condemned by the Courts of Assizes rose from ten and a-half per cent. to thirty-six per cent. And in the same way in Spain. Still these

statistics are not conclusive. We get no particulars of the education given, or of the prison system, and the great American Reformatory Jail of Elmira furnishes opposite results. (*a*)

The author then deals with the contention of the Communist and Socialist that crime will disappear with the abolition or equalisation of private property. He, on the contrary, contends that crime is not due to want, but to the disproportion between the criminal's wishes and his means; and he enters into a long and important argument to show that criminals are not more numerous among the poor than among the rich. He enumerates certain facts drawn from Italian statistics, which seem to establish his conclusions in an indirect way, being the only method possible from the data at command. For this purpose he defines the proletariat as the class which subsists entirely by weekly wages gained by their labour, and classes all outsiders as "proprietors." Dividing the Italian crimes of cupidity in 1880 into two classes, those probably committed by the proletariat and those probably committed by the other classes of society, he attributes 14,524 to the former, and 2011 to the latter, that is as 88 to 12. He then calculates that the proletaires are to the proprietors almost as 90 to 10, that is, in every 100 persons 90 will be proletaires; of 100 crimes caused by cupidity, 88 were committed in that year by proletaires and the rest by the others. Thus the classes above the proletariat commit in Italy more than their share of this form of crime. It will be seen from the penal statistics prepared in the same country for 1880, that the Correctional Tribunal has judged 17,923 proprietors and 98,224 individuals having no property, that is that the former were as 17½ to 100, and represented one-sixth of the number charged. Therefore, while the proprietors represented only about the 10th or the 11th of the population, they represented nearly one-sixth of the whole correctional criminality. Amongst those who exercise the liberal professions in Italy, there is one convict for every 345, while among the peasants there is only one for every 428. "All the facts, then," says Garofalo, "tend to destroy the illusion of the Socialists." He then quotes a passage from a French writer. "It is strange," says the author, "thus to see cupidity increase with riches, and also alongside the development of city life to see a greater looseness of sexual relations, and the sexual passions redoubling themselves, as the enormous progress of the delicts against morals proves. Nothing more fitted than these statistical proofs to show that a desire is inflamed by its own proper satisfaction."

Garofalo afterwards proceeds to show that the proper aim of penal law is neither punishment nor expiation, for pain has never the effect of purification, but on the contrary, tends to break down and deprave the physical and moral energies; and then he elaborately explains his own principle

(*a*) See Dr. Wines' great work on the state of Prisons and Child-Saving Institutions. Cambridge, U.S., 1880.

which is that of adaptation and elimination. The punishment of death is the most effective and the most deterrent of all modes of selection, and is made still more powerful by preventing the criminals having offspring, fitted to carry down into future generations the seeds of mental and moral disease. "Our epoch must not punish the children of delinquents, but it should prevent their being begotten, by the death of the delinquents or the perpetual isolation of each sex—an artificial selection by which the race will be morally ameliorated. Lombroso does not fear to attribute the greater humanity of our own age, in comparison with ages past, to the purification of the race by means of the penalty of death. The scaffold, to which every year thousands of malefactors are conducted, has prevented criminality in our day being more spread among the population. Who can tell what might have happened if this selection had not operated, if the criminal had been allowed to bear offspring, if we had amongst us the descendents of all the robbers, of all the assassins of past ages?" The comparative freedom of Great Britian from atrocious crimes, when contrasted with the middle and southern parts of Europe, is, with some probability, ascribed to the wholesale execution of vagabonds in the days of Henry VIII. and his successors—74,000 having been hanged in the reign of that monarch alone —and, thereafter, to the transportation of English criminals to Australia and America, thus removing them to conditions of life more adapted to their natures. Since the period when punishments were mitigated in Europe, crime has increased largely in the countries where such mitigation has taken place. Thus, in France, from 1828 to 1884, murders have increased from 197 to 234; infanticides, from 102 to 194; blows and assaults, from 8000 to 19,000; robberies, from 9000 to 33,000; and so on with other crimes and offences. And yet, from 1826 to 1884, the population had only increased by seven millions. In 1885, the volume of crime was still augmenting. In Naples, in 1832, homicides of all kinds (unintentional included), amounted to 669; and in 1880 (unintentional not included), to 1061. Other countries present similar phenomena. The statistics published by the Howard Association do not rebut these statistics.

Garofalo then proceeds, at length, to show that neither punishment nor expiation, but elimination, is the real aim of criminal punishment; and on that footing, criticises adversely many points of the current doctrines of law, such as the effect on punishment of the intoxication or alcoholism of the criminal at the time of the deed; the treatment of attempts at crime; crime through hypnotism; art and part; cumulative offences; recidivism; previous convictions; prescription of crime; and pardon and remission of punishment. It is impossible, with the space at command, to follow him through these suggestive and important discussions; it is sufficient to say that they acquire a totally new meaning when treated on the theory of elimination or adaptation. It is, in that view, not so much the objective character of the act itself, or the extent to which the criminal has succeeded

in carrying his criminal purposes into effect, but rather the light thrown by the deed upon the character of the criminal, his danger to society, and the means necessary either to adapt or to suppress him. Thus, the perversity of the criminal is the test by which every doctrine must be tried. By the aid of this touchstone, prescription of crimes, when there is no change for the better in the criminal, is entirely irrational, and ought to be denied to all malefactors, whose conduct has shown that they are incorrigible. As for pardon on great or festive occasions, he thinks that the State should be made responsible for all the damage caused afterwards by the crimes of the persons pardoned. In the last book he sketches a rational system of punishment, and maintains that the great instinctive criminals, regarded as beings of extreme moral degeneracy, and perpetually unsociable, as they cannot be adapted, must be absolutely eliminated from society, by the application of the death penalty. His reasonings on this matter are extremely weighty, and his illustrations striking. Everywhere, he says, where the death penalty has been altogether or almost abolished, murder has increased in an extraordinary degree. In Belgium murders increased in a frightful manner, whenever the knowledge of the abolition of the scaffold spread among the masses. From 1865 to 1880, murders increased from 34 to 120. In Prussia, where, for many years, there had been no executions, murders increased from 242 in 1854 to 518 in 1880. In Switzerland, where capital punishment was abolished in 1874, murders increased in five years in the proportion of 75 per cent. The same effect was produced in France and Italy. In the latter country there were no fewer than 3626 murders in 1880, while England has only an average of 250 a-year. The minor punishments—that is, the temporary and local eliminations, are also treated in the most suggestive and elaborate manner, and we trust this great representative work will be in the hands of every criminal jurist and practical lawyer. The conclusion contains a comparative table of the number of murders, assaults, and robberies, in the principal countries of Europe.

CHAS SCOTT.

The Practice of the Sheriff Courts in Civil Causes. By J. DOVE WILSON, LL.D., Advocate, assisted by J. C. DOVE WILSON, LL.B., Advocate, BELL & BRADFUTE, 1891.

A law book, which has passed into a fourth edition, is like a law-suit decided the same way by successive Courts of Appeal, and in the case of a treatise on practice, it may almost be said that the Court of last resort has spoken. The practitioners who know what they want, buy and use the book, which is the best judgment in its favour. Mr. Dove Wilson's "Sheriff Court Practice" has also the advantage of being the work not merely of an able lawyer, but of a judge, who, through a long and honourable career, has administered the law in one of the most important Sheriff

Courts, so that his statements have been tested in most points by experience of the most valuable kind. It is matter of congratulation to the legal profession that he has been able to devote a part of his well-earned leisure in revising once more, with the assistance of his son, the standard work on the procedure of the Civil Courts, by which so large a part of the litigious business of Scotland is transacted. The present edition is like its predecessors in type, form, and arrangement, and brings down to date the cases and statutes relating to the Sheriff Courts. There has been scarcely any statutory change of importance since the last edition of 1887. The table of contents is, we observe, unaltered. But as it is often the more minute changes in the law which escape observation, it may, perhaps, be the most useful form of review to notice briefly what Parliament and the Court of Session have done during this period as regards Sheriff Court procedure. A Small Debt Amendment Act was passed in 1889, which authorises actions in the Small Debt Court for the delivery of moveables when their value is found not to exceed £12; gives the Sheriff a discretionary jurisdiction against defenders resident beyond the county if one defender is resident within it; allows representatives, assignees, or trustees to be sisted in place of the pursuer; incorporates with the Small Debt Acts a series of sections of the Sheriff Courts Act, 1876, as to the form of service, and the amendment of petitions or the initial writs in proceedings in the ordinary Courts; authorises warrant for ejectment in small debt decrees, and implies warrant to open lockfast places in warrants to sequestrate for rent, or to sell, eject, or re-let; legalises the attendance of agents, which had already been a common practice in spite of the provisions to the contrary; authorises decrees for payment by instalments for any period not exceeding twelvemonths; enlarges the time within which, if avizandum is made, decree may be pronounced; dispenses with a witness to a charge or indorsation of a warrant, and makes provision for extract in favour of an agent, and for separate extracts apart from that formerly written, and still competent, on the principal summons. We concur with Mr. Wilson in thinking that the time has now come for a codification of the Acts relative to Sheriff Court Procedure, and we think, in common, it is believed, with most practitioners, that the Debts Recovery Act should be repealed, and Sheriff Court Procedure confined to two forms —one for ordinary, and the other for small-debt actions. The Debts Recovery Act is a dead letter in several sheriffdoms—rarely used in others —and, when used, inconvenient to litigants, practitioners, and judges. The class of cases to which it is applicable is ill-defined. The substitute for or subterfuge from a distinct record, which it provides, commonly leads to confusion as to the questions to be tried, and frequently results in a remit to the ordinary roll, when the whole procedure has to be begun again. The provision by which no expenses are given in respect of an unsuccessful appeal, is unfair, and has increased the unpopularity of the Act. The ordinary action in the Sheriff Court is now a simple and

inexpensive procedure, without technicalities, and easily applied to all suits worth trying. It would be proper, too, that a discretionary power should be given to the Sheriff in the Small Debt Court to state a case, on any important point of law, for the decision of the Court of Session. The interests at stake in these cases are frequently greater than in those which are the subject of appeals on a case stated to the Court of Justiciary. It is thought, also, that the appeal for want of jurisdiction, oppression, or incompetency to the Circuit Court of Justiciary, should be transferred to the Court of Session. Experience has proved that the interval between the close of the criminal business, and the departure of the next train, is not a satisfactory test for the exercise of judicial qualities. To prevent frivolous appeals in such cases unduly occupying the time of the Court, it would be proper that caution or consignation should be required as their condition. The other statutes which deal, not with procedure immediately, but with the substance of the law, the Removal Terms Act, 1886; the Guardianship of Infants Act, 1886; and the Judicial Factors Act, 1889, complete the brief limit of legislative change. When it is compared with the large alterations made by statute between 1875, the date of the second edition, and 1883, which are detailed in the preface to the third edition, it is evident either that Parliament has paid little attention to the Scots Sheriff Courts, during the last eight years, or that the substance of the law regulating them has been deemed generally satisfactory. Nor have any very important decisions, relative to Sheriff Court procedure, been pronounced by the Court of Session during the same period. Still, several of the points decided, deserve the attention of practitioners. An important question of Sheriff Court jurisdiction was raised in *Jack* v. *North British Railway*, 12 R. 1029, by which it was decided that, under § 46 of the Sheriff Court Act, 1876, a railway company is liable to the jurisdiction of any Sheriff within whose district it has a principal place of business or offices, when it can be cited under the provisions of § 137 of the Companies Clauses Act, 1847, although the cause of action did not arise within such district. Whether a railway company is liable at common law to the jurisdiction of a Sheriff within whose district the cause of action (either contract or delict) arose, if it is cited within that district, appears to be a point not so well settled, although Mr. Wilson's opinion is that it can. The decision in *Aberdeen Railway Co.* v. *Ferrier*, 16 D. 122, and the opinions in *Edward* v. *Inverness and Aberdeen Railway*, 4 Irv. 185, support this opinion. But the view indicated by the Lord President in *Jack's* case, that the citation must be at a principal station, raises a doubt on the point. Lord Shand reserved his opinion on it. In practice, it is believed to be common to sue a railway company for damages for injury or breach of contract where the injury took place or the contract was made within the Sheriff's jurisdiction, although there is no principal station for citation within the same jurisdiction.

Reduction is still incompetent, though seldom necessary, in the Sheriff

Court; and suspension is only competent when a sum of less than £25 is charged for. Accordingly, in *Crawford & Co.* v. *The Scottish Savings Investment Co.*, 12 R. 1633, where an interdict truly involved a reduction or suspension of a Sheriff Court decree, such interdict was held to be incompetent. The proper course was to bring the decree under review of the Court of Session. Declarator is also competent to the Sheriff only where the subject of dispute is moveable property not exceeding £1000 in value, see Sheriff Court Act, 1877, § 8 (2); but where the petitory conclusions were sufficient for the pursuer's remedy, a declaratory conclusion was allowed to be withdrawn and the action held competent, *Wilson* v. *Co-Operative Store Co. of Newhaven*, 13 R. 21. It deserves consideration, whether these old restrictions on the Sheriff's jurisdiction, which depend solely on the forms of actions, should not now be repealed.

After examining the present work with reference to these and the other principal cases on the subject of Sheriff Court practice decided since the last edition, we are able to say with confidence that nothing of importance is omitted, and the result of the decisions in all instances concisely and clearly stated. In some respects the treatise might possibly have admitted of greater condensation, but as it is intended for the assistance of practitioners, who have the smallest as well as the largest experience, we are not disposed to consider it an objection that the historical introduction, and several passages in the text, are of a critical or academic character. We doubt, however, whether a practical treatise on the law as it is, is the proper place for recommendations for its improvement, though Mr. Wilson's suggestions always deserve careful consideration, and it must be confessed that the number of lawyers who are reformers is so small, that it is refreshing to hear one so well entitled to speak on this subject as Mr. Wilson. It would be a great advantage to the law and to future litigants if the Government would give Mr. Wilson a brief to consolidate the whole statute law relating to Sheriff Court procedure.

Æ. J. G. Mackay

Scottish Law of Conveyancing (Heritable Rights). By John Craigie, M.A., LL.B., Advocate. Edinburgh: Bell & Bradfute, 1890.

Mr. Craigie's work on the Scottish Law of Conveyancing (Heritable Rights) may fairly claim to be one of the most successful law manuals, which are primarily intended to afford students the readiest means of mastering those points of a subject which the exigencies of examination demand. In its first edition the volume before us had all the virtues, but unfortunately also many of the vices, of an ordinary cram book. The author, however, has availed himself of the opportunity afforded by the demand for a second edition to expend a considerable amount of time and labour in increasing the size of the work, and has consequently greatly

extended its scope and usefulness. In the preface we are informed that the first two chapters have been re-written, and the others revised and enlarged. The result is that a modest little handbook of 150 pages has extended to a volume of somewhat over 270 pages. The first chapter on the "Principles of the Scottish Law of Conveyancing: tenures abolished and existing: allodial lands," is devoted to a short statement of the principles on which the feudal system is based, and a slight sketch of the history and vicissitudes of the different land tenures in Scotland. There can be no doubt that, armed with this brief historical review of the rise and fall of strict feudal theories, the student is better able to grapple with the difficulties of the creation and transmission of feudal estates than when, as in the first edition, launched at once into the midst of his subject. Upon the second chapter—practically on the feu-charter—the greatest amount of labour has been spent. Above a third of the whole volume has been devoted to this subject; and one cannot help thinking that, when writing this chapter, the author had in view the publication of a work of considerably larger dimensions than what he finally contented himself with. At least he has succeeded in giving a very clear analytical account of the different clauses of a feu-charter and their effect, and places the reader in the position of forming an accurate notion of the rights of superior and vassal resulting from the creation of a feudal estate. The summary of the law of casualties, noticing as it does the main points decided by the most important recent cases on this subject, may be mentioned as exceptionally useful. The length of this chapter is somewhat out of proportion to the rest of the book, and after the fairly complete way in which a grantee's title is dealt with we might have looked for a little more elaboration of the different steps by which at different times a disponee became fully entered with the superior.

Most of the important points relating to heritable conveyancing treated of in larger works, such as M. Bell's Lectures, are more or less fully discussed in Mr. Craigie's book. Those chapters which deal with the intricate subject of destinations perhaps deserve special mention. In no other work on Scots law will the student find collected in so small space, and in so clear, concise, and intelligible a fashion the main rules on which he will have to rely in interpreting destinations. The leading cases are judiciously referred to, and there is a large collection of carefully selected examples. Too great reliance may, however, be placed on illustrations. For example, after stating the general principle governing destinations to parent and child, the author, introducing the examples, continues—"These destinations illustrate the rule, and show cases in which it is not applicable." Much space would not have been taken up by a brief reference to the exceptions hinted at instead of leaving the student to find them out for himself from the illustrations. The work is throughout accurate in its statement of the law, and is written in a style of clear and lucid exposition that renders it specially useful and attractive to students of conveyancing

to whom it is mainly addressed; while practitioners will often find it more convenient for reference than a larger work on the subject.

W. HUNTER.

The Partnership Act, 1890, with Notes: Being a Supplement to a Treatise on the Law of Partnership. By the Right Hon. Sir N. LINDLEY, assisted by Sir W. CAMERON GULL, Bart., M.A., Barrister-at-Law, &c., and WALTER B. LINDLEY, M.A., Barrister-at-Law, &c. With an Introduction and Notes on the Law of Scotland, by J. CAMPBELL LORIMER, LL.B., Esq., Advocate. London: SWEET & MAXWELL, LD.; and Edinburgh: BELL & BRADFUTE, 1891.

The Partnership Act (53 & 54 Vict. cap. 39) came into force on the 1st of January of the present year. It is the second effort at codification of the Mercantile Law of the United Kingdom, the Bills of Exchange Act, 1882, being the first. The success of this last-named Act is generally admitted to have come up to the most sanguine expectations, and must surely have convinced the most prejudiced believer in the *jus non scriptum* of the benefits of assimilation and uniformity in the rules of the law merchant. Not that either the Bills of Exchange Act or the Partnership Act can be described as codes in the complete sense of the term—seeing that neither of them altogether closes the door upon the common law relative to the subjects with which they deal. Thus, for example, by the Partnership Act, the important subject of the goodwill of a dissolved firm is left unprovided for, and the distinctive differences between the laws of England and Scotland regarding both the separate *persona* of a firm, and the ranking of partnership creditors in bankruptcy are allowed to subsist. But the Act of 1890, like its predecessor of 1882, is a code in so far as the main body of rules, which were formerly to be gathered from a mass of decisions, statutes, rules of Court, &c., are now stated in a systematic form, and with the force of a legislative enactment. The value of the new statute can only, of course, be thoroughly tested by time; but a perusal of its provisions encourages one to predict that it will be of the greatest possible benefit to the mercantile community in the three Kingdoms, and that at no distant date we shall see it adopted by our colonial Legislatures.

The great authority of Lord Justice Lindley, as a writer on the law of partnership, makes it needless to say that the portion of the present volume executed by him and his English coadjutors—viz., that relating to the law of England—has been carefully and well done. This part of the work has been treated as a supplement to Lindley on "Partnership," and, accordingly, the annotations on the several sections bear reference throughout to the larger work. The annotation of the statute in relation to the law of Scotland has been done by Mr. Campbell Lorimer, whose familiarity with this branch of the law is well known to the profession. After a care-

ful perusal of a number of Mr. Lorimer's notes, we are satisfied that this part of the work will compare favourably with the English part of it. Mr. Lorimer gives to Bell's "Commentaries," and, to a smaller extent, to Clark's "Treatise on Partnership" the same position as his English colleagues assign to Lindley on "Partnership."

This joint production is not only interesting as showing an *entente cordiale* between English and Scottish authors and publishers (not likely to be to the pecuniary disadvantage of Scotland), but is also a most valuable commentary for lawyers and mercantile men on both sides of the Tweed. Nearly every section and sub section of the statute (Mr. Lorimer, by the way, seems to have overlooked § 3) has been annotated with reference both to England and Scotland. And so convenient is this arrangement that one must regret that a similar plan has not been adopted for the Bills of Exchange Act. The notes consist partly of critical analysis of the text, and partly of reference to decisions as illustrative thereof. On pp. 115, 116 a convenient summary is given of the changes effected on the English law and the doubtful points settled by the Act. The authors seem to take the view that the fact of a statute being intended to operate partially as a code does not prevent its language being construed according to the light of the earlier decisions. This may be the sound rule of construction, apart from any express declaration to the contrary in the Act itself. But it is a question how far it can be extended. Some of the opinions in the recent case of the *Bank of England* v. *Vagliano* (particularly those of the Earl of Selborne, and Lords Herschell and Bramwell), show the doubt that exists on the subject.

By way of criticism we shall just notice that Mr. Lorimer's note to section 46 seems out of place. It should have been placed under section 45, so as to be in harmony with the corresponding note in English law. The expression "this addenda" on p. 130 may be admissible in English practice, but it is not to be commended. Mr. Lorimer suggests a doubt on the construction of section 9, whether the section has not put an end to the rule of Scottish law, which requires that debts shall be constituted against the firm in the first instance. We do not see in the words of the statute any room for the notion that the law on this point has been changed. H. G.

The Law Relating to Trusts and Trustees. By HENRY GODEFROI, B.A., LL.B., of Lincoln's Inn, Esq., Barrister-at-Law, Joint-Author of "Godefroi and Shortt on the Law of Railway Companies." Second Edition. STEVENS & SONS, LIMITED.

There has been no lack of books—and of good books—on the Law of Trusts in England; the latest now lies before us—and on such a subject, *cæteris paribus*, the latest book is the most useful. There is no occasion, however, to compare the second edition of Mr. Godefroi's "Law of Trusts"

with anything but his own first edition, published twelve years ago. A glance at the two books proves at once the author's industry and the growth of his subject. Not, indeed, that the law of trusts of 1891 is to that of 1879 as Mr. Godefroi's second edition is to his first, for the later work is the more elaborate, but the growth of both statute and case law in the interval has been rapid. It is in the light of this growth that such a book must be considered. It might no doubt be possible to construct a Digest of the Law of Trusts, which should be perfectly scientific and symmetric in design, but with a list of some six thousand cited cases that would mean a vast number of cross references, increase of bulk, and loss of time. What is required is rather, as it were, an instantaneous photograph of the law as it stands to-day—accurate, complete, and well up to date. These merits Mr. Godefroi has attained, and his work is therefore reliable. That is not by itself enough: to reliability must be added ease of reference, which is in the main a matter of arrangement and of indices—a simple matter in theory, but in practice difficult beyond belief. Nor can success in this respect be fairly estimated without the test of actual daily use: but it will probably be found that here too Mr. Godefroi has succeeded. The chapters of the first edition have been much subdivided, which is an improvement; the present index is very full, but perhaps there also more subdivision—more numerous headings—might have been an advantage. For instance, the heading "Jurisdiction" appears in the index to the first edition, but not in this; yet Chapter XL. is entitled "Trusts of, and Jurisdiction as to, Foreign Property." This is an important and interesting chapter, but neither here nor (it is thought) elsewhere in the book does the author treat of the jurisdiction as to Foreign Trustees—that is, trustees of English trusts residing out of England—which has lately received some consideration, especially with reference to "service out of the jurisdiction" under the Rules of the Supreme Court (1883, Order XI., Rules 1 and 2). It is unfair to dwell upon individual omissions, and there are not many in this book. On the other hand, while for the main part confining himself to terse statement of decided law, Mr. Godefroi has not been afraid where necessary to give his views upon points not yet settled. For instance, he has careful suggestions to make as to mortgage investments by trustees under the Trustee Act of 1888—suggestions which may well prove of value, because trustees are prone to over estimate the protection extended to them by statute or by the terms of a deed.

In his Preface Mr. Godefroi refers to the Public Trustee Bills and the Trust Companies Bill now before Parliament, regretting that he could not postpone the appearance of this edition till after the passing of these "salutary measures." Opinions may differ as to the epithet, but the mere reference illustrates the rapid development of the Law of Trusts in these days, and the usefulness of a work like this to the many who desire or require to study its latest phases.

PHILIP F. WOOD.

Manual of the Elections (Scotland) Corrupt and Illegal Practices Act, 1890. By J. Edward Graham, Advocate. Edinburgh: William Blackwood & Sons, 1891.

Statute draughtmanship seems degenerating. The clear language of early Scots Acts is well known. He who ran might read them without a guide in the shape of the modern manual or analysis. Now-a-days, plain sailing through the mazes of contemporary legislation is not easy. Of recent Acts, few are more perplexing than those dealing with parliamentary and other elections, although here, if anywhere, simplicity should be the first consideration. Such an Act as "The Elections (Scotland) (Corrupt and Illegal Practices) Act, 1890"—the title is unique—which came into force on 1st October last, is an example. And Mr. Graham comes opportunely to the aid of all interested in county, burgh, parochial, and school board elections, or, as he designates them, "corporate elections," a phrase not in the Act. The Manual extends to 110 pages, and of these the text of the Act, together with that of the cognate Acts of 1883 and 1885, absorbs 100 pages. The balance represents the Manual, as no attempt has been made to annotate the statutes. Throughout the analysis, however, excellent comments are made by Mr. Graham. We note that, *ob majorem cautelam*, he advises the assumption of various duties which the Act does not impose, expressly or tacitly; while his views, as stated in an *addendum*, as to the non necessity of making returns of election expenses, where none are incurred, are at variance with the circular just issued by the Education Department. The learned author thinks Sheriffs may recover their travelling expenses, and *probably* their "hotel bills," when called *to* their counties on election business. The expense of itinerant investigations in the counties would rather appear to be the matter intended by the Legislature; but, if Mr. Graham be right, so much the better for the Sheriffs, and so much the worse for unlucky candidates or ratepayers in distant sheriffdoms.

G. W. W.

A Handbook of Court of Session Practice. By David Balfour, Solicitor. Edinburgh: William Green & Sons, 1891.

Mr. Balfour says in the preface to this book that although "it is primarily intended for students who are reading for law examinations, practitioners will find it a handy book of reference on the law of procedure." The book seems well fitted to serve its primary purpose, and students who have not the courage to grapple with Mackay, or who find Coldstream indigestible, will welcome this short and readily intelligible sketch of the ordinary procedure of the Court of Session. We doubt, however, whether Mr. Balfour's anticipation that the book will be used as a work of reference by practitioners, is likely to be realised. We should regret to think that there are many practitioners in any branch of the pro-

fession who require to use so elementary a treatise as a work of reference in their every-day practice; while, as a guide to the niceties of practice, it is, as befits a student's manual, almost useless. The references given are scanty, though the recent cases are duly, and as a rule correctly, noted, and, indeed, Mr. Balfour deserves commendation for the combination of accuracy with conciseness which characterises the book. It is, however, a little startling to be told that the evidence of witnesses of tender years will be "received *cum nota* if they show that they know that those who do not tell the truth will hereafter be punished." How many children, or grown-up people for that matter, can "show that they know" that? When a girl aged nine told Mr. Justice Maule that she didn't know where she would go if she told a lie, that learned judge replied, "No more do I."

J. J. C.

The Law relating to the Property of Married Persons. By DAVID MURRAY, M.A., Hon. LL.D. Glasgow, Member of the Faculty of Procurators in Glasgow. Glasgow: JAMES MACLEHOSE & SONS, 1891.

The result of the discovery that attendance on the law lectures of a University is not necessary to qualify for the final examination under the Law Agents Act, 1873 has been to produce a crop of lectures on Scots Law in various large towns throughout the country; and many of these lectures have, in due course, found their way in book form to increase, if not to enrich, the legal literature of the country. Most of these works the profession could well have dispensed with; and as their aim generally was to present, in the space of an hour's reading, a view of the whole law of Scotland, they were equally valueless to the legal student. The present work, however, although it also owes its origin to a lecture, delivered by the author, deserves to be placed in a different category, and must be considered as a valuable contribution to the exposition of a branch of our law rendered somewhat obscure by the unsettling character of recent legislation.

Dr. Murray has wisely devoted his attention to a particular branch of Scots law, and his selection of a subject—the proprietary rights arising from the relationships of husband and wife and parent and child, and the changes which may be effected on these by convention—is, at the present time, most appropriate. Since Lord Fraser's great work, the Married Women's Property Acts, of 1877 and 1881 have wrought changes in the law, the effect of which is even yet but dimly known and recognised, and these Acts, along with the great number of decided points arising out of the City of Glasgow Bank and other cases, have produced sufficient new material to warrant the publication of a treatise which will bring the law on this subject down to date.

The method adopted by Dr. Murray in his work, necessitated, no doubt, by the manner of its origin, is to deal first with the common law,

XUM

and thereafter, in separate chapters, to touch upon the recent Acts of Parliament which have effected alterations thereon. This mode of dealing with the subject will certainly detract from the merits of the work in the eyes of practising lawyers, but for the legal student, who desires to get a grasp of the principles of our law applicable to the property of the spouses, and the rights of the children therein, by tracing these principles from their source, and following them through the various changes introduced by the decisions of the Court and the legislation of Parliament, no better mode of treating the subject could be suggested.

With regard to the matter of the book we think Dr. Murray has, on the whole, performed his task well, although the treatment of many important parts is necessarily very superficial. The chapters dealing with the common law are clearly and correctly written, and where condensation is adopted, it is used in such a manner as to show that the learned author has a thorough grasp of this part of his subject; while, by his apt references to the customs of other countries to which our common law may be traced, he also shows that he has studied his subject not merely as a practising lawyer, but as a legal antiquarian, and the book is thereby invested with a literary interest which excites the attention of the reader. The changes introduced by the Intestate Moveable Succession Act, and the various Married Women's Property Acts, and the effect of the decisions under these Acts, are stated with brevity, but with clearness and accuracy. The chapter on marriage contracts presents, in small compass, the leading points which conveyancers should have in view in substituting conventional for the legal provisions of spouses and children. It embraces the most recent decisions, and will be found useful to legal practitioners, although, probably from too great a zeal for condensation, the import of some of the decisions is not stated with such clearness as is desirable. The work, moreover, is by no means free from inaccuracies, and one or two of the sections might, with advantage, be recast. Section 169 on the vesting of a fee subject to defeasance is anything but clear, and will be understood by very few, although one conversant with the subject may, by reference to the previous sections, make a guess at the writer's meaning. On p. 178, in dealing with the changes introduced by the Intestate Moveable Succession Act, it is said, "that next of kin and nearest of kin *were, formerly*, synonymous." We are not aware that they are not so still. On p. 180, line 25, the substitution of "*and*" for "*or*," is of essential importance. On p. 191, we find the statement, that "real burdens upon land are still heritable as to the succession of the creditor." Such securities are now moveable; the author has failed to appreciate the full extent of the alterations effected on real burdens by the 30th section of the Conveyancing Act, 1874. On p. 192, the point of the decision in *Hare*, 17 Rett. 105, is missed—that case decided that where the heir does succeed to a bond and disposition in security, he can still complete his title by service, although such security is moveable.

J. GRAHAM STEWART.

A Digest of the Law and Practice of Letters-Patent for Inventions, including the Statutes, and all Cases decided from the Passing of the Statute of Monopolies to October, 1890. Second Edition. By CLEMENT HIGGINS, Q.C., and G. EDWARDES JONES, Barrister-at Law. London: WILLIAM CLOWES & SONS, LIMITED.

A Treatise on the Law and Practice relating to Letters-Patent for Inventions. With an Appendix of Statutes, International Convention, Rules, Forms and Precedents, Orders, &c. By ROBERT FROST, B.Sc. (Lond.), of Lincoln's Inn, Barrister-at-Law. London: STEVENS & HAYNES.

The first of these volumes is an old friend in a new dress. Its arrangement has been slightly altered for the better, and it has most usefully incorporated the statutory provisions, so far as these are necessary or helpful, under each of its alphabetically arranged heads. The book does not, in point of fact, come absolutely up to the promise of its title page, which states that all the cases from 1623 to 1890 are included. We have noted twenty-seven Scottish cases which are not mentioned, these including the case of *Neilson* v. *Baird & Co.*, which is simply referred to as a cross action in the case of *Baird & Co.* v. *Neilson*, but which amounts, from first to last, to something like a small treatise upon patent law as understood in Scotland. Scots practice is also entirely omitted. The book is therefore essentially an English book; but even as regards English cases the list is not absolutely complete. We have noted ten English cases under the letter A which have been omitted. Further, the book does not give, and we daresay would not pretend to give, all the rulings in every case referred to. With these limitations, which do not really affect the utility of the book, we can say that this digest is a work of the greatest usefulness; the clear and logical subdivisions of its various heads, and the interest imparted by the arrangement of the various decisions under each subdivision in chronological order, actually make the book a pleasant book to read; and its careful and, so far as we have been able to test it, its methodical and accurate cross references and indices to each heading, render it a very easy matter to find the information required on any particular point.

The second of these books, "Frost's Patent Law and Practice," is a new candidate for the favour of the profession, and we may say at once that we extend to it the heartiest welcome. It is exceedingly well written, in a style at once lucid, thoughtful, and comprehensive. The first part of the book, pp. 1-520, is in effect a terse and well-arranged treatise on the general law of patents for inventions, as at present in force; and in this part of his work Mr. Frost has been very successful in setting forth a systematic statement of the principles of British patent law, and of the application of these principles to the circumstances of particular cases. The book is not so rich in details of the practice of the English Courts and

of the Patent Office as some other books which are before the profession; but we think that a work bringing the general law within a reasonable compass was wanted, and that Mr. Frost has supplied this want. The second part of the volume, pp. 525 to 711, is taken up by a good appendix of statutes and forms, and there is a very useful index of forty-eight pages.

ALFRED DANIELL.

Devoluzione delle Eredità vacanti alle Opere Pie. AVV. PIETRO PANZERA. Catania, 1890.

The object of this little pamphlet is to advocate the amendment of Art. 758 of the Italian Civil Code, which, like Art. 768 of the French Code, gives to the State the whole property of intestates who die without relatives within ten degrees. The amended article which the author proposes would give the estate in such cases "to the charities of the place, city, or province where the deceased was born." Sign. Panzera argues, in an interesting historical sketch, that the doctrine of *ultimus heres* lacks solid foundation, consuetudinary, logical, or moral. In ancient Rome the doctrine was subject to many equitable exceptions. *Bona vacantia*, under the Lex Julia, were taken by the fisc, subject to legacies and trusts; the estates of intestate and heirless soldiers, sailors, *curiales*, and craftsmen, went to their regiment, or *curia*, or guild (Cod. vi. 62); and those of religious persons, in like case, went to their Church or monastery, those of advocates to their college, and those of students to their academy (Nov. cxxxi. c. 13). The laws of the Lombards instituted the fisc without such exceptions, but the Code of Theodoric recognised the equitable claims of the Church, and even any *praesumptio officii*, as excluding the fisc. Feudal law again, gave the estate to the '*curtis regia*,' when there appeared no heir to perform the customary feudal services. Lastly, a law of the French Republic (repealed by the Code Napoleon, but adopted by the two Sicilies and by Sardinia) gave the estates of heirless and intestate foundlings to the hospital in which they had been brought up; and the Civil Code of Saxony awards to hospitals a third or a half of the estate of inmates who have died in similar circumstances. The author then states that the doctrine of *ultimus heres* is usually referred either to the general principle of the *dominium eminens* of the State (in which case he thinks that the State simply takes by might that to which it has no right), or to the notion that the estate has become a *res nullius*, of which the State takes possession in the interests of law and order, and to prevent unseemly conflicts among would-be *occupantes* (in which view he thinks it illogical for the State to avert one evil by committing another). He therefore proceeds to inquire on what just and rational principle such *bona vacantia* ought to be distributed, and he reaches the conclusion that the implied will of the intestate, as given effect to by Roman Law in the above exceptional cases,

ought to rule in all cases. What then is the implied will of the intestate? He argues that, as most wealthy people who have no near relatives usually leave money to charities, those who leave neither relatives nor a will must be presumed to wish their whole property to benefit suffering humanity rather than the State in general. But even if the premisses be sound, they surely do not warrant the conclusion. The essay, in fact, though ingenious and even eloquent, does more credit to the author's benevolence than to his legal acumen. While one sympathises with the object he has in view, one cannot but see that his proposed reform would be attended with difficulty, and even fraught with danger. In the first place, what are the charities or "pious works" of the intestate's native place, or city, or province? If a London millionnaire were to die heirless and intestate, how many charities would claim! And when you had adjusted a list of them, in what proportions would the estate have to be divided? And, again, would it not often be absolutely injurious to small provincial charities, and demoralising to their whole neighbourhood, if a million or even a thousand pounds were suddenly showered upon them, simply because the intestate happened to have been born there? On the whole, therefore, assuming that the State uses the money for public purposes and duly accounts for it, and especially where the State, as in Great Britain, distributes the bulk of the estate (albeit with much accompanying red tape) among distant or illegitimate relatives of the deceased, where such exist, we may well pause before countenancing the general principle that "pious foundations" ought to be *ultimi heredes*.

J. KIRKPATRICK.

The Philosophy of Right. By DIODATO LIOY, Professor in the University of Naples; translated from the Italian by W. HASTIE, M.A., B.D. 2 vols. London: KEGAN PAUL, TRENCH, TRÜBNER & Co., 1891.

From the able and experienced pen of Mr. William Hastie comes a translation of Professor Diodato Lioy's admirable "Filosofia del Diritto." It is a pity, however, that the translator has adopted what, to all ordinary readers, is a misleading title, and one which fails to convey any idea as to the real nature of the work. The fact is that *diritto*, like the Latin *jus*, the German *Recht*, and the French *droit*, means "law" and nothing but law, and that the author has used it in that sense, and not in the rarer and vaguer sense of moral rectitude or ethical "right." This mistranslation, for it cannot well be otherwise regarded, recurs very frequently throughout the English version; but in all other respects the translator's work is excellent, and his valuable preface shows his thorough mastery of the subject. What is the nature of the book, and why was it written? One would have thought that such men as Socrates and Plato among the ancients, and Vico, Ahrens, Trendelenburg, and Lorimer among the moderns, had sown the true spiritual seed of Law in such abundance as to yield fruit to all posterity. But of late years the enemy and blasphemer, the utilitarian and

the materialist, the "practical man," who believes in nothing but what he can see, or hear, or feel, the evolutionist, who regards man as a mere magnified monkey, have been returning to the attack, and it is against such foes that Professor Lioy stoutly enters the lists. In point of external form the work consists of three parts—*Prolegomena*, the Objects of Law, and the Subjects of Law. In the first part the author gives us a masterly review of all the philosophical theories on which systems of ethics and law have been founded; in the second he treats of religion, science, art, industry, commerce, and morality, and of the juridical rules to which they give rise; and in the third he deals with the individual, and with society, and examines their relations to each other, and to the external world. In point of substance, Professor Lioy's treatise follows the same lines as those of his great predecessors above-mentioned. He founds his system of Law on the same one and absolute basis as Vico did a century and a-half ago, and he peremptorily rejects utility and expediency, or pleasure and pain, or an equipoise between egoism and altruism, as the foundations of law. This keynote is struck in the author's preface, and is resonant throughout the book. Here, for instance, is an excellent piece of advice to "practical" readers—"Let them examine, with equal attention, internal facts and external facts in order to discover their laws." In the *prolegomena* he demolishes the fallacies of Hobbes, Rousseau, Bentham, Mill, Herbert Spencer, and others, and he quotes with approval the dictum of Trendelenburg that law is inseparable from morals. He seems equally at home among the philosophers of Italy, Great Britain, France, and Germany; but he frankly avows, and on good grounds, that Gioberti in philosophy, and Vico in the science of jurisprudence, have been his masters. At the same time he gives a fair and impartial account of the views of other schools, and leaves the reader to judge. As already indicated, the subjects of which he treats are very numerous, and in pursuit of his theme he leaves no stone unturned, whether in the domains of philosophy or religion, or social and political life: but the sum and substance of his teaching may, perhaps, be shortly stated as follows: Man is more than a mere superior ape; free-will, intellect, conscience, are more than mere magnified instinct; external, material sensations can never account for the emotions of the soul, or the operations of the mind; neither biology nor any other branch of physical science affords any adequate foundation for moral science; habit, association, natural selection, heredity, do not explain man's moral nature. In a word, if all philosophy and history, all the sciences, physical and mental, have been studied aright, they point unanimously and irresistibly to one conclusion, that man is differentiated from the lower animals by something which cannot be handled, or weighed, or analysed, or accounted for, or even adequately described by human beings, by that something known as his moral nature, something created "after God's own image." Upon that higher moral nature alone can any system of law be soundly based. That

higher nature of man is one of "the things which are not seen," but it is absolute, real, permanent, and infinitely more important than the shifting sands of "the things that are seen." To that higher nature belongs the *honestas*, which Vico has described as the source of all law, while *utilitas* is but its occasion. Of that one and indivisible nature, ethics, metaphysics, and law, are but different phases. The book deserves to be widely read by the general public, as well as by students of law and lawyers. It forms a worthy companion to the charming and original work of the late Professor Lorimer; to many readers it will come quite as a revelation; in many it will arouse a noble and generous enthusiasm for the study and the practice of law properly so-called.

J. KIRKPATRICK.

Kant's Principles of Politics. Edited and Translated by W. HASTIE, B.D. Edinburgh: T. & T. CLARK.

For all interested in the relations of politics and jurisprudence, the contrast between Kant and John Stuart Mill will be found full of suggestion. Mill is more concerned with philosophy and practical politics, as one swayed by benevolent impulse, seeking the common good of man, rather than the good of the commonwealth. Kant has no concern in practical politics, but, moved by a purely philosophic interest, he is engrossed with the ultimate principles of ethics and of civil law, as kindred sciences. He seeks a philosophic basis for the commonwealth, as it may find formal expression in law. Kant's whole work has thus the highest value for students of jurisprudence. Mr. Hastie, by editing and translating those treatises which present Kant's contribution to political science, has rendered a great service to students of law desiring to contemplate the principles which should determine a commonwealth in formulating its legal code. It is an important companion volume to Kant's "Philosophy of Law," already translated by Mr. Hastie.

The work before us is small in bulk, but great in worth; a book not to be rapidly read, but deliberately; not to be run through at a sitting, but to linger over, and to ponder in successive divisions. It is just such a book as secures for a deliberate student enlarged views, and wider expanse of life. To revert to the contrast already named, Kant's *direction* is back on the essentials of reason; Mill's is forward on the reasonable expectations of progress in the near future. Kant's range is determined by the extent to which he penetrates into the conditions of thought. As much further as he goes back, so much further does he advance in expectation of what is to be brought into history in a remote future. With him, the ultimate in thought becomes in another sense the final achievement in history. This is Kant's mission in ethics and law—to proclaim that the conditions of thought must at length be realised in history. He is not indifferent to the flow and ebb witnessed within an average lifetime; but

he is largely absorbed in the attempt to understand the essential conditions of human thought necessarily involved, and what these conditions are likely to work out in human history.

The general drift of the reasoning in this work may be understood by reference to the four brief dissertations included within the translator's scheme. The first deals with "The Natural Principle of the Political Order," enabling us to contemplate the possibility, or perhaps rather the necessity of a universal history or the certainties of human progression. The second dissertation treats of "The Principles of Political Right," as these supply a theory of practice for the State. The third is occupied with an exposition of "The Principle of Progress" as connected with a rational scheme of international law. The fourth is Kant's Essay on "Perpetual Peace," published in 1795. The bare enumeration will show how closely Kant connects ethics, politics and law; the study of the book will prove with what grasp the thinker of Königsberg laid hold on the essentials of thought as concerned with civil organisation, and with the formulating of civil law.

To summarise Kant is proverbially difficult, but we may give in outline such account of his thought as may enable the reader to judge to some extent of the region into which inquiry is here guided. A full appreciation of the range of thought pre-supposes some acquaintance with the developed theory of knowledge and of practice with which Kant's name is connected. The translator's introduction renders valuable help towards such understanding of the unfolding of Kantian thought as the general reader may require, and it will be appreciated by those who have become familiar with the forms of the great German thinker, whose place is so prominent that "the return upon Kant" is regarded as inevitable for our nineteenth century thought. At the same time, it ought to be said that the papers here translated and presented to the English reader for the first time belong to the comparatively popular division of Kant's writings, and may be readily appreciated by readers whose interest concentrates more in politics and law than in philosophy.

In brief outline the order of Kant's reasoning may be presented. There is a universal history growing under the eyes of our race. It is largely moulded by forces which we cannot fully measure or comprehend; but the conditions of human thought are the persistent and ever active elements in the midst of the necessary activity of our race. Whoever would understand the history must concentrate on two things, the ultimate principles on which our thought proceeds, and the measure of advance made in the consolidation of civil law in harmony with these principles. What does our thought as to order, right, and law really involve? And how far are national and international law the expression of pure thought, in contrast with pressure of class interests? These are the two main questions for the student of human progress. They are fitly addressed to the legal mind as it is by special training fitted for the study which concerns itself with their answer. There are principles of political right

which must find expression in the right of the State. The end of the Civil State "is the realisation of the rights of men under public compulsory laws by which every individual can have what is his own assigned to him, and secured against the encroachments or assaults of others." This implies the idea of an external right arising out of the idea of human freedom. Right in general implies "the limitation of the freedom of any individual to the extent of its agreement with the freedom of all other individuals, in so far as this is possible by a universal law." Thus "Civil Constitution is a relation of free men who live under coercive laws without prejudicing their liberty otherwise." The rational principles on which the civil state is founded are these:—1, The liberty of every member of the society as a man; 2, the equality of every member of the society with every other; 3, the self dependency of every member of the commonwealth as a citizen."

From this outline the reader will gather what is the main course of Kant's thoughts in the treatises now translated by Mr. Hastie, to whom the English student is indebted for the publication of this second volume on the relation of Ethics to Law. The reader will readily forecast from the principles just enumerated what appear to Kant to be the essential conditions for an ultimate reign of peace. These are—the rigid conformity of civil law with the rational principles above enumerated, securing universal liberty, equality, and dependence; the establishment of international law on a harmonious basis; and effective resistance to everything which can threaten a violation of these principles.

There is among practical politicians, much more than amongst legally trained minds, aversion to theoretic politicians. This is a natural result of difference of training and of daily experience. In practical politics there must be a constant acquiescence in "give and take" arrangements. The exigencies of party politics increase this aversion even to the point of impatience. The legal mind recognises more clearly and fully that principles and legal forms must have some living relation. It is therefore one of the forms of national service to be rendered by the profession—to supply a living, active relation between the theoretic thinker and the legislator, a relation strengthened and rendered increasingly effective by the position of legally trained representatives in the legislature. These condensed treatises of Kant should aid, not only in study of the principles of law, but also in the maturing, especially among the rising members of the bar, thought as to the wants and interests of our nation, and even of the whole human race, as these depend upon the action of our legislature. Thus the philosophic thinker will have his pathway of influence through the legislature to the people, and to the world. Mr. Hastie is to be congratulated on the judgment which has selected for translation these more popular treatises of a thinker whose penetration is of the keenest in the annals of modern philosophy.

H. Calderwood.

Notes on Decided Cases.

Company—Surrender of Shares—Forfeiture of Shares.—The subjects of surrender and forfeiture of shares in public companies have recently received important illustration in the Court of Session.

I. Surrender of Shares.—The case of the *General Property Investment Company* v. *Craig*, 20th December, 1890, 28 S.L.R. 326, is an instance of surrender. The peculiarity of surrender is, that it is not sanctioned, nor even mentioned, in the Companies Acts. Forfeiture, on the other hand, is sanctioned by being embodied in the statutory articles of association of Table A. which authorise it on failure to pay any call, and provide that the forfeited share shall be deemed the property of the company, and may be disposed of by it. In the case of *Trevor* v. *Whitworth*,(a) in 1887, it was pointed out that neither forfeiture nor surrender involves repayment of money by the company. Such a transaction would be illegal, either as unauthorised trading or unauthorised reduction of capital. But Lord Herschell stated that if a surrender were accepted, where a company is in a position to forfeit the shares, the transaction would be perfectly valid. Further he describes a forfeiture as presumably exonerating from future liability those who have shown themselves unable to contribute. Similarly, Lord Watson explained that surrenders of shares have been admitted by the Courts upon the principle that they have practically the same effect as forfeiture: the main difference being that the one is a proceeding *in invitum*, and the other a proceeding taken with the assent of the shareholder who is unable to retain and pay future calls on his shares. So also Lord Macnaghten held that there can be no objection to the surrender of shares which are liable to forfeiture; but that a surrender in return for money is a sale, however the transaction may be disguised.

The case of *Craig*, in which the Court had recently to apply these principles, was one of a shareholder of an investment company, who was

(a) L.R. 12 App. 409.

rendered hopelessly insolvent by the failure of the City of Glasgow Bank in 1878. He held 250 £10 shares of the investment company, on which £2 had been paid, and in December, 1878, a call for £2 more (£500) was made. Instead of taking proceedings in bankruptcy, he made over his whole estates to the bank liquidators, who in 1879 made an arrangement with the investment company, by which, as Craig was unable to meet the call, he transferred the shares to the company, in consideration of being relieved of future calls, but without any price being paid by the company. It was also the understanding, and it was acted on, that the company should waive its right to enforce the call already made. Some of the shares so surrendered were re-issued to new shareholders, but the greater number remained in the company's hands when it went into liquidation in 1886, and the remaining £6 per share was called up.

An action of reduction of the transfer and for payment of the calls was then raised against the shareholder. The question thus came to be, whether the terms on which the shares were transferred or surrendered to the Company amounted to a sale or transfer for value. The relief from future calls could not make it so, for that occurs in all forfeitures and surrenders. The waiver of the claim for the call already made was the only other consideration in the transaction. As the bank liquidators took over the shareholders' whole estate, no doubt a dividend (which, in this case, would have been a mere fraction of the call) might have been stipulated for, or a bankruptcy forced on. But the Court, while evidently feeling the point a narrow one, took the broad and reasonable view that in the circumstances this was a fair settlement with an insolvent shareholder, and not a sale to the Company, or a giving away or reduction of its capital. It is obvious that the clearing of insolvent shareholders off the register of a going Company, where capital is partly uncalled, is the legitimate and proper use of forfeitures and surrenders: and this was a reasonable exercise of that power, without any repayment of the Company's capital, though possibly slightly more favourable terms might have been secured for the Company.

II. Forfeiture of Shares.—The other case of *Barnett* v. *M'Mahon*, 19th March, 1891, raises questions as to the effect of forfeiture of shares, which the holder was fraudulently induced to take, when he is sought to be made liable in a winding up for calls made prior to the forfeiture.

The principles are important, but cannot well be appreciated without a short statement of the facts, which, however, are not disputed.

The Company was incorporated, and shares were applied for and allotted to the defender in October and November 1886, and the amounts due on application and allotment were paid.

In November 1886 the remainder was called up by three calls, the first being payable in December.

The defender declined to pay on account of alleged false and fraudulent representations in the prospectus; but he did not repudiate the shares, nor

claim back his money, and took no steps to rescind the contract or have his name removed from the register.

On 24th March 1887 the directors, in terms of the articles of association, forfeited the shares of twenty-three members, including the defender, for failure to pay the first call, and removed his name from the register.

Another shareholder having applied to the Court for removal of his name from the register, and return of his money, Mr. Justice Kay, on 5th April, directed this to be done, on the ground that the prospectus was a most audacious fraud. Other shareholders made similar applications, and a like order, embracing ten of them, was afterwards pronounced.

Meantime, a winding-up petition was presented on 6th April, and a meeting of shareholders was directed to be held on 19th April, at which a committee of investigation was appointed, who, on 26th July, reported that a large reduction of the price had been provisionally arranged with the vendors, and that the Company should be wound up, with a view to reconstruction, the forfeited shareholders having the option, on paying the calls, of getting the forfeiture cancelled, and of joining the other shareholders in taking shares in the new Company, in exchange for the shares in the old one.

The company accordingly went into voluntary liquidation on 25th August, the directors having first passed a resolution cancelling the forfeitures, subject to compliance on the part of the forfeited shareholders with the reconstruction agreement.

The liquidation and reconstruction proceeded, the debts of the company were paid, and a surplus handed over to the new company. But the defender did not take advantage of the option offered, and the liquidators brought this action for the calls, founding on one of the articles of association which provided that money payable in respect of any forfeited share should, notwithstanding the forfeiture, be payable to the company.

The defender pleaded that he was not a shareholder, and was not liable as a debtor for the calls, in respect of the fraud of the directors acting for the company, by which he was induced to take the shares on which his liability arose.

A proof having been allowed in the Sheriff Court of Aberdeen, both by Sheriff Dove Wilson and Sheriff Guthrie Smith, an appeal was taken to the Court of Session, where parole proof was, to a large extent, superseded by the admission that the prospectus contained misrepresentations which would have entitled the defender to rescind his contract for taking the shares, if he had raised an action for that purpose before the liquidation.

The Lord Ordinary (Lord Kincairney), in an elaborate judgment, gave decree for the calls, holding that, after a winding up, it was too late for the defender to challenge his liability to pay the capital unpaid on the shares.

This interlocutor has been reversed by the First Division of the Court, the judgment being delivered by Lord Kinnear, and concurred in by Lords Adam and M'Laren.

The main ground of judgment is that the defender, at the time of the liquidation, was not a shareholder, but merely a debtor to the company. This view is further expounded by his lordship, who holds that the fraud having been discovered, though the defender did not repudiate his shares to the extent of insisting for rescission of the contract, yet he repudiated all liability under the shares, and the directors gave effect to that repudiation by forfeiting the shares and abstaining from enforcing the calls: that, therefore, the company did for the defender just what the Court did for the applicants, by removing their names from the register. The defender did not seek to rescind the contract, and his Lordship held that he had no need to do so, as it had been determined by the valid act of the directors. The defender is thus, he holds, converted into a mere debtor of the company; and, to an action for implement of that obligation, he has the unanswerable defence that the claim of debt arises out of an attempted fraud.

The judgment, of which this is the gist, is an important exposition of company law, and, like everything that falls from Lord Kinnear, deserves careful attention and study. It resolves into the two propositions—(1) that forfeiture of the shares had the same effect as rescinding the contract would have had; and (2) that the defender was, by the forfeiture, reduced to the position of an ordinary debtor to the company. With great deference, both propositions appear to be open to grave doubt.

(1.) Forfeiture has a totally different effect from rescission. By rescission the membership contract is annulled from the beginning. The money contributed as capital is repaid, and all liability, present and future, in respect of the shares is at an end. By forfeiture, on the other hand, the membership contract ceases only as to the future. The past liability is not removed, the subsisting liability for outstanding calls remains, and there is even a future and contingent liability to be placed on the B List. All these are got quit of under an action of rescission or reduction; and such an action is competent and necessary, even though the name has been removed from the register as a sequel of forfeiture. In this company other shareholders successfully used the remedy of rescission, by means of an application for removal of their names and repayment of their money. But the defender and others were content with forfeiture and its very different and limited effects.

(2.) Again—Is the defender in the same position as an ordinary debtor to the company? The contract on which the debt or liability arises is essentially different from any contract with an outsider. It is the membership contract under which the shareholders are united as a community of persons bound to provide funds—(1) to meet obligations to outside creditors; and (2) for adjustment of rights *inter se*. Under the statutory contract of membership, present members on the A List, past members on the B List, and forfeited members are all debtors to the company. Present membership is not the test of liability under the membership contract.

Is not the liability of forfeited members just an incident or continuation of the membership liability, and as such essentially different in character from the liability of any outside debtor to the company?

If the defender be not in the position of an ordinary debtor, but, on the contrary, in a position *quoad* liability the same as that of a member, then the principles illustrated in *Oakes* v. *Turquand*, (*a*) *Tennent* v. *City of Glasgow Bank*,(*b*) *Burgess' Case*,(*c*) and other cases of that class will apply, and after liquidation it would be too late to rescind the contract of membership, voidable till then on the ground of fraud; and that result would hold, whether the question be one with creditors, or with other innocent co-obligants under the membership contract. This was the conclusion reached by Lord Kincairney. But, as already indicated, both judgments are well worthy of study, for the application of the principles involved is new in Scotland, and apparently also in England.

J. Campbell Lorimer.

Liability of Railway Company in connection with Traders' Waggons—In the case of *Barr* v. *The Caledonian Railway Company*, recently reported (21st November, 1890, 18 R. 139), the Court of Session has pronounced a judgment of some interest to the trading public as well as to railway companies. A certain amount of uncertainty existed as to the liability of a railway company in respect of waggons placed on its line by the owners of the merchandise conveyed. In *Richardson* v. *Great Eastern Railway Company* (L.R. 1 C.P.D. 342), it had been laid down that the duty of a company was to make an examination of foreign trucks coming upon their line in the course of a large business, though it could not be expected that the examination should be minute. In *Watson* v. *North British Railway Company* (1876, 3 R. 637), the claim was for damage to private waggons injured by an accident to a train under the control of the defenders, of which they formed part. The accident was caused by the breaking of the coupling between the foremost waggon and the defenders' engine, the coupling being the "plant" of the pursuer. Although, in the circumstances, the company were found liable upon the facts, and there was a difference of opinion on the Bench, it was expressly stated that there was none on the question of law. The duty on the company was defined to be one to use all reasonable care and diligence for the protection of the waggons they undertook to convey. The notion of their liability being that of carriers of goods was brushed aside as untenable, and its assimilation to that of carriers of passengers was received with little more favour. It was said that in a contract of haulage the burden of proving fault was distinctly on the pursuer. The case of *Barr*, if it has not carried the doc

(*a*) L.R. 2 H.L. 325. (*b*) 6 R. 551 and (H.L.) 69.
(*c*) L.R. 15 C.D. 507.

trine of *Watson's* case further, has supplied an additional and important illustration. The defenders were in the habit of conveying coal along their lines in traders' waggons to a port, at a less rate than was charged by them when they furnished waggons. The coal was unloaded at the port, and the waggons brought back by the defenders, the return of the empty waggons being covered by the one charge. In returning waggons an accident happened to the train of which they formed part, owing to a latent defect in a private waggon belonging to another trader, and five of the pursuer's waggons were damaged. It was argued to the Court that the liability was that of common carriers, and, indeed, the liability under the Edict "*Nautæ cauponæ*," seems to have been the only available ground of claim, as there was no attempt to prove negligence. The contention was unanimously rejected by the First Division. There was some speculation as to whether the contract was a contract of carriage as regards the coals which had been conveyed in the waggons from the colliery to the pit, under an obligation to deliver into a ship. The Lord President expressed no opinion; Lord Adam expressly, and Lord Trayner (Ordinary), by implication, held that in both cases the contract was not a proper one of carriage; the former observing that the elements were absent—entire responsibility for the soundness of the carriage and for the packing of the goods. Lord M'Laren assimilated the relation as respects the coals, to the ordinary contract of carriage, and as respects the waggons, to a contract of location; and also distinguished the case from that of a railway carriage or waggon received by a railway company for delivery at a distinct place, and for which freight is paid; a case in which the liability of the company would not be governed by this decision. There has been in Scottish cases a failure to distinguish precisely, as was so clearly done by English judges in *Hall* v. *The London, Brighton, and South Coast Railway Company*, L.R. 15, Q.B.D. 505, between "carriage," with its enlarged liabilities and its increased charge, and "conveyance," a distinction recognised in the Railway Clauses Act of 1845, where it permits railway companies to "carry or convey" upon the railway. These discussions in *Barr's* case as to whether the carriage carries itself, remind us of a commentary by an old Scotch minister on the passage in Acts, "And we took up our carriages and went up to Jerusalem." "You would be much mistaken, my friends, if you were to think that the word carriages in this connection had any reference to the wheeled vehicles in which modern successors of the apostles make their tours of visitation. It means not the thing that carries, but the things that are carried, the baggage, the luggage, the portmanteau." The Courts have arrived at a different result from the pulpit.

J. F.

Husband and Wife — Loan by Wife to Husband — Ranking in Husband's Sequestration.—The case of *Cochrane* v. *Lamont's Trustee*,

24th January, 1891, 28 Sc.L.R. 299, is an excellent illustration of the singular results of amateur legislation. The Married Women's Property Act, 1881, is generally supposed to have been passed in the interests of married women. In point of fact it has practically deprived her of the right of ranking upon her husband's estate for money lent. The law before the statute is well stated in the case of *Laidlaw* v. *Laidlaw's Trs.*, 16th December, 1887, 10 Rett. 371. In that case the wife succeeded to considerable sums from which her husband's rights were excluded. These sums she lent to her husband, who was in difficulty, and they were applied in relieving him of his more pressing debts. It was held that the wife was entitled to rank, not after, but along with the other creditors in the sequestration of the husband. Any other result would have been unjust. No doubt there is often a crop of doubtful family claims in a sequestration. But where there has been a clear and deliberate transaction of loan between wife and husband, it is impossible to suggest any reason in the interests of married women, or, indeed, of the other creditors, why the claim on such a transaction should not rank *pari passu*. In *Cochrane* v. *Lamont's Trustee* again, the wife had a separate moveable estate by operation of the Act of 1881—*i.e.*, not by virtue of antenuptial contract or other private arrangement. Of that estate she lent £1370 to her husband, for which a promissory note was granted on the eve of sequestration. The claim was made by an assignee of the wife, apparently under the absurd idea that the assignee of a promissory note granted under such circumstances would be unaffected by any limitation on the wife's right to claim in the sequestration. Under *Laidlaw's* case the claim would have been sustained for a *pari passu* ranking, but here it was rejected on account of the following provision of the statute:—Section 1 (sub-section 4), "Any money . . . lent to the husband . . . shall be treated as assets of the husband's estate in bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the value of such money . . . after, but not before, the claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied." There is, of course, no ambiguity about these words, but what is the justification for them? Money lent by the wife to the husband was never, and could never be, treated as assets of the wife, therefore the first declaration of the statute seems unnecessary. But why should the *bonâ fide* claim on loan be excluded from *pari passu* ranking? Is it to discourage wives from lending to their husbands in distress, because they are warned they will not recover the money? For one case in which such an effect might be produced, it is safe to say that there will be a hundred in which the wife will lose her money. Is it the interest of the general body of creditors that wives should not help their husbands? Or is it supposed that family honour requires the outside creditors to be paid before the wife? Family honour, regulated by Act of Parliament, would lose some of its distinction. Two points remain for consideration. In

Laidlaw's case the husband's right was excluded by antenuptial contract. The statute says, section 1 (sub-section 5), "Nothing herein contained shall exclude or abridge the power of settlement by antenuptial contract of marriage." Apparently, therefore, since this power of settlement is not abridged, the wife may still, under an antenuptial contract of marriage, receive a separate estate of such a character that, when she lends it to her husband, she may rank for the amount *pari passu* in his sequestration. In other words, *Laidlaw's* case was not repealed by the statute; or the declarations of sub-section 4 apply only to estate made separate by the operation of the statute. We hazard this construction, but it is far from clear. But, further, the reservation of the statute is confined to settlement by antenuptial contract. Perhaps, by section 8 the reservation is extended to postnuptial contracts and donations between spouses. Donations are revoked by sequestration, but settlements by contract between spouses, whether before or during marriage, do not exhaust the cases in which separate estate is created. A more common case is where the estate comes from a parent, or other third party. The statutory reservation does not apply to this, but does it follow that the statute has destroyed the wife's right as creditor in such a case? The better view is that the reservation was not necessary, and that the statute applies only to separate estate created by the operation of the new law. But to what confusion will this not lead? The Act was passed in order that spouses might trust to its operation in protecting the wife's right, and accordingly in many cases the protection by a settlement will be dispensed with. The march of legal reform is often in a zig-zag line.

W. C. S.

Bill of Exchange—Acceptance procured by forgery.—*The Bank of England* v. *Vagliano*, March, 1891.—This case was one involving a large amount (£71,500) paid by the Bank of England to retire forty-three acceptances of Messrs. Vagliano. The question was whether the Bank was entitled to debit these acceptances, made payable at the Bank of England, to the acceptors' account with them. The acceptors pleaded that their acceptances were obtained by fraud, and that the signatures of the drawer and the endorsements of the payees were forgeries. The facts in general were that a clerk of the acceptors, taking advantage of the ordinary routine of their business, forged letters of advice from a firm or firms in the habit of drawing upon Messrs. Vagliano, forged also drafts corresponding to the fictitious, letters of advice payable in the names of known firms, procured Messrs. Vagliano's acceptances thereto, and then presented the bills for payment at the Bank, with forged endorsements by the nominal payees. The House of Lords, reversing the decisions of Mr. Justice Charles and of the Court of Appeal (22 Q.B.D. 103 and 23 Q.B.D. 243), held that the Bank were entitled to debit these bills to Messrs. Vagliano's

account. The main ground on which the Lords proceeded was, that while the Bank may have to take the risk of the forged endorsement of a genuine bill, they were in this case misled by the acceptors. It was the actings of the acceptors which led the Bank to believe that these were genuine bills. The mischief was really done in the acceptors' hands by their clerk being allowed to take advantage of the facilities afforded by their course of business. The acceptors had, no doubt, been themselves defrauded by their clerk, but their genuine signature, presented according to the ordinary course of dealing between them and the Bank, put the Bank off their guard, and entitled the Bank to assume that they were paying genuine bills on their customers' account. In this there is plain ground of equity as against the acceptors, free of any technicality pertaining to the special law of bills. The acceptors, being themselves cheated, had concurred in laying the bills before the Bank, as if they were in ordinary course. The loss consequent on the Bank paying these bills upon the faith of the acceptors' signature justly enough fell on the acceptors. The fact that the endorsement of the nominal payees was forged, and that the money was paid to a person having no right of action against the customer was met by the contention, that these documents, if they were Bills of Exchange at all, were, in the sense of the Bills of Exchange Act, 45 & 46 Vict. c. 61, sect. 7, sub-sect. 3, payable to "fictitious or non-existing" persons. Bills made payable nominally to payees who have not in reality any connection with the drawer, are treated as if made payable to "fictitious" payees. Such bills are by the Act to be treated as if payable to bearer; and on this ground also the payment to the fraudulent clerk was held by Lord Herschell to be justified as against the subscribing acceptors. The main point in the judgment is the doctrine that the drawee who is cheated into signing as acceptor to a forged draft payable at his banker cannot throw the loss upon his banker, who has paid the bill upon the faith of his customer's signature. The defrauded acceptor has sent the bill with a representation under his hand not only that the drawer's signature is genuine, but that the bill is to be treated by his banker in ordinary course.

Lord Bramwell who, along with Lord Field, dissented from the judgment, took the unusual course of telling the reporters to treat the decision of the majority as entirely circumstantial, but the conduct of Messrs. Vagliano was very much what would have been adopted by others similarly placed.

R. VARY CAMPBELL.

COLONIAL CASES

Musgrove v. *Chun Teong Toy.*(*a*) — The historical development of the Chinese problem in Australia has already been mentioned in the pages of this *Review* (Vol. III., *supra*, p. 64). Since the date of that note judgment has been delivered by Lord Halsbury, on behalf of the Judicial Committee of the Privy Council, in the great Chinese immigration appeal.(*b*.)

Stated briefly the material facts were these. On the 27th April, 1888, the British ship *Afghan*, of 1439 tons measurement, arrived in the port of Melbourne, having on board 268 Chinese alien immigrants, among whom was the respondent, Chun Teong Toy. Now the Chinese Act of 1881 contained the following provisions:—"If any vessel having on board a greater number of immigrants . . . than in the proportion of one such immigrant to every hundred tons of the tonnage of such vessel shall arrive at any time in any port in Victoria, the owner, master, or charterer of such vessel shall be liable on conviction to a penalty of £100 for each immigrant so carried in excess of the foregoing limitation" (sec. 2). . . . "Before any immigrant arriving from ports beyond Victoria shall be permitted to land from any vessel at any port or place in Victoria, and before making any entry at the Customs, the master of the vessel by which such immigrant shall so arrive shall pay to the Collector . . . of Customs the sum of £10 for every such immigrant." On the arrival of the *Afghan* in the port of Melbourne, the appellant, A. W. Musgrove, Collector of Customs, acting under the authority of the Commissioner of Trade (the responsible Minister of the Crown in Victoria in matters relating to immigration) refused either to permit the respondent to land, or to accept on his behalf the tax of £10, which the master of the *Afghan* was ready and offered to pay. Thereupon the respondent sued the appellant in the Supreme Court of Victoria, which, by a majority of two, decided in his favour, and the damages were assessed at £150. From these proceedings,

(*a*) The writer is indebted to his friend, J. W. M'Carthy, Esq., junior counsel for the respondent in this appeal, for the use of his brief, and for valuable information in the preparation of this note. The following other authorities have been consulted. Parl. Papers, C. 5448 of 1888, and a reprint in pamphlet form of the speech of Mr. Wrixon, counsel for the appellant, and ex-Attorney-General for Victoria. A. W. R.

(*b*) Judgment was delivered on 18th March.

the present appeal to the Privy Council was brought by special leave. The Judicial Committee have now reversed the findings of the majority of the judges in the Court below (Williams, J.; Holroyd, J.; A'Beckett, J.; and Wrenfordsley, J.), and have expressed their entire concurrence in the able judgment of Mr. Justice Kerford, who, with Higinbothan, C. J., constituted the minority.

The issues raised by this appeal with less or more directness were important and numerous. The points on which the decision of the Judicial Committee has actually turned are both minute and few. The object of the later Chinese legislation in Victoria, said the Lord Chancellor in effect, has been restrictive and not fiscal—a position, the soundness of which is demonstrated by our note (*supra*, p. 64) on the origin and development of the "Chinese puzzle" in the Australian Colonies. Where the master of a vessel has committed an offence against section 2 of the Act of 1881, he can have no right to require the collector of customs to accept the poll tax imposed by section 3, and thus to further the purpose for which the unlawful act was committed. An ingenious argument, urged by Mr. M'Carthy, that the statute, being penal, should be strictly construed and that the respondent ought not to be held responsible for the acts of the master of the *Afghan* was impliedly disposed of by the Lord Chancellor, apparently on the ground that the illegality of the master tainted every member of his crew. In such reasoning, one seems to hear the echo of the old "doctrine of identification" laid down in *Thorogood* v. *Bryan* (1849, 8 C.B., 115), and exploded in *Mills* v. *Armstrong* (1888, 13 App. Cas. 1). Whether the act of the appellant was under the circumstances an "act of state," whether the principle determined in *Buron* v. *Denman* (1848, 2 Ex. 117), with regard to the Imperial, applies also to the Colonial, advisers of the Crown, what is the precise position of Victorian Ministers under the Constitution Acts, in whom does the royal prerogative to exclude aliens now reside, so far as the Colony of Victoria is concerned, in fact, all the great constitutional questions in the determination of which the Australian Colonies have and take a vital interest, are—perhaps rightly—postponed by the Judicial Committee to a more convenient season. An action for damages improperly brought by a Chinese alien, whose very *locus standi* in a British Court of Law is something more than doubtful, may justify the Privy Council in hearing issues so grave and delicate, elaborately argued. But greater pomp and circumstance must attend their definite adjustment.

A. W. R.

Jenoure v. *Delmege* (1891), A.C. 73 (*i.e.*, *Appeal Cases, New Series*, 1891).—In this case, an appeal from the Supreme Court of Jamaica, the material facts were as follows:—

XUM

Mr. F. A. Jenoure, a Justice of the Peace for the parish of Portland, Jamaica, brought to the notice of the inspector of constabulary for the district a case of alleged refusal on the part of Dr. Delmege, the Government medical officer, to attend a patient without payment of a fee, and requested him to inquire into the matter, adding—"I am informed it is by no means an uncommon occurrence for Dr. Delmege to refuse to attend such cases." Dr. Delmege raised an action of damages against Mr. Jenoure, who pleaded, first, that the statements contained in his letter were true in substance and in fact; and secondly, that the occasion of the publication was privileged. The action was tried before Sir A. G. Ellis, Chief Justice of Jamaica, and a jury, who returned a verdict for the plaintiff, with £50 damages, and judgment was entered accordingly. Thereupon, the defendant moved for a new trial, and a rule was granted, only, however, with regard to an alleged misdirection on the question of privilege. The rule was argued before the Chief Justice and the two puisne judges of the Supreme Court, who unanimously discharged it. Special leave to appeal to the Privy Council was then obtained, and the pleas of justification and privilege raised by the defendant in the Court below were argued before the Judicial Committee. In charging the jury the Chief Justice had said—(1) That a distinction must be drawn between defamatory statements made in the discharge of a duty, and defamatory statements volunteered; and (2) that in the latter case the existence of privilege was dependent on whether the defendant honestly believed his volunteered communication to be true, and *that the burden of proof to that effect was on him.* The Judicial Committee have, however, expressed their disagreement with these propositions, and have held—(1) that no distinction can be drawn between one class of privileged communications and another, and that precisely the same considerations apply to all cases of qualified privilege; and (2), following *Clark* v. *Molyneux* (13 Q.B.D. 237), that the burden of proof lay upon the plaintiff to show that the defendant was actuated by malice. A new trial will, therefore, be granted, subject to the condition that the defendant shall not again raise the plea of justification which has, in their lordships' opinion, been finally disposed of.

A. W. R.



Alphonse Rivier

PROFESSOR OF INTERNATIONAL LAW IN THE UNIVERSITY OF BRUSSELS

XUM

THE ARCHIVES OF THE HIGH COURT OF JUSTICIARY.

I.

WITH the exception of great political or social convulsions, there is nothing so intensely interesting to the mass of the people as the proceedings in important criminal trials, especially where the facts are doubtful and the results uncertain. And not without abundant reason, though in some respects the interest is similar to that of the gambler or the speculator. Where else can be found instances of more stirring adventure; cases of more dauntless heroism or more atrocious wickedness; more thrilling romances, more baffling mysteries, more vivid illustrations of social and political changes, or more brilliant and eventful intellectual contests? The spectators are excited to the highest pitch, and become deeply concerned in the struggles of counsel, and the probable fates of the parties. And this is true in a high degree of the Supreme Criminal Court of Scotland, in whose doings may be traced the whole rise and progress of Scottish manners, and the entire course of the religious and political history of the nation. It may, therefore, not be uninteresting to give a short notice of the archives of this ancient tribunal, which has passed substantially unchanged through so many storms and across so many centuries.

It is not distinctly known where the books and documents of the Court were kept till they were transferred to the Register House about 1811. It is said that the books them-

selves had been kept for greater safety in the private residences of the Clerks of Justiciary, although it does not well appear how they would be in greater safety in such places, since their frayed and blackened appearance would powerfully recommend them to all energetic housemaids for lighting fires and other useful domestic purposes. As for the papers and documents, it is said that they were preserved in a small room attached to the Court, and, if so, they would probably lie in early times in the Castle; afterwards in an old ruinous jail in a close in the Lawnmarket, now no longer existing; and ultimately in the new Session House; but laborious inquiries in all quarters likely to possess information, including the Board of Works and the Exchequer, have failed to elicit with certainty the habitat of either books or documents. As a flitting is proverbially worse than a fire, it is not likely that those continued shiftings were favourable to the safety of the collection, and it is not so wonderful that some papers should have gone down in the wreck of time, as that so many should have been preserved. Down to 1887 they remained in their new domicile, the larger part in a semi-obscure and low-roofed cellar at the base of the building, where there was neither adequate space nor sufficient light for proper arrangement or consultation. In that year and the next they were finally shifted to commodious premises in Parliament Square, which were at one time occupied by the Union Bank. There the books and productions, from 1852 downwards, were placed in shelves in three working rooms on the first flat upstairs, while all before that time were located in four record rooms, two flats under the level of the Square, but not properly speaking cellars, as on all but the front side they are above the level of the ground, and well-lighted, dry, and airy. One of these chambers is a spacious stone vault, formerly the strong room of the Bank, with a groined stone roof, and a strong stone closet, in which the dynamite was placed for safety during the trial of the dynamiters. The other three chambers have wooden floors, and are reached on one side through the iron door of

the vault, which is practically burglar proof; but on the other through a wooden door, which is now barred up and strongly barricaded. After the flitting in 1887-88, two of these vaults were partly shelved, and part of the books and documents chronologically arranged on them, but the shelving was not sufficient to give a separate space for each year, and accordingly the Board of Works have now (since May, 1891) shelved each chamber from roof to floor, which when the papers are arranged upon them, will allow of easy examination by lawyers as well as literary men. This improvement was chiefly obtained by the assistance of the present Lord Advocate, who takes a great and intelligent interest in this valuable collection of records, and who personally inspected the premises and brought the matter under the attention of the Government.

Besides these four chambers, there are underneath the Courts still "deeper depths," two cellars which may well be called Pandemonia, in which are laid away many ghastly productions, packets of poison which have furnished materials for deadly doses, jars which have contained the *disjecta membra* of murdered men and women, knives which have pierced hearts or mangled throats, and clothes which bear the dark evidences of sanguinary outrages. If the dead at any time revisit this world, these vaults and chambers will at midnight, "when graves do yawn," present a dubious company. There heroic Lady Glammis, alleged witch and traitress, will light the darkness with her sheet of fire; the pale shade of Renwick will ponder on the record of his interrogatory, and recognise his shattered signature; the "red Macgregor," son of the famous Rob, who, according to the novelist, could drive a dirk through a deal table, can read the death-warrant which sent him to a Sassenach gibbet; Pritchard, if there is poisoning in the other world, can still draw from the stock he used in this; and many famous or infamous figures in Scottish history will flit about in the obscurity. And it may be safely said, that here "Auld Nick" will have a larger bodyguard of witches, and a

stronger reason for playing his bagpipes, than he had in "Alloway's auld haunted Kirk."

The oldest Book of Justiciary commences in November, 1493, with an "Ayre" held at Lauder by Lord Gray, Justiciar of Scotland south of the Forth; and this is succeeded by a very important one which sat at Jedburgh in February, 1494. It is not certain whether this volume was meant to be a Minute-Book of Court or a Book of Adjournal; it is rather of a mixed species, as it includes "plegiations" as well as trials and forfeitures. It ends in 1504, where there is a gap of about three years. Its history has not been clearly traced. It was in the custody of the Faculty of Advocates for a century and a-half, previous to May, 1880, but on its being found to be a genuine record of Justiciary, it was courteously restored by that learned body to the archives of the Court. The next volume extends from 1507 to 1513, and contains "Ayres" at Ayr, Kirkcudbright, and Wigton, as well as sittings of the Court at Edinburgh, in 1512. This book was also in the keeping of the Faculty for about a century, and was handed over, with the volume already mentioned, to the custody of the Clerk of Justiciary. We are, probably, indebted to the Faculty for their good state of preservation. There is a fine copy of these two volumes, by Thomas Thomson, contained in the Advocates' Library. They are of great interest in many respects, commencing as they do ten years before Flodden Field, and ceasing with the catastrophe of that fatal battle, as if the whole judicial life of Scotland had been suddenly struck dead. There is afterwards a gap of eleven years, up to 1524. Where these records were kept since 1513 is a mystery, but they are, on the whole, in good preservation, though wanting some of the leaves, and with considerable gaps; and they are written in a neat hand, fairly legible when once the letters and the many contractions have been mastered. Indeed, they are more readable than many subsequent volumes, which are almost unconsultable from the wretchedness of the manuscript.

This period, from 1493 to 1513, was one of great excitement and restless activity of thought and action over the whole of Europe. America and the East Indies had been discovered; the human imagination had been on all matters stimulated to an unprecedented degree. Henry VIII., who was soon to do battle with the Pope, had ascended the throne of England; it was the epic period of Scotland, when the exploits of Bruce and Wallace were sounded in mythic prose and sung in heroic verse; and James IV., a young and energetic monarch was straining every nerve to raise a semi-barbarous country to a higher civilisation. These two volumes strikingly illustrate the circumstances of this time. They exhibit the King, through his Justiciar, in conflict with the turbulent chiefs and thieves and murderers of the Borders. The Elliotts, the Turnbulls, and all the well-known predatory clans pass successively through the dock, and wherever bail or "plegiation" is required, there is a Douglas or other discontented nobleman ready to find it. The criminals, however, often bear no proper resemblance to those of our time. It is not Bill Sykes or Fagin the Jew, or criminals of that class, who occupy the attention of the Justiciar, but "raiders," and wholesale robbers often of respectability, well-born gentlemen, with their friends and vassals, who do their "lifting" on a large scale, and burn and slaughter as accessory to some feud. These records show many interesting particulars about "Ayres" in those far-back days. The kind of cases which came before them is illustrated by those which were heard at Jedburgh in 1494. The trial of *Alexander Turnbull* for "raiding" is particularly interesting, for it seems to have included, besides the actual murder of three persons, a complete "lift" of the whole, or almost the whole plenishing of the house of a gentleman, or substantial yeoman, who drank from silver, whose "women kind" figured in "scarlet veils," and who must have lived in tolerable comfort for that age. So far as can be made out, through the obscurity of barbarous Latin and the antiquated terms employed, which often may

equally signify male or female attire, the following were part of the booty carried away:—

9 Horses and mares.
44 Oxen and cows.
2 Stands of arms.
40 Pounds of gold and silver.
6 Small drinking-cups of silver. (*? Nip glasses.*)
12 Large tin vases.
6 Men's coats.
11 Coats and holiday shirts (*or shifts*). (*Sunday clothes.*)
12 Scarlet veils.
5 Coverlets.
5 Large big-bellied drinking vessels.
6 Spears.
6 Axes.
2 Gold rings.
1 Tyke of a feather bed.
22 Pairs of blankets.
22 Worsted garments.
26 Sheets.
22 Tunics.
20 Swords.
1 Leathern ring case.
Greaves and other articles.
5 Flanders' caps.
2 Webs of cloth.
3 Webs linen wool.
5 Boxes.
4 Coffers.
3 Ells English cloth.
Towels (*Manitergios*).
&c., &c.

It is probable that a Border household possessing so good a "plenishing" did not want either for meat or drink.

The "ayre" at Jedburgh, already mentioned, was one of importance. It sat for six days, during which 191 cases came before the justiciar, and about an equal number of these were got through each day—*i.e.*,

1st day, ...	30
2nd ,, ...	36
3rd ,, ...	30
4th ,, ...	33
5th ,, ...	32
6th ,, ...	30
	191

The greater number of the cases called, however, consisted, either of outlawries for not appearing, or of "plegia-

tions," *i.e.*, undertakings by responsible parties to present the panels to underlie the law at some subsequent Court, which were entered into in presence of the justiciar. Excluding all these, the actual trials were for the following classes of crime :—

Murder, treason, &c.,	9
Assault, injury, oppression, &c.,	3
Fire-raising,	11
Theft, cattle-lifting, raiding, &c.,	44
Communicating with the English,	1
Communicating with rebels at the horn,	4
	72

It is to be remarked that no sexual or indecent offences came up before that Circuit at all. The very different state of matters in future centuries will be afterwards shown. The number of fines and other moneys levied at this "ayre," compared with the other punishments inflicted, are very significant. In the following table there are included the various sentences and all money items, which fell to the King (except the moveable escheat of offenders), such as fines, sums plegiated, forfeitures, &c., all the latter being carefully marked on the margin of the record, probably for the Lord Treasurer who was personally present, and the total summed up at the end :—

To the signet,	11
In the King's will,	8
Put to the horn,	7
Beheaded,	1
Hanged,	2
	29
Fined and forfeited, &c.,	157
	186

This mild system of punishment by fine and forfeiture, was a valuable feeder of the King's treasury, and thus, no doubt, greatly stimulated the zeal while it stayed the axe of the justiciar. We have means of ascertaining the money profit gained at this ayre by substituting fines for the gallows. There is entered at the close of the record of the Circuit a note of its expenses, and as there is also a note of the money proceeds, it is thus possible to obtain a rough idea of the gain made by the King from the Jedburgh Justice "Ayre," excluding therefrom the value of escheats. This penal harvest, however, was somewhat higher than ordinary, as will be seen from the following comparison :—

	Year.	Lb. Scots.
Jedburgh, . . .	1494	1583
Ayr, ...	1511	826
Wigton, . . .	1511	759
Kirkcudbright, . .	1511	744

The expenses of the Jedburgh ayre ("expensæ itineris") were :—

	Lb. Scots.	s.	d.
For the Lord Justiciar, ...	14	0	0
For the Lord Treasurer and the Abbot of Dunfermline, ...	28	0	0
For the Lord Chamberlain, ...	14	0	0
For the Clerk of Justiciary, ...	7	0	0
For the "Hospitium" (apparently allowances for treating) of :—			
Lord Justiciar, ...	0	26	8
Lord Treasurer, ...	0	40	0
Lord Abbot of Dunfermline, ...	0	20	0
Clerk of Justiciary, ...	0	20	0
For Brothers of Roxburgh (*King's Eleemosynaries*),	0	40	0
For Firma Dom. Assisæ, ...	0	20	0
Total expenses, . . .	71	16	8

The last of these entries, which probably means "Rent for the House of the Jury," seems to suggest that the Court itself sat in the open air, while the jury retired into a booth constructed for their use.

As in the valuation of the goods of "fugitives," in the record of this Circuit, an ox is valued at 5 lb. Scots, and three cows at 3 lbs. Scots, it is easy to calculate, first, the surplus in money got by the proceedings at Jedburgh; and second, its value in oxen or cows; and thus to conjecture a reason for the striking mildness of the sentences:—

Fines, &c., 1583 lbs. Scots—*i.e.*, about 316 oxen or 1583 cows;
Expenses, &c., 71 lbs. Scots—*i.e.*, about 14 oxen or 71 cows;
Gain, 1512 lbs. Scots—*i.e.*, about 302 oxen or 1512 cows.

But this does not represent the full profit, for, as already mentioned, it takes no account of the escheats, nor of such items as that specified in a royal order, entered in the record, dated June, 1512, by which the King grants a permit to two persons accused of treason to pass at large for three months, for the purpose of their selling or burdening their lands to pay the expenses for "puttin' of their aire in their lands," and for "outredding the sum due to the King for putting their aire *in compositio*." And it cannot be said that the officials were starved, when each high functionary had nearly three oxen, and the Clerk of Justiciary about an ox and a-half, though no doubt the beef was melted down to more liquid nutriments in the actual use.

Jury trial was in full operation during the period covered by those volumes, and the juries seem to have been chosen from persons of high social station and respectability. We will give two instances—specimens of Edinburgh juries—one from the trial of *Dickson* for murder; the other from that of *Pott* for theft, including sheep and cattle stealing—both in 1512:—

Dickson.	*Pott.*
Laird of Hawkshaws.	Lord Armisfield.
Laird of Ford.	Lord Mannerston.

	Dickson.	*Pott.*
	John Paterson, of Gavinkirk.	Lord Dalmahoy.
	James Baillie, of Chapelgill.	Lord Jerviswood.
5	And. Colquohoun, of the Wra'.	Lord Kirk.
	R. Crichton, of the Quarter.	Lord Tallo.
	Gilbert Berdon, of Passo.	Lord Calderwood.
	W. Inglis, of Langlandhill.	Lord Crossford.
	J. Elphinstone, of Henderston.	Master James Gifford.
10	J. Wylie, of Bonytoun.	Wm. Tweedie, in Oliver Castle.
	George Geddes.	
	John Haldane.	Thos. Low.
	James Brown, in Peebles.	Wm. Kerdettan.
	Patrick Paterson.	John Waitty.
15	Adam Tweedy.	David Elphinstone.
		Matthew Elphinstone.

Both criminals were convicted, and Dickson was beheaded, while Pott was sent to the gallows. The jury in those cases consisted of fifteen, but in some other cases there were only thirteen on the assize. Indeed the number seems to have varied for each trial. A few juries taken from the 18th century records would show in a striking manner the rise of the middle-class since 1512. Ten pounds Scots was in that year the fine exacted from a jury man for not obeying his citation.

Before leaving these two oldest volumes, we must remark the technical accuracy, the order and regularity, and the fairness of the methods of our ancestors in those times in keeping the records of their Courts. We shall only cite one interesting example of their orderliness in a minute of a sitting of the Lords of Council held on 24th September, 1512. Of course the books of Justiciary were not the appropriate place for entering the proceedings of these dignitaries, but as the *res gestæ* were mixed up with a criminal trial, it was found necessary to record the proceedings both of the Justiciars and the Lords of Council. There were twenty-eight lords and landed gentlemen present at the sitting in question.

The business began by the presenting of a supplication to the King, who seems to have been personally in the Council, by William Douglas of Drumlanrig, praying that, in reference to the criminal action raised against him for the slaughter of Robert Crichton of Kirkpath, it should be put to the deliverance of the Lords, whether Crichton was at the horn at the time of his slaughter. There was also, on the other hand, a complaint by Lord Crichton and the friends of the deceased asking that the whole matter should be at once sent to a jury. The question of being at the horn, however, was treated as a matter of State, to be dealt with by the Council, and it was after deliberation decided by them that Crichton was in point of fact a rebel at the horn at the time he was killed. The case with this finding was sent to the judgment of a jury, and both parties consented that the Lords should be placed on the assize. The result was that, applying the finding of the Council to the facts, no proceedings were directed to be taken against the panel in respect that it had been decided that Crichton was a rebel at the time he was slaughtered. Immediately afterwards the King called upon the Lords to advise him as to the rule to be followed in such a case in future, and it was ultimately settled that if the slaughter of a rebel took place at the time of his apprehension and in order to secure it, it should be no point of dittay, and the slaughterer should have half of the unlaw falling to the King, but that after apprehension the captor should have no right to murder his captive. The whole proceedings were gone through in a manner well suited to their importance both to the King and to the parties.

We have treated these first two volumes of the Justiciary Records separately, and, before mentioning the nature and contents of the subsequent volumes, it may be as well to indicate their general character. The ordinary books include two classes—the Minutes of Court and the Books of Adjournal. The former are supposed to consist of the actual minutes of the proceedings taken in Court by the clerk at the time; and

XUM

the Books of Adjournal to be duplicates of these minutes made afterwards, along with copies inserted therein at full length of all Acts of Adjournal, commissions of judges and officials, and other important documents. There are, of course, no signatures in the Books of Adjournal; but many interlocutors and orders in the minutes bear the subscriptions of the Senators and others. It is not easy at the earlier periods, however, to distinguish the original Minutes from the Books of Adjournal. The former are often so clear and free from mistakes and corrections that they could scarcely have been written in Court; and it is quite certain that, in point of fact, scrolls or rough notes were sometimes made, from which the minutes were written out. Indeed a scroll has been preserved of part of a volume of minutes of Court as far down as 1576 to 1580. The Minutes of trials, also, are, in the beginning of the series, mixed up with entries of plegiation, which are afterwards recorded in separate books, called "Books of Plegiation," one of which is of date 18th May, 1526, to 18th February, 1539, and is titled on the back. "Liber Plegiatorum Supremi Domini Nostri."

The first volume of Minutes, after the two preceding the Battle of Flodden, records the criminal trials before the Court of the Justiciar from 1524 to 1531; and the series thereafter, but with a number of gaps, owing to books having been lost, runs down to the present time. Sometimes they are bound in sheepskin, and are well written and fairly preserved, but sometimes only roughly stitched in paper and tied together in *fasciculi*. Not unfrequently they are illegible from the bad character of the writing. There has come down a good proportion of the trials before Cromwell's judges; and from the Restoration of King Charles II., the records are almost continuous. There are also occasionally books or *fasciculi*, each of which contains the proceedings in one single important trial. The earliest Book of Adjournal records proceedings from 1536 to 1547; after 1547 there are gaps; but from about the commencement of the seventeenth century, these Books are almost continuous. The Circuit

Books, properly so called—that is, not the ayres of the Justiciar, but the sittings of the proper Circuit Court—begin in the year 1658, but they are very irregular till 1708, after which they run down almost continuously. There were no Circuit Books of Adjournal kept; so that, had the Circuit Minute-books been burnt or lost, there could have been no possibility af supplying their place. This defect was noticed by Royal Commissions; but, as the making of full copies of the voluminous Circuit proceedings would have necessitated an additional staff, no remedy was provided. Last year, however (1890), the Lords passed an Act of Adjournal, providing an abbreviated mode of recording the substance of Circuit trials, and the first volume of these new Circuit Books of Adjournal is now complete. We here give the approximate numbers of the books of Court now in the Justiciary Office:—

Minutes of High Court—vols. or *fasciculi*, .	157
Books of Adjournal, ...	136
Circuit Minute-Books, ...	310
Circuit Book of Adjournal, ...	1
	604

Besides these there are the "Books of Plegiations," and *fasciculi* containing the proceedings in important single trials and also in certain civil actions, such as processes of perambulation, and the minutes of special commissions appointed to investigate cases of witchcraft. Numerous treason trials are included in the ordinary books, but there are besides Minutes of the so-called Courts of Oyer and Terminer, which are of much interest, including—

Treason trials (1748-9) — Robertson, of Struan; Irvine, of Drum; M'Gregor, of Glengyle.

Treason trial (1793-4)—David Downie.

Treason trial (1820)—Hardie and Baird.

The long series of trials for treason and similar State proceedings contained in the Minute-books of Court will be

afterwards alluded to, as well as trials for witchcraft, which are not inferior in interest. We will also return to the whole books afterwards, and notice the general nature of their contents.

But the books are by no means the larger portion of the contents of the Justiciary Office. The processes themselves, with the papers and productions which they contain, are very numerous and often of great interest. Many of these processes, besides containing the steps of procedure, indictments, declarations, medical reports and the like, contain hundreds of productions which were put in evidence. However, from an enquiry recently ordered by the Lord Advocate, ten productions for each case, after deducting those borrowed up, are, so far as regards this century, under the average for each action. This estimate does not include citations, executions, or any mere formal writings of that sort. Seeing that from High Court and Circuit trials, and High Court and Circuit appeals, there is an addition to the shelves of about 300 new cases each year, a fair estimate for the present century will give . . . . 270,000 papers.

It is not possible as yet to give an accurate and reliable estimate of the productions for the prior centuries, but allowing for the sixteenth, seventeenth, and eighteenth centuries, say . . 230,000 ,,

There will be . . . . 500,000 ,,

or half a million productions in processes throwing light on the manners and habits of the people from the last years of the 15th century. We will by-and-by give some illustrations of their character.

But the books and the productions in the processes do not exhaust the whole of the documents on the shelves of the Justiciary Office. There is an immense number of other interesting papers which have found their way into these repositories. It would be vain to attempt to give anything

like a complete classification of this miscellaneous collection. We may only instance :—

1. Notes of evidence, or more accurately, gossip taken up by the deputies, sent down by the Justice-Clerk to different localities to get material for the Porteous Rolls. The persons called upon to give information were generally publicans, innkeepers, blacksmiths, clergymen, and others likely to hear the current talk of the place.
2. The Porteous Rolls made up from these notes. There is a large collection of these, some of them of gigantic length. One taken up at random is 132 feet long. They contain, in the left-hand column, the names of the panels and of the witnesses for the particular circuit, and on the right, the details of the various indictments. These documents give a vivid picture of the state of crime in the particular district at the time.
3. Lists of rebels.
4. Oaths of allegiance to James VII., William and Mary, and the Georges ; some of them written in a highly ornamental style, and having attached numbers of interesting signatures.
5. Petitions to the Court.
6. Reports by sheriffs on the state of the lunatic asylums ; also reports on jails — containing material for important statistics.
7. Verdicts of juries (numerous), with the seals still unbroken.
8. Appointments of the Lord Advocates and the Judges.
9. What may be called "drift." papers which have found their way, as it were, accidentally, into the office— as, for instance, an order by Mary of Guise, lying loose between the leaves of a book of records, and subscribed in her own bold writing.

But it is impossible to specify all these numerous papers, and we will only mention, in addition to the above, the

Returns of the Jury Rolls, among which there is one of great interest. It is a distinctly written book—the manuscript consisting of about ninety pages, and is about nine inches long and five inches broad. It is a return taken in 1682 of all persons in Edinburgh qualified to serve as jurymen. The lists were given in by the constables of the different districts of the city, and the names are arranged under the several constabularies. It furnishes an excellent idea of little picturesque Edinburgh at the end of the seventeenth century, showing the trades carried on in the metropolis, and the parts of it which the tradesmen severally inhabited. At the end of it is given a long list which is headed "List of Barrons and Landed Men." We will afterwards give some details of this interesting book, and also a notice of the nature and contents of the other classes of documents in the Justiciary Office. In the meantime, it may be said that a repository containing more than 600 volumes of judicial records—probably above half-a-million of productions, and masses of other interesting documents—forms not an unimportant store of information for historical, antiquarian, social, and literary purposes.

CHAS. SCOTT.

LYNCH.

TO protect the individual against wrong, whether public or private, is the primary object of law. At an early stage of civilisation the State removed the trial and punishment of offences out of unlicensed hands, and committed this high trust to men specially chosen for judicial fitness and impartiality. But even to them this trust is granted under conditions intended and calculated to protect innocence, even at the risk of letting guilt escape unpunished. In Britain the individual's rights of free defence and fair trial have long been held elementary and axiomatic. Regard for personal liberty, aversion to force or any rule but that of the law, and love of justice have usually characterised our institutions and our people. Extraordinary tribunals and exceptional offences, however wisely composed and carefully defined, are alien to our Constitution, and long unknown in practice to England or Scotland. No government, no majority, possesses over or against the individual any rights or powers superior to or independent of the ordinary law of the land. For we believe that no adequate security for life and property can exist unless the law of the land is habitually regarded as supreme in all causes over all persons. No one can be accused except in cases provided, and according to forms prescribed. No one can be made to suffer in body or estate except for a breach of law established by the ordinary modes of proof, at the instance of lawful accusers, before the ordinary Courts of law. The law interposes its process as a wall of safety between the accused and excited passions or adverse interests whether of mob, or of party, or of king. It has fixed trial

by jury as the exclusive mode of determining guilt or innocence in all serious charges. Our juries and judges are certainly not infallible. But their errors or failings lean to mercy's side. Of corrupt partiality or venality no British judge or jury has in modern times been suspected. Our juries are popular because we can trust them to resist popular pressure, because we believe that they look honestly to the justice of the cause, and will not sacrifice their sense of duty and of right to satisfy public opinion or to gain public applause.

In many parts of the United States they manage things differently, and, as they think, better. If, indeed, we study their Constitution and its commentators, the law seems to speak with a voice the same as, or even clearer than, our own. The Constitution is supreme. No State can deny to any person within its jurisdiction the equal protection of the laws. No person shall be held to answer for a capital or infamous crime except on presentment of a grand jury. Every person has right to a speedy and impartial trial by a jury of the State, to be informed of the accusation, to be confronted with the witnesses adduced against him, and to have witnesses and counsel heard in his defence. No one shall be deprived of life, liberty, or property without due process of law, or be twice tried or put in jeopardy for the same offence. No cruel or unusual punishments shall be inflicted. In theory the supremacy of the law is complete, and its safeguards excellent. What jurist could enforce more emphatically than Justice Story the necessity of trial by jury in order "to guard against a spirit of violence and vindictiveness on the part of the people," and the danger to innocent men from the "passions of a multitude roused to hatred by unfounded calumnies or stimulated to cruelty by bitter political enmities."

But, as events at New Orleans in March last painfully remind us, in several of the States there prevails a higher, or at least a stronger law, found in no constitution, framed by no statute, on which Kent, Story, and Wharton are silent, which

is implicitly obeyed by the inhabitants, sets the law of the land at open defiance, and now asserts a claim to international recognition. It is named Lynch Law. It has the same kind of title to be called law, that devil-worship has to be called religion. The New Orleans trial, as a leading case in the jurisprudence of Lynch, has attracted great attention. It has many aspects, domestic and international, which deserve study.

Two articles may be referred to as specially instructive: "Lynch Law and Unrestricted Immigration," by Henry Cabot Lodge, in the *North American Review* for May, 1891; and "Le Droit des Gens et la Loi de Lynch aux Etats-Unis," by Arthur Desjardins, in the *Revue des Deux Mondes* of 15th May, 1891. The statistics, as well as many of the facts and instances, after-mentioned, are taken from the latter.

The essential facts of the New Orleans incident appear to be as follows:—The chief of the local police was found dead, in circumstances which pointed to murder. An honest and energetic officer, he had probably many personal enemies among the criminal classes. It is said that he had incurred the enmity of certain influential sugar and whisky "rings." He had been engaged in tracing the operations of a secret society named the Mafia, consisting of some of the Italian residents, chiefly Sicilians, which was alleged to enforce its decrees against its members by the penalty of death. The Italians as a whole were industrious and prosperous, but not the more popular that they had gained a practical monopoly of certain trades. They were undoubtedly a class against whom the prejudice and fury of the populace might easily be directed. The actual murder was apparently the work of one or two persons. But the rumour gained currency that it had been decreed by the Mafia. Membership in the Mafia seemed naturally to imply complicity in the act. At least eleven Italians, suspected of being members, were arrested on the charge of being concerned in the crime, and at 14th March last, were still confined in the New Orleans prison. Of these, some had become naturalised Americans, but at

least four retained their Italian nationality. At this date, two were awaiting trial; three had been tried, but the trials had miscarried; and the remaining six had been tried and acquitted by a local jury. As far as one can judge, this verdict was a just one. Not unnaturally, however, if, as alleged, several jurors had been bribed, it was received with great disfavour. The cause was removed to the Supreme Court of Judge Lynch. Citizens "of good standing," including some leaders of the Young Democratic party, and prominent merchants, raised a mob, forced the prison, seized these eleven prisoners, and assassinated every man of them. Some they shot, others they hanged and used their bodies as targets for revolver practice, while one unfortunate was hanged three times over. The authorities had been forewarned, but, whether from cowardice, or from sympathy with the lynchers, took no steps to guard the prison. With the exception of one brave man, sheriffs and police looked on with folded hands, as if it was no business of theirs. This foul and cruel deed was approved by the populace. These murderers of men, all defenceless save in the protection of public justice, were regarded as heroes who had saved the city. The American Press, with few exceptions, excused the act, then justified it. When the Italian Government, in fulfilment of its ordinary duty towards its citizens, demanded that the families of such of the victims as were Italian subjects should be indemnified, and their avowed notorious murderers brought to justice, the Press became indignant. The Italian claim was resented as an impertinent interference with a peculiar domestic institution. Nor did the Federal Government lag behind the Press in disclaiming responsibility. But, that everything might be done decently and in order, the State Attorney, Mr. Lodge, drew up a verbose report, leading to nothing. The Grand Jury issued what they regard as a justification of their refusal to *present* the leaders of the mob. In this document they appeal to popular local opinion about the organisation and acts of the Mafia. Then they say that the jury, which acquitted six of the eleven, had failed in its duty—a strange argument why

they also should violate their duty. To the moral sense of civilised Europe the justification may seem worse than the crime.

Mr. Lodge, having deplored the act of the New Orleans mob as "lawless," and then extenuated it by misapplying Bacon's saying about the revenge which is a kind of wild justice, assigns for it two causes. These were, *first*, a lack of confidence in juries—except, we suppose, Grand Juries; and *second*, the belief that the persons killed were members of the Mafia, and that the Mafia used murder as the means of maintaining its discipline. He moralises, most virtuously, on the wickedness of Societies which regard assassination as legitimate. The conclusion of his whole argument is that the immigration of persons inferior in intelligence, education, and character, to the citizens of the United States, is a serious danger, and should be further restricted. Now, the popular belief that juries cannot be trusted, may be an excellent reason for the people of a democratic State setting about the reform of their judicial system. It might be some excuse for hanging or shooting a few of the jurors. In a case of similar suspicion, in Missouri, both judge and attorney were lynched. But it is difficult to understand why to have been acquitted by an American jury should be a crime expiable only by death. And what of those prisoners who had not been tried at all? Why visit on their heads the alleged faults of a jury which had nothing, and could have nothing, to do with their innocence or guilt? Let it be assumed that they were members of the Mafia, and that the Mafia was all that the prejudices of New Orleans paint it. Even then, in what respect was the Mafia worse than the mob? Is it so clear that the Italian immigrants were inferior in character, intelligence, and the qualities which make good citizens, to the Americans "of standing" who planned and executed this hateful assassination?

To a curious inquirer into the origin and processes of barbarous customs, lynch law offers a wide and tempting field. Even its name and pedigree are matter of dispute.

XUM

Some trace it back to James Fitz-Stephen Lynch, Mayor of Galway in the end of the fifteenth century, who hanged his own son out of a window, in spite of popular clamour, and in execution of a lawful sentence which his inferior officers had refused to carry out. This he did "to show a good example to posterity." It is rather Irish logic to plead this ultra-Roman example as a precedent for pronouncing and inflicting sentences in defiance of law and in obedience to popular passions. Antiquarians may seek to parallel the milder penalties of lynch law in the ignominies often more comic than cruel, like the ceremonies which candidates for the freedom of certain guilds and corporations had to undergo, by which our remote ancestors, in some few places, were wont to correct shrews and cuckolds. Black-letter lawyers may remember "The Lawless Court" of Rochford, which sat at cock crow, but only levied fines, "Lidford law," and "Jeddart justice." Both the latter were more serious. They meant hanging first and trying afterwards. But the summary semi military jurisdiction exercised (before America was discovered), in these exceptional towns, probably over offenders taken in the act, was, at least, committed not to the casual multitude, but to high officials, with powers defined by law, and responsible to the Crown—the Warden of the Stannaries and the Warden of the Marches. Two centuries ago, these proverbial expressions had ceased to have other than mere antiquarian interest. Neither Jedburgh nor Lidford realised their privilege. On the contrary, they repudiated the implied imputation as false and libellous. They knew no better. They did not foresee that the reproach of mediæval civilisation might, omitting the after trial, become the glory of New World justice.

Probably Lynch Law is indigenous to American soil. Some of its refinements may be due to Red Indian sources. Its Lycurgus was one John Lynch, of Irish race, a farmer, perhaps a justice of the peace, who flourished in Virginia or Carolina in the seventeenth or eighteenth century. It is said that he was recognised as judge over a wide district, and

chastised offenders by summary floggings, a punishment Lynch law in its modern development has retained.

No doubt there are cases in which the forms and rules of law may be dispensed with, when its substance cannot otherwise be preserved. This has often happened in times of civil war or invasion. Similarly, communities of colonists or pioneers settling in territory subject to no government, beyond reach of Courts or magistrates, may lawfully protect themselves against wrong if they observe the essential dictates of justice. For example, the British settlers at Port Nicolson, New Zealand, 1840, during the few months that elapsed between their landing and the erection of New Zealand into a Crown colony, held judicial assemblies, and turned proven bad characters adrift. A similar plea may be made for some acts in the earlier history of the Western States, and, with a large charity, cover the doings of the vigilance committees and regulators of young California. But as soon as ordinary Courts are established, the plea of necessity ceases to be available, and acts, formerly excusable, have then no sanction but barefaced brute force, which "bids its will avouch the deed." This is the "Lynch law" as now developed, which every moralist and jurist, out of the United States, must condemn.

The Court of Lynch consists of a lawless multitude, occasionally drunk, always savage, impelled by a common desire to maltreat or kill some object of their dislike. The number of judges varies with the force necessary to carry out their will. For they are accusers, judges, executioners and legislators all in one and at once.

Its procedure cannot be reproached with delay. No charge is made, no proof taken, no defence allowed. In the case of a foreigner ignorant of the language, any opportunity of defending himself would clearly be superfluous. Even the identity of the accused is left to chance. Everything is arbitary and undefined. Occasionally, to induce confession, torture is resorted to. But the punishment is the most interesting, and the only protracted part of the proceedings. A

mob is always cruel. Mild penalties, such as "tarring and feathering" men, "blueing" women, riding on a sharp rail, are seldom inflicted. For venial delinquencies the favourite punishment is public flogging. Graver offences, such as alleged thefts of horses or cattle, are sufficiently expiated by the accused being shot or hanged. Burning alive is usually reserved for negroes or Indians in cases where popular feeling is strongly excited. Sometimes both modes of death are ingeniously combined in a manner which recalls the torches of Nero's gardens. At San Antonio on 7th March last, lynchers dipped an alleged thief in petroleum, set fire to him, "lighting up the surrounding country," and after a sufficient enjoyment of his agonies, drew him up by the neck.

Its jurisdiction includes all persons within reach of violence. It combines all prerogatives of Czar, Sultan, and Inquisitor, except mercy. Its native vigour extends to all acts or even opinions, however innocent or virtuous, which may be distasteful to local sentiment. *Vox populi vox Dei!* It was an American who defined republican liberty as "The liberty to say and do what the prevailing voice of the brotherhood will allow and protect." Now for illustrations:—

The founder of the Mormon faith, Joe Smith, was seized and shot, as his religious opinions were disapproved of by the militia of Missouri. But Judge Lynch also solves the most delicate questions of domestic life. In one of the cases most recently reported the offence was having married a widower, a clergyman, against the wishes of his daughters. The offender, a young girl, was enticed into a morning walk in the woods where she met fifty or sixty lynchers. She was stripped entirely naked, tied face downward on a log, and whipped with rods until she fainted, and after, so that within a few days she died. However, some officials of the ordinary law appear to think that this was going too far.

One other leading case may be cited, that of the Rev. Elijah P. Lovejoy, St. Louis, editor of the *Observer*. In the

spring of 1836 a negro was taken out of jail by a mob and burned alive. An attempt was made to bring the murderers to justice. Of course it failed. The judge, in charging the Grand Jury, laid down the doctrine that when a mob is hurried by "some mysterious, metaphysical, and almost electric frenzy" to commit a deed of violence, the participators are absolved from guilt, and are not proper subjects of punishment. If the Grand Jury should find that such was the fact, then, said this oracle of justice, "act not at all in the matter: the case transcends your jurisdiction: it is beyond the reach of human law." Mr. Lovejoy ventured to comment upon this charge. The mob were indignant. They destroyed his press. He removed his paper to Alton. Again they destroyed his press and his office. They did not, however, cut out his tongue and cast it on a dunghill, which a pro-slavery newspaper had suggested as an effective means of silencing criticism. Still he persevered, and got another press. This time the mob made sure work. They besieged his house, fired it, and shot him dead as he attempted to escape from the burning building. This deed was justified in Boston, in public meeting, in the historic Faneuil Hall by the Attorney-General of the Commonwealth.

Such is the jurisprudence of lynch law, potent for evil, impotent for good. Its activity seems in no danger of lessening. This is shown by the comparative statistics of executions in course of ordinary justice and by lynch law respectively which M. Desjardins has prepared. The figures apply to the whole territory of the United States. During the years 1884 to 1889 inclusive, 558 persons were executed by the law of the land; while 975 met death at the hands of Judge Lynch, 60 of these in one county within less than two years.

Few countries have been free from occasional outbreaks of an excited populace. But most civilised Governments have regarded repression of such as their plain duty, and have been supported in their action by public opinion. More than a century and a-half has passed since an Edin-

burgh mob broke into Porteous' prison, and hanged him. Porteous had been convicted of homicide, and sentenced to the gallows by the Supreme Criminal Court. The sentence had been respited by what was regarded as an arbitrary exertion of the royal prerogative. Yet the deed was murder. No one justified it. The authorities made prompt investigation. The principal actors fled the land, to avoid condign punishment. The city paid a large indemnity to the victim's widow, and narrowly escaped having its walls dismantled, and its guards disbanded. That any similar outbreak could now take place in our city is scarcely possible, and that it should be approved is inconceivable.

But in the United States the tendency drifts towards erecting the casual will of any temporary majority into a standard of right and wrong. What value is set on individual liberty in a community like New Orleans, where killing is no murder if a sufficient number of citizens of standing take part in it, and subservience to the "*civium ardor prava jubentium*" the special duty and virtue of ministers of justice?

The international issues involved in this question are reserved for separate treatment.

N. J. D. Kennedy.

THE FRENCH BAR.

I.

ADVOCACY in France has an honourable and ancient history. Within the ranks of the Order of Advocates have been found at all times in France true friends of liberty and the best defenders of popular rights. If, occasionally, under the blind influence of anarchy or the exclusive policy of despotism, rude attempts have been made to destroy the Bar as a distinctive feature of the national life of France, the suppression or curtailment of its functions has been only momentary, passing away with the emancipation of the country from lawlessness on the one hand and tyranny on the other. The experiment of every man his own advocate, by the sole right of citizenship, was indeed one of the wildest episodes of the Revolution, for it meant nothing less than the utter disregard of all law.

In connection with the various political changes in France the annals of the Order of Advocates are unique. No other modern State can point to a similar institution of the same vigour and vitality, or so thoroughly identified with its national history. The Bar of England, in its corporate capacity, cannot be said to have played any direct part in great political revolutions. Absolutely free and independent, its existence, happily, was never threatened, as in France, and so it has never been called upon to vindicate its right to be and live. In other countries of continental Europe, again, no Bar has existed with any pretension to the name.

So far back as the sixteenth century, the advocates frequenting the Parliament of Paris formed themselves into an organisation under the title of the Order of Advocates, and it would seem that their example was soon thereafter followed by the advocates who resorted to the French provincial parliaments. Under the Monarchy these parliaments were the highest legal tribunals. The Parliament of Paris had not, as might have been expected, any appellate jurisdiction over the provincial assemblies; a fact which helped to accentuate that diversity of laws and customs throughout France, which excited the ridicule of Voltaire, according to whom a traveller in passing through the country changed his law almost as often as his inn. At the time of its institution the probable number of members of the Parisian Order of Advocates was about 400. Their head was then called the Dean (*Doyen*), though afterwards, and as at present, the Staff or Baton Bearer (*Bâtonnier*). In the discharge of their functions as judicial tribunals, these old French parliaments have been highly praised by various writers (*e.g.*, Alison in his "History of Europe") for their impartiality and purity, and it was in their presence that the French advocates gradually acquired that reputation for eloquence which has always been so peculiarly associated with them. French law is still in all its essential branches a reflex of the Roman system of jurisprudence, and the forensic efforts of the Roman forum have always been the models for French pleading, so different from the calm, calculating, measured style of British advocacy. Relying almost wholly upon declamation, the typical advocate of last century was described by Voltaire as one who, after studying for three years the laws of Theodosius and Justinian, and the "Custom" of Paris, and being admitted by his order, had the right to plead for money, *if*, said the cynic, *he possessed a strong voice*. Jury trial and publicity in criminal proceedings were then unknown, and the arena for the display of an advocate's talents was confined to civil proceedings. Probably it was the uninteresting nature of these causes,

as opportunities for florid language, which induced the advocates of the old school to invent their laboured exordiums, no longer a feature of French pleading. But whatever criticisms may now be passed upon the ancient mode of pleading, one thing is certain, and that is, that France is greatly indebted to her old advocates for the present charm and grace of her national tongue.

Our immediate interest is, however, with the French Bar of to-day. An eminent French writer, in a recent work, somewhat boldly claims that the Order of Advocates in France is not a corporation, receiving its constitution from the State, but a body, having its source in natural law and superior to positive law. But this pardonable boast must be taken with some reserve, seeing that the Government has successfully claimed a right to legislate with reference to the Order. No doubt, in contrast with other continental nations, the French Bar is immeasurably free in this respect, but it cannot, in view of this legislative interference, pretend to so great an independence as is possessed by the English or Scottish Bar.

The advocates in France do not, as in each of our three kingdoms, emanate from one central admitting body. Each tribunal in a district or *arrondissement* of a Department, and each appellate Court in every Department, has its own following of advocates. Inscribing themselves on a register or *tableau*, the advocates constitute the Order of Advocates before their respective Courts, and it is by these Orders that new members are admitted. Technically, therefore, it would be quite correct, as some French writers do, to speak of the French "Bars," but more generally and popularly, all are comprehended in the simple reference to the French Bar. This term is often, however, specially used as referring *par excellence* to the Parisian Order of Advocates, containing, as it does, the foremost representatives of French advocacy. Every Order has an administrative and disciplinary council—*le Conseil de l'Ordre*—the composition of which varies with the numbers upon

its roll. In all Courts where the Order possesses more than 100 members, the council consists of fifteen, and if the number on the roll is less, the membership of the council is correspondingly reduced. The minimum is five where there are no more than thirty advocates. But to this general regulation Paris is an exception. The strength of the Parisian Faculty exclusive of the *stagiaires* is about 2000 members, with a council, including the Dean, of 21. This council seems small in relation to its large roll, but the explanation is found in its sufficiency for the 400 or 500 members in actual practice. By an ordinance of Louis Philippe of 27th August, 1830—still in great measure regarded as the charter of the French Bar—these councils are elected by the advocates of each Order, meeting in general assembly. The election is by ballot, and a relative majority of the voters present is conclusive. The Dean, in terms of this ordinance, is elected in the same way, but the majority in his case must be an absolute one of all those entitled to vote. The ordinance practically restored the advocates to the position they held before Napoleon deprived them of their rights, and placed the appointment of the councils, with their deans, under the Procurator-General, an official subject to his own control. The same ordinance also permitted advocates, after due enrolment in any particular Court, to plead without special leave in all the Courts of the realm, save the Court of Cassation and State Council. A decree of 22nd March, 1822, regulates the qualification for election to the councils of the Order, by requiring, in the case of Paris, an inscription of ten years, and elsewhere, of five years, by the lapse of which period French advocates become at once eligible for the councils, and "seniors" in the respective Courts to which they are attached. But, although these councils are invested with punitive powers, such as suspension, or even perpetual exclusion for professional misdemeanours, such powers are seldom exercised, and their attention is practically confined to duties of administration and the admission of new members. In case, however, of any undue

exercise of discipline, protection is afforded by a right of appeal to the Court; and, again, expulsion, supposing such an occurrence, would by no means prevent the offender from applying for admission to another Bar.

The admission of new members is carefully regulated by the councils of each Order, as well as indirectly controlled by legislation and judicial supervision. Every candidate must be a Frenchman, by origin or naturalised, and be a licentiate (*licencié*) in law of a French University. For this degree of *licencié* the State prescribes a course of study and examinations, spread over three years. The principal subjects of study are Roman law and the civil code, which, with political economy and civil procedure, are compulsory; and among optional courses, of which three must be selected, it is interesting to observe the important branches of private international law, maritime law, comparative mercantile legislation, and colonial government. The examinations for the degree are conducted in public and *viva voce*. Fortified with the licenciateship, the applicant, of the age of at least twenty-two, takes the first step to admission by getting the Dean or a member of the Order to present him to the President of the Court, before whom he takes a professional oath, and thereafter formally requests the council of the Order to admit him to what is called the "*stage*." The *stage* is his probationary period of three years, during which time, as a *stagiaire*, he must assiduously follow the proceedings of the Court. This is a legislative provision, intended to be educational, and it certainly has the advantage of enabling the young advocate, thus permitted to plead, to acquire a practical acquaintance with his profession before finally devoting himself to it. To this arrangement, French lawyers profess considerable partiality. Concurrently with the demand for the admission to the stage, the council obtains a report from one of their members upon the probity and position of the applicant, and if this be satisfactory, he is then admitted as a *stagiaire*. Formerly he used to take a political oath, but this is in disuse, or, if taken, devoid of significance. Of anti-

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quarian interest also is now the oath which compelled the *stagiaire* to swear that "he would have nothing to do with cases he knew to be iniquitous," although it may be assumed that such a duty is still binding upon the members of the French Bar. Sworn and admitted, the *stagiaire* has then right to the exercise of his profession, with the title of advocate before his particular Court, and to be addressed as *Maître*. Regularly frequenting the Court, attending two special meetings of the Order held every year before and after the Easter recess, as well as the weekly conferences presided over by the Dean, and signing the attendance register of the Court on Monday afternoons, he can in three years complete his period of trial, and must at the longest do so in five years. No interruption of his attendance in Court can exceed three months, and in all cases of absence he must obtain the leave of his dean. Practice as an *avoué* or solicitor, for no matter how long, does not under present rules dispense with any period of the stage. A member of the magistracy is, however, admitted *de plano*. Assuming that the *stagiaire* has duly completed his stage, proved by another report to the council, he is finally admitted *au tableau—i.e.*, his name is inserted in the official roll of advocates practising before the Court he attends. His claim to precedence flows back to his first inscription as a *stagiaire*, and he becomes entitled to the full privileges of his Order. The Order at one time laid claim to an exclusive jurisdiction with reference to the admission or rejection of candidates both before and after completion of the stage, but their proverbial rights in this respect are now obsolete, for the Courts have so often intervened as to make the rejection by the Order of any applicant impossible, except in the clear interests of justice, and, in fact, by this subjection to judicial review, instead of losing ,the councils of the Order have gained in authority. Having entered the Bar freely, a French advocate may leave it as freely, and, when he leaves, all his liabilities as a member cease. The same laws and regulations govern the Order of Advocates in Algeria and the colonies.

The cost of entrance to the French Bar is nominal. The payments preliminary to admission to the *stage* do not exceed 100 francs, while another 100 francs cover the cost of final admission. The annual subscription is also trifling. On final admission, members are, however, subjected to an annual Government tax, which has been imposed since 1848. It is somewhat resented as foreign to a free profession. But while the entrance and other fees of the French Bar are so very much lower than even the comparatively moderate fees of the English Bar, the French advocate, on the other hand, has to reckon with numerous restrictions unknown in Britain. Apart from the practice of his profession, he has no other outlet for his talents beyond the world of letters or the arena of political life, in both of which spheres the French Bar has had many celebrated representatives. Strangely as it seems to us, he is debarred, to the extent at least of enabling him to take an active part in their management, from being interested in commercial companies. He cannot thus aspire to the happy and remunerative position of a railway or company director. Nor can he be interested pecuniarily in the press as salaried editor, although this rule is relaxed in regard to legal and scientific magazines. The profession is, further, incompatible with every other avocation, unless such as that of a professor of law, and a judicial appointment of necessity prevents its continued exercise. The advocate cannot, by way of illustration, be the prefect of a department and still pursue his practice at the Bar, as the sheriff of a Scottish county may do, to whom a prefect is in some respects analogous.

But there are special conditions applicable to the Order of Advocates before the Court of Cassation (*a*) and the Council of State, which are the supreme tribunals of France, the one

(*a*) The Court of Cassation is a more convenient rendering for *La Cour de Cassation* than the Supreme Court of Appeal. Scots lawyers are familiar with the word "cass" as one of the many equivalent terms employed in a decree of reduction, and probably it was originally borrowed from the Fr. *casser* to break = *L. quatĕre*.

in civil and criminal affairs, and the other in administrative matters. The appellate jurisdiction of these Courts is exercised in a somewhat circuitous way. Their ultimate aim is to secure uniformity of law and administration all over the country, but this is effected in a manner quite different from the action of the British House of Lords, which disposes of appeals by definitive and final judgment on first hearing. These supreme French Courts, in the first place and in the absence of conflict between lower tribunals, merely declare their opinion whether a judgment brought under review is conform or disconform to law, and if disconform, they remit the case to another tribunal of similar jurisdiction to the Court whose judgment is appealed. The tribunal to which the remit is made is in no way bound by the opinions expressed by the Court in "casing" the previous judgment. Absolutely sovereign, the lower, concurrent tribunal may again pronounce a similar decision. If a case is again appealed, however, or if conflict arises between the decisions of inferior Courts in different parts of France, these supreme Courts then exercise a proper appellate jurisdiction, when their judgments are final and obligatory on all inferior tribunals throughout the Republic. By a recent law, the whole of the magistracy are subjected to the Court of Cassation as a Court of discipline. The Court of Cassation, sitting in Paris, consists of a President-in-chief, a President for each of its three chambers, and forty-five ordinary judges. The advocates entitled to practise before it and the Council of State form a distinct and exclusive organisation, and are incorporated by an ordinance of the First Empire, uniting under the title of "Order of Advocates to the King [now Republic] and the Court of Cassation" the former Order of Advocates to the King's Council and the College of Advocates before the Court of Cassation. This ordinance provides rules for their internal discipline, and confirms irrevocably the ancient number of members at sixty. Their President is elected, agreeably to a decree in 1850, in the same way as the Dean of the Order in other Courts. The advocates of this

body stand upon a unique footing, for they are at once advocates and solicitors; they directly represent the litigants, arrange the procedure, and argue cases to their conclusion. They are State functionaries, and are described as *officiers ministériels*. Moreover, they are owners of their valuable charges (*officia*), so that either they or their heirs can transmit them to successive holders by way of presentation, for which, of course, the presentees pay. Before enrolling, they not only take a professional oath but furnish caution for 7000 francs, or £280, against loss parties may suffer by their fault. Every member must be of the age of at least twenty-five, and have practised as an advocate for three years before an inferior tribunal. The Order enjoys an absolute monopoly of pleading in its own Courts, with the concurrent right of pleading in all other tribunals. The exclusive privileges which it enjoys cannot be regarded otherwise than as serious blemishes; but, while these are regretted by many in France, vested interests demand such a heavy compensation as to present an almost insuperable barrier to reform. This system of *vénalité*—the growth of centuries—not only comprises these particular advocates, but also notaries, solicitors, clerks of Court, messengers-at-arms, &c., &c., so that the redemption money necessary to overthrow their monopolies may readily be conceived as enormous. The services of the advocates before the *Cour de Cassation* and *Conseil d'Etat* are obligatory, and their fees are due in all cases, except where parties are allowed to litigate *in forma pauperis*, and the very firm hold which they have upon their office may be judged from the fact that a decree of the President of the Republic is a condition precedent to their expulsion.

The Parisian Order of Advocates before the Court of Appeal is not, and, with its moderate exactions, cannot very well be a wealthy body. Its annual income averages £3000. Widows' pensions absorb fully £1000 of this income. Legacies are, however, occasionally left to the Order. M. Paillet, a distinguished Dean, was the first in this way to commemorate his connection with the Bar by leaving the Parisian

Order 10,000 francs for the encouragement of the junior Bar, and his example has been followed by other two eminent Deans. The income from such legacies forms a source for the distribution of rewards every two years. The Order possesses a rich and valuable library, going back to 1664. The Courts in which the members practise are handsome and commodious, all contained in the modern magnificent Palais de Justice, situated in the most ancient and historic part of the Metropolis. The marble hall is much more imposing than the central hall of the London Law Courts, and, when thronged with its "gentlemen of the long robe," always carrying their *affaires* in their portfolios (for they dispense with clerks), astir with bustling solicitors, and crowded with litigants in all their national vivacity, the hall presents an interesting spectacle. The finely adorned court-rooms which encircle the hall, especially the repressional chambers, with their array of judges, *Ministère public*, and Court officials, form also exceedingly effective pictures, enlivened as they are in the criminal Courts by the presence of the Republican soldiery and gendarmerie. Such is the Parisian advocate's environment. His costume is plain, if not sombre. Now-a-days he wears no wig, although, to judge from historical paintings, it was once much more in evidence than his robe. The Revolution is responsible for its disappearance, and the "cap of liberty" takes its place. He wears this—*la toque*—a black circular cap with velvet rim, constantly even when speaking, only uncovering when reading documents or closing a speech. It is at all times useful to him alike as a draught protector and as the symbol by which he asserts his freedom, if at any time he considers this invaded by the bench. He also wears the bands which his degree of licentiate in law first entitled him to wear, and which with his robe, it is curious to observe, he assumes when undergoing his examination for it in the University. But in pleading criminal cases, and in meetings of the whole Court, he wears a shoulder knot of silk tipped with fur. In reference to his robe, a very playful statement is made by the present Dean of the Parisian Order, M.

Cresson,(*a*) who, in his authoritative work, "The Rules and Usages of the Advocate's Profession," says that the robe is not intended to amuse the public, but is the guarantee of equality among members by concealing any differences of dress which fortune might favour. The learned Dean evidently overlooks the Roman origin of the toga in the desire to connect it with "Liberty, Equality, and Fraternity," for, with as much reason, he might have made the same apology for the blouse of French workmen. The members dress as they please, and all interference with their private costume is now deprecated. The members must reside within the jurisdiction of the Courts. A curious rule prevails among the Parisian brethren, supported by long tradition, which prohibits them from leasing or occupying furnished apartments. To every one but an advocate, *maisons ou chambres meublées* are *à louer*. So, where he is not owner of his residence or not living with his family, he must personally become the tenant of his chambers as well as furnish them with his own effects. His *cabinet* is inviolable, except when he is implicated, as "actor or art and part," in some criminal offence, and as the police can only in this contingency search his rooms for an accused or proofs of crime, such visits of the detective agent to his *sanctum sanctorum* must be few and far between.

The daily life of the French Bar is a subject of compara-

(*a*) M. Cresson is a distinguished member of the French Bar. Born at Calais in 1824, he was called in 1846. The Revolution of 1848 saw him a lieutenant of the National Guard, and during that crisis, at one moment, as soldier, he was fighting the rebels in the streets, and at another, as advocate, defending them before courts-martial. One of his forensic feats was the acquittal of a son of Victor Hugo on a political charge. Again, during the siege of Paris, with its horrors increased by intestine discontent, he discharged the duties, assumed *se invito*, of Prefect of Police with great ability and acceptance. As a pleader, with a style peculiarly dramatic, he has been engaged in many *causes célèbres*, appearing to best advantage, perhaps, in mercantile litigations, in which an early experience in a banking-house has been of service to him. His work referred to in the text is the standard treatise on its subject. Elected Dean of the Parisian Order in July, 1889, M. Cresson, in accordance with custom, now retires from his high position, and that with the congratulations of his colleagues.

tive interest to advocates in other countries, for, as has been said, "a feeling of brotherhood ought to exist between the Bars of all civilised nations."(a) Of course the advocate's functions are much the same everywhere, and thus it may be assumed that the work of the French advocate is divided between pleading and consultation; but he is also often employed to perform the office of friendly judge, so much so that one author makes his duties as referee a distinct branch of the advocate's calling. Generally, it takes some considerable time before a Parisian advocate acquires a remunerative practice. In the commencement of his career he may have briefs for the mere opportunity of arguing the cases, and given this privilege solicitors deem him sufficiently rewarded without any fee. The junior barrister sometimes receives more consideration from his "seniors," to one or more of whom it is a common practice for him to act as secretary, with duties like those of the "devil" of an English "leader." The "leader" may pass the fee or a proportion to his secretary in cases in which he has assisted him, but no rule is recognised which obliges him to do so. The case of a pauper litigant is another opportunity of pleading given to the young advocate, but here again he is at some disadvantage, because in the event of success he is not substantially rewarded, whatever be the position of the opposing litigant, who is only mulcted in Court dues. His one consolation in all these matters is, that by degrees he is making a reputation which will in time ensure success. Early in the day he puts himself at the disposal of clients, whom he can receive directly, unaccompanied by solicitors, and without any previous memorial. Seven o'clock in the morning is not too early an hour to consult him in his chamber. So, one can appreciate a quaint, old French writer who says "the advocate's profession cures men of idleness, for with him to be an advocate and an early riser were two inseparable things." The young

(a) Sir Roundell Palmer (now Lord Selborne), Attorney-General, at the Jubilee Banquet given in 1864 by the English Bar in honour of M. Berryer.

counsel sometimes also discharges a duty akin to that of the public writer of the Continent, for if his client be illiterate, in addition to advising upon the terms of a letter, he may have to write it out, and in a case of charity to pay its postage. He is at all times free to accept or refuse briefs, save in criminal cases, where he cannot decline the duty of defence when assigned to him by the Court, for, in such cases, a refusal without valid excuse would render him liable to an infraction of the Penal Code. This Code also, by the way, prohibits him from revealing secrets, *sous peine d'amende*, which seems a somewhat uncalled-for interference by positive law with a liberal profession, among whose members unbecoming conduct, such as this enactment implies, is as rare in France as it is in Britain. It accounts, however, for the advocate's reluctance to show even legal friends concrete examples of actions in dependence before the Courts, unless and until these have become "ancient history." The facts in cases are not elicited after the form of a Scottish record or according to the English practice, and save and for the purpose usually of *ex parte* statements in very important cases, printing is not common. Written pleadings are therefore, in so far as these are necessary, almost invariably retained in manuscript. But the all important point in French pleading is the *exposé verbal* of a case which the advocate makes to the Court. No action for fees is allowed. Some litigants, taking advantage of this, withhold *honoraria*, while in their turn some advocates insist on prepayment. Neither the English practice of settling counsel's fees termly nor the Scottish of handing these with instructions prevails in France. But while there is no uniformity in the mode of payment, the members of the French Bar in good practice are liberally "fee'd," although not on anything like the scale of the English Bar. The relation of advocate and client is viewed in France in different ways. The majority of authors discountenance the view that the advocate is simply a mandatory, while a few regard his employment as a real contract of service, of which the fees depend on the importance of the case and his standing. The theory

of hire, running very close to agency, is, however, repudiated by Pothier and also by most modern writers. No contractual relationship does exist, certainly, such as a Court of law can enforce. The profession is independent of and higher than the sphere of contract. Some members of the French Bar, particularly M. Mollot, give expression to views in reference to the profession which, we fear, are rarely acted upon in France. Thus, an advocate is advised to abstain from accepting too great a number of cases, lest, surcharged with business, he may become covetous, and in the long run suffer the loss of his abilities. M. Mollot tersely says that, in his opinion, this covetousness "kills" talent, whereas an English lawyer would be apt to say that his forensic powers increase in ratio to his briefs. The Scottish Bar does not present a state of matters, so common at the English Bar, of leading counsel accepting briefs in the no doubt sanguine expectation of pleading them, but with prospects, from the briefs they already hold, so remote as to deprive them of nearly all hope of doing so. Solicitors, in this country, are much to blame for the system against which they complain so vehemently; but at the same time, counsel in such positions might do well to listen, if only in the interest of the junior Bar, to the kindly advice of the French authors on this point. Acceptance of certain cases may, say the French writers, puzzle the advocate, and in such a predicament, legal doubt will permit acceptance, where moral doubt, he is counselled, will suggest the return of the brief; but as an observation of Pascal(*a*) implies, the moral doubt is apt to merge into legal dubiety when fees accompany the brief, and so set a questioning conscience at rest. Patience is another quality recommended to the French advocate, for, he is told, his profession is not an industry in accordance with which he may, like his English brother, regulate his consultations by the clock.

(*a*) "*Combien un avocat bien payé d'avance trouve-t-il plus juste la cause dont il est chargé?*"

In a civil case, the solicitor is always master of the conduct of it, and by his instructions the advocate must abide. The reverse of this rule prevails in a criminal case. The reason of this is, that in a civil case the advocate is not responsible for his opinions or speeches, and does not therefore oblige his client unless in the presence of his solicitor; it is only if the latter be silent that the words of the advocate are held as those of and binding on the client. The French advocate has not the wide power of compromise inherent, for instance, in the Scotch advocate, and in this respect French advocacy seems shorn of one of its most legitimate and best functions. For the protection and vindication of his clients' rights he enjoys perfect freedom, and cannot be made the subject of an action for defamation as the result of his opinions or pleading. Notwithstanding the greatest publicity given to criminal trials, secrecy is observed in civil proceedings during the examination of witnesses. The reason of this eccentricity, for such it is undoubtedly, is, that the presence of the public might unduly disturb the equanimity of the witnesses. Why witnesses in a criminal trial, say, for a capital offence, should not be likewise protected from public gaze is passing strange! In a criminal trial, again, the presiding judge usurps, as it were, another prerogative of the Bar, for it is he who examines the witnesses in chief upon documents submitted to him by the *Ministère public*, of which the principal is the charge or indictment (frequently a very long document), describing minutely not only the manner in which the crime has been committed but also full accompanying circumstances and the antecedents of the accused. All additional interrogatories, after the examination-in-chief, whether desired by prosecution or defence, are also almost invariably put by the presiding judge.

G. W. Wilton.

A FORGOTTEN CHAPTER IN THE HISTORY OF THE LAW.

IN the year 1874 the British Parliament passed an Act to amend the law relating to land rights in Scotland, and one of its provisions was, that "fees of conquest" should descend to the same persons in the same manner, and subject to the same rules as "fees of heritage." To the lawyers of all the English-speaking people outside of Scotland, and even to many Scottish laymen the statement will convey no meaning except, perhaps, that some antiquated rule, which swelled bills of costs, has not with undue haste been obliterated from the Scottish system of landownership. Yet the history of "fees of conquest" has its interest for all students of the origin and development of the English and Scottish laws of real property.

The rule applied to cases where a person seised in fee-simple, and dying intestate without issue, was survived by one or more elder brothers, and one or more younger brothers, and to parallel cases, where he or she was survived by more remote collateral kinsmen. If such a person was survived by an elder brother and a younger brother, and if the land had come to him by descent, it passed from him to the younger brother, because "heritage always descends," but if the land was "conquest" in his person—that is to say, if it had come to him by purchase, gift, or any other channel than inheritance, it passed (prior to 1874) to his elder brother, because "conquest always ascends." If it had come

to him by descent, and he had left two younger brothers, it passed, by virtue of the rule of primogeniture, to the elder of the two; but if the land was "conquest," and there were two elder brothers, it passed to the *younger* of the two, because "conquest ascends only by degrees." If the land was conquest, and then passed by inheritance to the younger of two elder brothers, and he died seised without issue, it then passed, not to his elder brother, but to the next youngest brother, because "conquest only ascends once and then descends."

This distinction formed part of the early English law of "descents," but has been unknown to it since the days of Henry VI., for Littleton's fifth section runs thus:—"Also if there be three brethren, and the middle brother purchaseth lands in fee-simple and die without issue, the elder brother shall have the land by descent, and not the younger, &c. And also if there be three brethren, and the youngest purchase lands in fee-simple and die without issue, the eldest brother shall have the land by descent, and not the middle, for that the eldest is most worthy of blood." Here the distinction between heritage and conquest, or "descent" and "purchase" is ignored.

When we turn to the pages of Glanville, however, we find the law of England on this subject still unsettled in Henry II.'s time.

If a stranger made a grant to the eldest of four brothers and he died without issue, all the brothers were equally near to him in degree, but the land descended to the second brother as the most worthy of blood. And if the third or the fourth brother had a similar grant and died without issue, the land descended to the eldest brother as the most worthy of blood. Again, if a middle brother has died without issue, seised of land which had come to him by descent, it passed to the next youngest brother. That is just another instance of the rule of primogeniture, for upon that rule the hypothesis of a man dying so seised of land which had come to him by descent, whilst any elder brother was still alive, is excluded. So much is assumed by Glanville in considering

another case, the case of the grant having been made to a man, not by a stranger but by his father or his elder brother. Such grants were very common in those days, as a method of providing for younger sons.

Suppose, he says, a man has four sons and with the consent of his eldest son, endows the second with a reasonable portion of his heritage, and that this son dies, seised, without issue, survived by his father and all his brothers, a great conflict of opinion has arisen or may arise in the King's Court on the question who ought to succeed him. The father's contention would be that the land which came of his donation should return to himself. To this the eldest son replies that the father cannot be heard because it is part of the law of the realm that no man can at once be heir and lord of the same tenement. "*Nemo ejusdem tenementi simul potest esse hæres atque dominus.*" If the father's claim were sustained he would be in the position of owing homage to himself. The third son, in turn, claims that the same reasoning must exclude the eldest son, because being heir of their father's whole inheritance, on the father's death he must become lord as well as heir of the tenement in question, and if he cannot retain it in perpetuity how can he claim it *jure hæreditario?* Again, the youngest son may use the argument against all the others, for each has the prospect of being one day heir of the whole inheritance.

In solving the question, Glanville first disposes of the father. Not only, he says, does the maxim *Nemo potest* exclude the father, but also—(1) the rule that a grant on which homage has followed cannot return to the grantor if the grantee has left an heir of his body, or even a more remote heir; and (2) the other rule that "heritage never ascends." He proceeds to say that the question betwixt the elder and younger brother has several times been decided in the King's Court *ex æquitate* to the effect that the land should remain with the elder until the paternal inheritance should descend to him. It is still uncertain whether he will ever become heir of the whole inheritance, for he may predecease his father and in

that case the difficulty as to the homage will never arise. But if he survives his father, the land in question shall pass to the younger surviving brother.(*a*)

By Bracton's time the question had been settled on this footing, and the doctrine developed. He says that in questions of succession, "*refert etiam a quo fiat perquisitum utrum ab extraneo persona vel a patre communi vel ab alio antecessore sicut a fratre antenato.*" And he puts the case of three brothers—(1.) If the eldest brother had been enfeoffed by the father, and died without issue in the father's lifetime, the middle brother succeeded as heir to the purchased land, and did homage to his father for it. But when the father died, and his inheritance fell to the middle brother, it included the seignory of the land to which he had already succeeded, and he was in the position of owing homage to himself. Accordingly, that land passed over to the youngest brother. But if the father's inheritance descended to the eldest brother, and homage for the purchased land had intervened, it forthwith passed to the middle brother. "*Non enim possunt simul stare perquisitum et dominium propter homagium, homagium enim expellit perquisitum.*" (2.) If the father had enfeoffed the youngest brother, and he died without issue, the nearer heir was the eldest brother, with whom the fief remained until the father's death. But then the middle brother might, by writ of right, recover it, unless the eldest brother had issue born before judgment in the suit. In that case, the children excluded the middle brother. (3.) If the middle brother had been enfeoffed, the same rules applied to the claims of the eldest brother and the youngest.(*b*)

The same doctrine appears in Fleta, Britton, and Fitzherbert, all attributable to the reign of Edward I.(*c*) But Fleta compresses it into much less space than Bracton, and

(*a*) Glanville, 7, 1, *ad fin.*

(*b*) Bracton, 6, 30, 3, f. 65.

(*c*) Fleta, 6, 1, 14-16; Britton, c. 119, *in med.*; Fitzherbert, "Avowry," 255, 13 Ed. I.

Britton alludes to it only in a single phrase. From Fitzherbert it appears that a question had arisen in the thirteenth year of Edward's reign, and been decided upon the maxims, "*Nemo potest esse hæres ac dominus,*" and "*Homagium expellit perquisitum;*" but they were fast disappearing out of the English law. Sir Matthew Hale notes that they have been "obsolete for aught I can find, ever since 13 Edward I."(*a*) One of the results of the *Quia Emptores* (12 Edward I.), was that thenceforth subinfeudation, or the granting of land to be held of the grantor, ceased altogether in England, so that every relationship of tenure of estates in fee-simple, which now exists, must have been constituted prior to the date of the statute. Obviously Homage, and other such incidents of the feudal relation, must soon after have ceased to affect the minds of the lawyers; and the maxims and rules depending on them went into oblivion. And thus, from at latest, the time of Henry VI., as we have seen from Littleton, the English law drew no distinction between purchased lands according as they came from an ancestor or a stranger, and in all cases of descent between brethren, cast the inheritance upon the eldest.

When we turn to the most ancient manuscripts in Scottish jurisprudence, we find that this inquiry throws some light upon a time-honoured controversy,—Was the *Regiam Majestatem* a genuine Scottish Customary, or merely a transcript of Glanville which had found its way into a Scottish library? So far as "fees of conquest" are concerned, it would seem to be the former, for it expresses on this subject what was for ages the law of Scotland, and never was the law of England.

The passages in Glanville on succession amongst brethren are transcribed word for word into the *Regiam;* but for the sections in the last book of the latter from the 40th to the end there is nothing to correspond in Glanville, and one of these sections, the 42nd, headed "*De Successione Fratrum,*"

(*a*) Hale, H. C. L., 315.

is to this effect :—If there be three brothers born of the same father and mother, and the middle brother having land or tenement dies without issue, his eldest brother shall have that land or tenement and not the next or youngest brother, for conquest of lands, as has been said, ought by degrees to ascend and heritage by degrees to descend.

This passage in the same words appears as the 88th chapter of the ancient Scottish Code known as the *Quoniam Attachiamenta*; and the 97th chapter of that code headed "*Differentia inter Hæreditatem et Conquastum*" runs :— The conquest of every lawful free-man who dies seised thereof without issue ascends by degrees to the eldest, but heritage descends by degrees.

That heritage descends, and descends by degrees, is, as we have seen, only a statement of the rule of primogeniture. That conquest ascends is also an acknowledgment of the same rule. But that "conquest ascends by degrees" (that is to say that the inheritance of conquest passed to the younger of two elder brothers) was a rule of the existence of which at any era in the English law there is no evidence. Accordingly the passages quoted from the *Regiam* and the *Quoniam* express an ancient rule of the Scottish law in which it had at a remote period diverged from the system on the other side of the Tweed.

Again, these passages take no note of the distinction amongst purchased lands according as they had come from a stranger or an ancestor, and (with the exception to be immediately mentioned) that was the state of the Scottish law from the earliest times yielding authentic records. It may therefore be inferred that the *Regiam* and the *Quoniam* express on this point the Scottish custom of a time subsequent, perhaps long subsequent, to that of Glanville, when the whimsical puzzle about Homage had ceased to oppress the minds of the feudalists in both countries.

Sir Thomas Craig (1538-1608) in his *Jus Feudale* (which is so often quoted by Blackstone) sets forth all the Scottish rules of succession to conquest as they existed down to 1874.

XUM

And he notes that that is not conquest which one takes by grant from his father or his grandfather if he is next in succession at the time of taking, because there has only taken place what the feudalists call *præceptio hæreditatis*, or a propulsion of the fee.(*a*) And yet "Homagium" bulks largely in Craig's treatise, and on the death of his ancestor the grantee, in the case the author puts, would be in the position of owing homage to himself. It was thus settled in the sixteenth century that conquest always ascended except in cases where, although the fief was technically conquest, it had really come into the person of the *de cujus* by what was a mere discounting of the ancestor's death.

Craig puts the case of several brothers of one marriage of whom Titius is the eldest and Seius the youngest. Maevius the brother of a later marriage acquires a feu and dies without issue. According to some, he says, Seius should succeed as the next eldest, but in his opinion Titius should because Maevius was not the brother-german of Seius.(*b*) This question arose for decision in 1664 in the case of *Lady Clerkington* v. *Stewart*; and it was held in the Court of Session, contrary to Craig's view, that when the deceased was the youngest brother, the immediate elder brother, whether of the same or of a former marriage, was heir both to heritage and conquest.

It may be that an examination of all the sections of the *Regiam*, conducted on the same lines as this paper, would result in a settlement of the controversy as to that document which generated so much heat amongst the antiquarians of by-gone days.

GEORGE LAW.

(*a*) *Jus Feudale*, 2, 15, 18.
(*b*) *Ibid.*, 2, 15, 19.

THE ADMINISTRATION OF JUSTICE IN THE LEVANT.

II.

PARLIAMENTARY Government in Turkey had a short life, and not a merry one. It was inaugurated by the famous ordinance of 1876 already referred to. This Parliament was composed of two Chambers, both open to all the subjects of the empire, without distinction of nationality or religion. Did it last a fortnight? It was hardly created when it was dissolved, and most of its members sent into exile. The notion of elections in Turkey of members of a Parliament at Constantinople, seemed almost too ludicrous for Europe to take seriously.

Ottoman Private Law and Judicial Organisation.

Ottoman private law, both civil and religious, is based solely on the Koran, to the legal parts of which were gradually added the decisions and edicts of the Kaliphs of the first century of the Hegira. At a later date, when it was necessary to fix definitely the legal system of Islamism, these decisions and edicts obtained the authority of law. Mussulman jurisprudence accordingly derives its rules and authorities exclusively from the Koran and these supplements, which are called "the sacred texts." This is one of the principal reasons why this legislation is so completely imbued with a religious and theocratic spirit.

The part of the Koran, called Ilme-Fich, or Private Law, deals with the laws and the rules which determine the

relations of the Mussulmans, both *inter se* and with the infidels. This part of the Koran is divided into three books, the first of which treats of contracts and bilateral deeds in general; the second, of unilateral deeds, or such as depend on the will of a single individual; the third, deals with laws binding upon all Mussulmans, with civic organisation, and particularly with the laws of succession, of oath, of judicial and extra-judicial admissions, of proof by witnesses, of paternity and filiation, of the constitution of marriage, of crimes, &c. The Koran consecrates as a fundamental principle in Mussulman legal procedure as well as in every deed of a Mussulman, that *bona fides* must always be presumed.

Courts of the Cheri. — The judicial organisation embraces, firstly, the tribunals of the Cheri or Cheria, whose function it is to apply between Mussulmans the civil and religious laws which are derived from the Koran and the "sacred texts." The persons charged with the application of these laws are the Imams, the Muftis, and the Cadits, all three included under the denomination of Ulemas. The Muftis deliver judgments, called "fetvas," which deal either with public law, in which case they are at the instance of the Government, or with private law. In the latter case they are given to private individuals who have had recourse to them for the elucidation of points relating to doctrine, public worship, and especially of civil and criminal law. The Cadit combines the functions of justice of peace and those of a civil and criminal judge. He adjudicates on all matrimonial differences, assists testators, receives procurations and oaths, records purchases and sales, especially of immoveables, and interprets the Koran. He presides in the Public Court, supported by two Muftis, who in this case play the part of assessors, by a clerk of Court, and by several interpreters. The judicial organisation of the tribunals of the Cheri (Mehkeme-i-Cheriyé), comprises —1. A High Court of Appeal (Arz-Odassi), divided into two chambers, both being Courts of final appeal. 2. A High

Court of Justice in each vilayet or province. 3. The Courts of the judges, or Cadilics, fixed at the chief towns of the arrondissements and the cantons.

THE STATUTORY COURTS (*Mehkemé-i-Nizamiyé*). — As I have said, the Courts of the Cheri have to do solely with the Mussulmans. It was necessary, therefore, to establish a second class of tribunals to decide differences between the Mussulman and non-Mussulman subjects of the Porte. To effect this end the statutory Courts were created. They are at once civil and criminal, and have jurisdiction over all subjects of the Ottoman Empire. These Courts, which are directly dependent on the Minister of Justice, are divided into :—

(1.) Courts of First Instance, sitting at the chief town of each canton. In all civil actions for a sum not exceeding 1000 piastres, or £8, 6s. 8d., and in all criminal actions involving imprisonment for not more than one week, or a fine of 100 piastres (16s. 8d.), their judgment is final. Subject to appeal they have competence in all civil claims above 1000 piastres, and in all criminal cases involving three months' imprisonment and a fine of 500 piastres (£4. 3s. 4d.).

(2.) Civil Appeal Courts (Houkouk-Medjlissi), sitting at the chief town of each arrondissement. These Courts try appeals from the judgments of the cantonal Courts. They also, as Courts of first instance, try civil suits having a value of not more than 5000 piastres, and there is in these cases no appeal. Subject to appeal they deal with criminal cases involving more than three months' imprisonment and a fine of 500 piastres.

(3.) The Courts of Justice (Divan-i-Temizi), which sit at the capital of each department. These Courts are divided into two sections, civil and criminal. They take up all appeals from the judgments of the statutory Courts of the cantons and arrondissements. They are further competent to try all crimes and delicts. At the head of this judicial hierarchy is placed the Supreme Court of Justice (Divan-i-Ahkiam-i-

Adliyé), sitting at Constantinople. This Court is divided into two sections:—(1.) A Court of Cassation (Mehkemé-i-Temiz), which takes up all appeals against the judgments and decrees, whether civil or criminal, passed by the inferior tribunals. It has for this purpose a Civil Chamber and a Criminal Chamber. (2.) A High Court of Appeal (Mehkemé-i-Nizamiyé), which deals with civil and criminal suits for the first time, and without appeal. It is divided likewise into a civil and a criminal chamber.

The Council of State (*Chourai Devlet*).—The Council of State was instituted in 1868. It comprises three sections, one administrative, another legislative, and the third contentious. Each section is composed of five councillors and a president. At the head of the three sections is placed a Minister, who has the title of President of the Council.

Mixed Tribunals of Commerce (*Mehkemé-i-Tidjaret*).—At a comparatively recent date the Ottoman Government, with the consent of the Powers, instituted tribunals of commerce in the capital and in the chief provincial towns. A commission *ad hoc* had prepared a commercial code, following almost literally the French Commercial Code. This code is divided into three books. The first relates to commerce in general, the formation of companies, merchants, mercantile books, of agents at sea and on land, of bills of exchange and drafts.

The second treats of bankruptcy and sequestration.

The third is entitled the Maritime Commercial Code, and treats of ships, their seizure and sale, of the captain, of charter parties, of the laws of freights, of bottomry bonds, of maritime assurance and averages, of prescriptions demurrers, &c. At Constantinople the tribunals of commerce are divided into two chambers—(1) A mixed chamber; (2) a chamber of commerce called second chamber of commerce, this last being sub-divided into a chamber of

commerce by land and a Maritime Chamber (Bahrie-i-Medjliss). Until 1875 the tribunals of commerce were directly dependent on the Minister of Commerce and his department. By a decree of 9th December, 1875, they were transferred to the department of the Minister of Justice.

The first or mixed Chamber of Commerce is competent in all commercial and civil disputes arising between an Ottoman subject and a foreigner. This jurisdiction results from the "capitulations" themselves, but is practised under special forms and laws offering certain guarantees to foreigners amenable to the jurisdiction. At their institution the mixed tribunals of commerce took cognisance only of commercial disputes in which foreigners were interested, but subsequently by a circular of the Minister of Justice, dated 23rd August, 1858, the tenor of which had been previously arranged between the Great Powers and the Porte, these tribunals deal likewise with civil questions between Ottomans and foreigners, the value of which is over 1000 piastres (£8, 6s. 8d.).

The mixed tribunals of commerce sit at present at Constantinople, Smyrna, Salonica, Beyrout, and some other towns of the coast. They are composed of a president and of two Ottoman judges appointed by Imperial decree, and of two judges delegated by the Embassy or Consulate of the country of the foreigner who is a party to the action. The judges-delegate are nominated every year by their respective consuls, and are assumed in every case in which a countryman of theirs is a party. The dragoman of the foreigner's embassy or consulate is present at the trial.

The mixed tribunal of commerce sitting at Constantinople judges as a Court of final appeal in all questions submitted to it. Its judgments are only liable to attack by the form of civil petition. The cases in which this is open are fourteen in number, and are defined and enumerated in the code of commercial procedure. This mode of attacking judgments is highly inconvenient, the petition having to be presented before the same Court and the same judges who

XUM

pronounced the decision which it is sought to impugn. It is very easy to understand that one rarely succeeds in inducing them to reverse their judgments and pronounce one to the contrary effect.

The initiatory procedure before the mixed tribunals of commerce varies according as the plaintiff is a foreigner or an Ottoman. If he is a foreigner the petition must be addressed to his embassy. Through this channel it is transmitted under the form of "tacrir" to the president of the mixed chamber, who then cites the Ottoman defendant to appear at a time appointed. If the plaintiff is an Ottoman subject, the defender can only be reached through the channel of his embassy, to which the citation must be addressed. The judgments pronounced by the mixed tribunals of commerce in the provinces are subject to appeal if the sum in dispute exceeds the amount of 4000 piastres (£33. 6s. 8d.). The appeal is to the Mixed Chamber of Commerce at Constantinople, which in this case acts as an Appeal Court. The decree pronounced in these circumstances by this Court is likewise liable to be impugned by "Civil Petition."

An appeal may be intimated within three months. The second commercial chamber, composed entirely of Ottoman judges, takes cognisance of commercial questions arising between Ottoman merchants, Mussulman and non-Mussulman. (See Articles 8, 10 and 13 of the Appendix to the Ottoman Code of Commerce.) It deals, in addition, with all bankruptcies and sequestrations, if the bankrupt is an Ottoman subject, even though all the creditors should be foreigners. It is, moreover, the only Court competent to take cognisance of the bankruptcy of a foreigner if among the creditors there happen to be one solitary Ottoman. The judgments of this Court are subject to review in every way ordinary or extraordinary, whether by appeal or petition, &c.

XUM

The Privileges and Immunities of the Greek Community, and the Jurisdiction of the Œcumenical Church.

It is especially from the point of view of European law that one speaks of the situation of foreigners in the East as privileged. At its origin it was due merely to the application of the Turkish common-law. In fact, according to Mussulman ideas, jurisprudence and laws belong exclusively to the sphere of religion. This is the reason that we find the Turks, at the time of the taking of Constantinople, granting to the conquered population who remained subject to the Empire, the freedom to practise their religion. It seemed to the Turks a necessary consequence from this that the infidels should have the right of applying their own law among themselves. Immediately after the conquest of Constantinople, the Sultan, Mehmet-el-Fatih, made it one of his chief occupations to fix the position of the Orthodox Church. The throne of the Patriarch was at that time vacant, and the Sultan ordered the Greek community to proceed to the election of a Patriarch. This dignity having fallen upon S. S. Genadios Scholarios, the conqueror received the new Patriarch with great ceremony. In delivering to him the pastoral staff, he addressed him thus—"Be a Patriarch in peace, make use of our friendship in all thou needest, and enjoy all the privileges of thy predecessors." He gave him for this end a diploma of investiture (Berat), setting forth his dignity as civil and religious lord of the Greek nation, as well as all the rights and prerogatives attached to his person. These privileges and immunities have subsequently been confirmed by each succeeding sultan.

The Ottoman Government has even entered into formal engagements on the subject. It may be enough to mention —(1) The Imperial firman promulgated in the month of Chaban, in the year 1269 (1853), by the Sultan Medjid; (2) The firman as to Reforms, of 30th November, 1875; (3) Article 11. of the Constitution of 1876, which declared that the Ottoman Empire maintained the privileges and immunities enjoyed by the Greek community and the

XUM

Œcumenical Church. Nevertheless, during this last decade, the Ottoman Government threatened to strike a blow at these immunities and prerogatives by taking away from the Patriarchal Church all freedom of action in its decisions so far as they concerned the clergy and their benefices (including the Church's philanthropic institutions and the real estate belonging to them), marriage, divorce, wills, and the goods of minors and orphans. This menacing attitude of the Ottoman Government towards the Church and its prerogatives, the integrity of which is indispensable for the existence of the communal as well as the religious life of the Greek people in this empire, led S. S. Denis V. to order all the churches in Turkey to be closed, and that all relations with the Porte should cease. It was only in January, 1891, that the Sultan, Abdul Hamid, fearing the consequences of this state of matters, made up his mind at last to give complete satisfaction to the just demands of the Greek community. The position of this community is fixed in Turkey by a "Constitution" composed of a series of orders and decrees (*κανονισμοί*) which deal with the functions of the Patriarch, his election, the composition of the Synod, the organisation of the ecclesiastical and administrative Courts, the functions of the metropolitans in the provinces, &c.

The Patriarch of Constantinople has the title of "Archbishop of Constantinople the New Rome, Œcumenical Patriarch." He enjoys in addition to his spiritual power as pontiff of the Orthodox Church a very extensive temporal authority over the orthodox subjects of the Porte. He is elected by the General Assembly, composed of representatives of the different Greek communities, and is consecrated by the Synod. The Patriarch, *ex officio*, is the representative of the Greek nation to the Ottoman Government, with which he communicates either in person or by his Ministers for Foreign Affairs (styled Great Logothete), and by his vice-chancellor. The Greek Church has three other patriarchs besides the Patriarch of Constantinople, at Antioch, Alexandria, and Jerusalem. Canonically the four are all equal, but the three last allow an honorary precedence to the Patriarch of Con-

stantinople. Under the authority of each patriarch stand the Metropolitans, archbishops or bishops, who may have one or more suffragan bishops, according to the importance of their sees.

The Synod (Ἱερὰ Σύνοδος) is the sacred college of the Œcumenical throne. It is composed of twelve archbishops, and its functions consist in superintending, with the patriarch, the maintenance of ecclesiastical discipline. It gives its decisions in the form of decrees or of synodical letters. After the Synod comes the National Council composed of eight lay members and four archbishops. It sits as both a judicial body and as a deliberative or administrative assembly. As a judicial body it hears appeals from all judgments pronounced by the "demogeronties" of the provinces. As a deliberative assembly it assists the patriarch in the civil government of the nation. The assembly has, further, the general supervision of the national schools, and it controls the finances of the hospitals and appoints their administrators or "ephors." Lastly, come the Civil Tribunal and the Ecclesiastical Tribunal. These two Courts are presided over by the Grand Vicar of the Patriarch, and are composed of four prelates. The debates before the ecclesiastical Court are heard with closed doors, the parties must present themselves in person, unless they have a legal ground of excuse, in which case they may be represented by a mandatory. The collection of Armenopulos (Promptuarium Harmenopuli) which is practically a compilation from Justinian's Institutes, and the decrees of the Byzantine Emperors are the recognised authority, both in the ecclesiastical and in the civil Courts. The code of procedure is the Ottoman code of commercial procedure. Civil suits of the clergy can only be tried at Constantinople, before the Civil Tribunal sitting in the Patriarchate. A clergyman cannot be indicted, arrested, or put in prison on a criminal charge, except by the authority of the patriarch. In accordance with the National Statute (Art. 8 of the special law as to the election of Metropolitans), the synod is the Court which has the right of trying a Metropolitan

who is charged with a religious offence. Its authority consists of the canons and the Berats.

If, on the contrary, the offence is of a secular nature the patriarch and the synod nominate a mixed commission composed of several members taken from the National Council. They interrogate the accused and draw up a report which is submitted to the patriarch. If the report bears that the accused is guilty, the patriarch assisted by the synod applies the penalty enjoined by the law of the state, and notifies it to the Sublime Porte. If the punishment is one of imprisonment, it is undergone in the patriarchal prison. If a metropolitan is charged with a crime, he is first degraded by the patriarch, and then given over to the local tribunals to be punished according to the criminal law of the empire.

Divorces, as well as all matrimonial questions, are governed by the religious laws, and fall within the domain of the ecclesiastical Courts. All questions as to wills come before the Mixed Council. Further, it is important to observe that, in order that the patriarchial authority may be effectual over the Greek community, the execution of its sentences is backed up by the State. The Ottoman Government is bound to lend its aid whenever required to do so.

The Organisation of the Armenian Community.

The Armenian community having lost its political independence in Turkey, endeavoured to acquire for itself religious independence in that country. In 1841, with the sanction of the Porte, it instituted a Council of Notables sitting, at Coum Capon, to assist the Armenian Patriarch in the management of the civil affairs of the community. In 1847, two assemblies were instituted for this council, one to deal with civil, and the other with ecclesiastical, affairs. Under the influence of the liberal ideas which each day gained ground in the minds of the Armenian people, the National Council issued, in 1860, an ordinance known as the National Armenian Constitution, which, however, did not receive the Imperial sanction till 1863, when it was put in

force. This constitution established a genuine national representation.

The Armenian Patriarch of Constantinople is the civil and religious head of the Armenian subjects of the Porte. In the spiritual order, however, he is only the Vicar of the Catholicos of Ethmiadjin, near Erivan, in Russian Armenia, who is the head of the Gregorian Church.

The Reformed Tribunals in Egypt.

(1.) Their Constitution. — The institution of these Courts is in derogation of the status which foreigners enjoy in Egypt as in the East, generally in virtue of the "Capitulations." As already explained, a foreigner in the "Echelles," and in all the countries outside Christendom, has the privilege of ex-territoriality, and that of being answerable only to the Courts of the consular authority of his own country, in which, of course, his own law is administered. After the year 1860, certain customs, contrary alike to the letter and the spirit of the capitulations, had introduced into Egypt a state of things which amounted to absolute judicial anarchy, prejudicial to the interests of both natives and foreigners. In 1865, the Egyptian Government made its first attempt to induce the European Powers to allow law Courts of a normal kind to be established in Egypt, to which foreigners should be subject. Two years later, in 1867, Nubor Pacha, then the Egyptian Minister for Foreign Affairs, addressed a circular to the Powers, in which he set forth the encroachments of the consuls on the jurisdiction of the country, especially in criminal matters and questions affecting real property. He submitted to them, at the same time, a plan for the organisation of national Courts, which should deal with differences between foreigners and natives, allowing the foreign element a large share in the composition of these Courts. He promised further, that codes should be published, the provisions of which should be borrowed from the laws of European countries.

In consequence of this proposal, an International Com-

XUM

mission was assembled at Cairo, in 1869, at which the Powers were represented by their consuls-general and their consular judges. The object of this Commission was to examine if the judicial organisation, which had prevailed in Egypt up to that time, could be reformed. The result of its examination was favourable to the scheme, and the Commission recommended that a single Court should be set up, which should apply a uniform legal system. Negotiations for this purpose were entered into between the Powers and the Egyptian Government, and continued till 1873. At that time all the European Cabinets, with the exception of France, had given their consent to the proposal. France hesitated a long time, and it was not till November, 1874, that the Republic authorised its representative to sign the treaty.

On the 28th June, 1875, the Reformed Courts were established at Alexandria with great solemnity. The Khedive, surrounded by his Ministers, by the different consuls, and by all the leading Egyptian officials, inaugurated them, declaring that they would begin their duties on 18th October, 1875. The Courts were first established for five years, a period which has been extended by repeated enactments. They are independent of the Egyptian Government, and in no way bound to it, though they administer justice in the name of the Khedive, and the judges are paid by the local government.

(2.) Their Competence and Organisation.—At their foundation these were instituted to take cognisance solely of civil and commercial suits between natives and foreigners, or between foreigners belonging to different nationalities. They dealt, in addition, with all questions affecting real property even between persons of the same nationality, and had also a limited jurisdiction over foreigners in criminal affairs.

The result then of this new judicial system was—

1. That the consular jurisdiction in all questions between foreigners of the same nationality remained intact.

2. That the consular Courts preserved full jurisdiction over all criminal proceedings instituted against subjects of their nationality, either by natives or by foreigners of another nationality.

3. The local Courts continued to deal with criminal proceedings against a native by a foreigner, and they retain their entire jurisdiction in questions between natives.

All questions, moreover, as to sale, obligations, contracts of hypothec, and cases regarding real property were transferred from the local tribunals to the Reformed Courts.

The Reformed Courts comprised three civil Courts of first instance, at Alexandria, Cairo, and Zagazig respectively, and a Court of Appeal at Alexandria. Each Court of first instance was composed of seven judges, four foreigners and three natives. The Court of Appeal has eleven judges, seven of whom are foreigners.

In commercial cases each Court of first instance took in as assessors two merchants, a foreigner and a native, who were elected, and had the right to vote. The Court of Appeal alone took in no assessors of this kind.

The Reformed Courts appointed one of their members to act as Justice of the Peace.

A Public Prosecutor, with several subordinate officials, was also appointed.

The Courts were to be held in public, and in addition to Arabic, the French and Italian languages were officially recognised.

The Police Court was composed of three judges, two foreigners and a native, and of four foreign assessors. The Assize Court was composed of three judges, two of whom were foreigners, and of a jury of foreigners only.

Police cases were competent only in the Reformed Courts. As to crimes and delicts they had jurisdiction only in cases in which a judge or official of the Court was implicated, or where the execution of their sentences had been impeded.

(3.) THE CODES.—The Egyptian Government published its new codes on the 16th September, 1875.

XUM

The Civil Code, Commercial Code, and Code of Procedure were modelled on the French codes. The Penal Code, however, was much more indulgent than the French one. It was also distinctly in advance of it, as for instance in allowing an accused person, although placed in solitary confinement, to communicate, without witnesses, with his counsel or legal adviser. It proclaimed further the principles of freedom of defence, and of the nomination of an official defender, the right of the accused to demand a public trial, the duty of hearing witnesses for the defence, and the right of liberation on bail in minor cases. These provisions are all contained in the Code of Criminal Procedure.

(4.) Extension of the Authority of the Reformed Courts.—In 1884, an International Commission was called by the Powers at Cairo, to inquire into the advisability of extending the jurisdiction of these Courts, and introducing at the same time modifications into their organisation. The Commission extended considerably the competence of these Courts in criminal matters. They can now take cognisance of all delicts, with the exception of those of a political nature, or such as are committed between foreigners of the same nationality. And even in cases where the Reformed Courts are not competent, the preliminary investigation is conducted under their authority, and the accused is not transferred to the Court which has jurisdiction till this has been done. The *régime* of the "capitulations" being in force in Egypt, it follows that the diplomatic agents, consuls-general, consuls, vice-consuls, and their families, enjoy the privilege of ex-territoriality, and, in consequence, are in no case subject to the criminal jurisdiction of the Reformed Courts.

As civil and commercial Courts, their jurisdiction was extended to all bankruptcies without exception, and to cases relating to companies having places of business in Egypt. They also deal with all actions directed against the advocates or officials of Court in respect of acts incident to their profession.

XUM

The International Commission further decided that diplomatic and consular agents should have the option of suing third parties in these Courts, but should not be liable to be cited before them as defenders, except as to counter claims, or in suits arising out of commercial business carried on by them in Egypt or relating to real property possessed by them there. It provided also that the Courts should be competent to decide any case, even between natives, in which the parties had consented to their jurisdiction.

(5.) The New Organisation of the Courts of First Instance, and of Appeal.—The International Commission re-established the Court of Mansourah, and created "delegations" for summary cases in important centres. These "delegations" are practically Courts of justices of peace, and deal with civil and commercial as well as simple police cases. The Court is held by a single judge, delegated by the nearest Reformed Court. This judge can only conduct preliminary criminal procedure in the jurisdiction.

The Court of Alexandria is the Court of Appeal both as to law and facts. It is composed of at least seven judges, nominated by the Great Powers and two native judges. The International Commission reduced the number of magistrates in the Courts of First Instance from five to three—two foreigners and one native. It also constituted English an official language, in addition to Arabic, French, and Italian. No one but a properly enrolled advocate can conduct cases in these Courts.

The Reformed Criminal Courts in Egypt.—The first step in the trial of a prisoner is his private interrogation by a crown official. The procedure is borrowed from that employed in France by the judge d'instruction. Consuls are no longer allowed to be present. The International Commission abolished the Assize Court. It was found that a jury composed of members of different nations, with various religions, failed to possess the advantages of the jury system

in Christendom. It substituted, very properly, independent judges of different nationalities, with assessors attached to them. It further gave the prisoner a right to appeal.

Crimes and delicts are at present tried by a Court of five judges, all lawyers, three of whom are foreigners, and two natives, and three assessors, two of whom are foreigners. There is an appeal in the following cases:—1. If an essential error has been committed in the inferior Court. 2. If an incompetent penalty has been imposed. 3. If the facts found proved do not constitute a crime or delict. 4. If the judgment is contrary to the weight of the evidence. The Court of Requests, composed of three judges, has the duty of deciding whether the appeal is competent. If so found, the case is sent before the Criminal Chamber, whose judgment is final. This Chamber is composed of six judges and four assessors. Crimes prescribe in twenty years, and delicts in ten years. The Courts have special prisons attached to them. Foreign Governments have, however, the option of claiming any person of their nationality who has been sentenced to more than one year's imprisonment, that he may undergo his punishment in his own country. They are even entitled to remit the sentence, but in this case the prisoner whose sentence has been remitted must not enter the Egyptian territory until its term has expired, under pain of being arrested and confined in the state prisons. Lastly there is the "Court of Conflicts," whose province it is to adjudicate in all disputes that may arise between the Reformed and the native Courts.

In conclusion I may point out that the legal position of Egypt was fixed by the Convention of London, in 1840, entered into by Great Britain, France, and Russia, and accepted by Turkey. The provisions then laid down are still in force, in spite of the position which England has held in Egypt since 1881.

D. Démétriadés.

Current Topics.

Judicial Inquiry into Sanity of Prisoner in Bar of Trial—Novel Procedure.—"Dundonnachie" has disappeared from among us. He suffered for years under the delusion, which no one shared, that he was the victim of the oppression of judges and persons in high places. Those who have followed the incidents of his recent trial will be inclined to say that he has at last seen justified the conviction of a lifetime. He committed an assault; he was indicted for that crime before the High Court of Justiciary; he was tried for the offence of insanity; and he has been sent to Perth during Her Majesty's pleasure. The procedure is certainly novel. The Crown indicts for a crime, summons a jury, brings the panel to the bar, and all this without the slightest intention that he shall be tried. Days before the day of trial, intimation is sent from the Crown office to the prisoner's agent that before trial an inquiry will be instituted into the panel's state of mind with a view to show that he is unable to plead or instruct his defence. At the calling of the diet the panel is not asked to plead, but the inquiry into sanity is at once proceeded with. As one reads the newspaper accounts, the suggestion that there should be inquiry appears to come from the judge, but when the intimation by the Crown is remembered, when it is observed that the moment the so-called suggestion is made, the Crown is able to put into the witness-box three doctors, all well precognosced; that the examination of the witnesses is conducted by Crown counsel; that the judge is addressed by Crown counsel upon the subject, and urged to adopt the course he did adopt; it is apparent that the real mover in the proceedings was the Crown. But what strikes one as strangest of all is that this procedure was taken notwithstanding the most strenuous opposition on the part of prisoner's counsel. He opposed the inquiry on the ground that it was not the part of the Crown after bringing a man to the bar for trial, to institute such an inquiry. His objection was repelled on the ground of "suggestion of the judge." The examination proceeded, and the Crown witnesses were cross-examined. The result of their evidence seems to be, that while the panel suffered under certain delusions as to judges being leagued against him to

deny him justice, and was in consequence dangerous (though what his being dangerous could have to do with his ability to instruct his defence it is hard to see), he was otherwise above the average of intelligence, and was quite well able to give an account of the facts connected with the crime laid to his charge. In view of that evidence his counsel argued that the panel was quite able to instruct his defence and stand his trial, and that he had a right to be tried by a jury, which ought not to be taken from him at the instance of the Crown on the pretext of insanity. Against this was heard counsel for the Crown, who convinced the judge. The judge found the prisoner insane and unfit to be tried, and sent him without a trial to Perth for that indefinite period known as Her Majesty's pleasure.

It would be surprising if there were any authority for such proceedings in the law of Scotland. There is none as far as we can discover. The plea of insanity put forward by a prisoner in bar of trial is well known. In such a case the Court allows a proof without impanelling a jury. In England it is otherwise, for a jury is impanelled to try the question whether upon arraignment the accused is insane (Russel on Crimes, i. 136-7). Upon the other hand, it is stated in a modern work of practice, Macdonald, 2nd Edition, p. 161, that "although no question as to sanity be raised, the Court will, if they see cause, *ex proprio motu*, investigate whether the accused be a fit subject for trial or not." There are three cases reported, in which such inquiry has been made at the instance of the judge. The cases referred to are the cases of *Warrand*, H.C., Jan. 17, 1825, Shaw, 130; *Wm. Douglas*, H.C., May 28, 1827, Shaw, 192, and *John Barclay*, H.C., Feb. 4, 1833, Bell's Notes, 1. The presiding judge in all these cases was the Lord Justice-Clerk Boyle. In *Warrand's* case the Lord Justice-Clerk, on the prisoner being brought into Court and the diet called, "stated [the quotation is from the record] that their Lordships were clearly of opinion that it was necessary before proceeding further in the case to ascertain whether the panel was at present a proper object for trial, and that evidence as to his state of mind should immediately be taken. The counsel for the panel stated that they were anxious that the trial should immediately proceed, and that they had nothing whatever to offer on the subject of the suggestion now made by the Court. The Lord Advocate stated that having brought the present charge it was not his intention to take any step in regard to the course of proceeding now suggested by the Court; but as it was the opinion of the Court that it should be adopted, he was now ready to assist in the investigation by examining such witnesses regarding the state of mind of the panel as may be suggested." The panel was removed from the bar and examined by several medical men, and upon their evidence and that of some other witnesses the Court found that the panel was not a proper subject for trial at the time. In the case of *Douglas* the Lord Justice-Clerk, in respect of a statement made by the panel in his declaration, stated that he thought it would be right to have the opinion of some medical

gentleman in attendance upon the sanity of the panel. Both Mr. Dundas, A.D., and Mr. Cockburn, counsel for the panel, declined to interfere. The Court called Dr. Thomas Spens, and took his evidence on oath, with the result that the panel was found to be sane. In *Barclay's* case the attention of the Court was attracted by the prisoner's manner, and, his counsel not opposing, the Court remitted to certain physicians to visit and examine the panel. On their evidence being taken at a future day, the Solicitor-General contended that the panel was a fit subject for trial, and the Court so found. It is obvious, we think, that these cases form no precedent for the proceedings we have described. They are all cases in which the judge, having his attention called to the panel's state of mind, interfered, as he is always entitled to do, in the interests of the panel. In all these cases the prosecutor, having brought the charge, declined to take any step with the view of preventing it going to trial. In the case of *Barclay* the Solicitor-General actively opposed the stoppage of the trial. They were inquiries *ex proprio motu* of the judge, in which neither the prosecutor nor the panel's counsel interfered. There is one case reported (*Paterson*, Jedburgh Circuit, April 1, 1842, 1 Broun, 200) in which the inquiry was made at the suggestion of the Advocate Depute, who had been informed of the panel's insanity. There was no opposition on the part of the counsel for the panel, and it is obvious from the report that the Advocate Depute, in informing the Court and requesting inquiry, was taking that step which had his counsel been possessed of the same information he would himself have taken. It was an interference in the prisoner's interest on account of information received between the indictment and the trial. To appeal to it as an authority for the proceedings in this case is out of the question. For such proceedings we are, therefore, left without precedent.

There is no case of the prosecutor taking the plea and urging it before the Court in spite of the opposition of prisoner's counsel. Nor is it surprising that it should be so. For what substantially is such a proceeding as this but a device by which an inquiry may be instituted into any man's sanity before a judge of the High Court of Justiciary sitting without a jury, upon the result of which he may be sent to prison for an indefinite period. All that is necessary is to serve him with an indictment for some trifling offence, summon a jury to look on at the farce, examine a couple of doctors, and it is done. Whether he has really committed the crime with which he is charged is no matter, for the merits of the case will never be reached. It is a new method of conducting inquiries into sanity, and it results in imprisonment. There is a well-known statutory procedure before the Sheriff for the case of dangerous lunatics, a procedure protected by sufficient safeguards; but that procedure results only in placing the lunatic in a parochial asylum, from which an order of the Lunacy Board may liberate him (24 & 25 Vict. c. 54, secs. 15, 16 and 17). The latter procedure was begun in the case of "*Dundonnachie*," but stopped in favour

of the novel one we have described. Can it be that the desire of the Crown Authorities to have him put into a prison rather than an asylum, under their own control as to release, rather than under that of the Board of Lunacy, was the parent of the ingenious design which has accomplished these objects?

The American Patent System.—The origin and development of the American Patent System have never been more tersely or more eloquently described than in the address delivered by Mr. Commissioner Mitchell at the Centennial Celebration recently held at Washington.

Mr. Mitchell begins with a sketch of the early English patent system, and particularly alludes to the notorious "Statute of James." We have never been able quite to understand the fascination which the Statute of Monopolies exercises over the minds of American patent lawyers. They seem not to be aware that its place in English legal history is purely accidental, and they glory in the belief, which appears to us to be unfounded in fact—that it "followed the *Mayflower* across the ocean;" as if that were anything to be proud of. This, however, by the way. There have been three stages in the development of the American patent system:—

1. *Patent right*, in the literal meaning of the term, is recognised, but only *novel* inventions are patented. This may be called the *Colonial* period. It commenced about 1641 and lasted till 1793.

2. Then comes an *intermediate* stage, beginning with the Act of 1793 and ending with the Act of 1836, in which the duties of the American Patent Department are circumscribed within very narrow limits, and the examination for novelty disappears.

3. With the Act of 1836 the *modern* American Patent System begins, and the examining corps of experts reappear at Washington. Mr. Mitchell's paper would form an excellent preface to a new edition of "Curtis."

The Law of Conspiracy.—The Bill for the Amendment of the Law of Conspiracy, recently introduced by Mr. E. Robertson, and rejected on the second reading, was an ably drawn, and well meant, but ill timed, production. In a period of greater political peace it might have had some chance of being considered on its merits. The idea of the Bill was this:—By the Conspiracy and Protection of Property Act, 1875, 38 & 39 Vict. c. 86, it is declared that, so far as trade disputes between employers and workmen are concerned, an agreement between two or more to do any acts in furtherance of such disputes shall not be indictable as a conspiracy if

such acts committed by one person would not be punishable as a crime. Mr. Robertson proposed to make that declaration universal instead of limiting it to trade disputes. This was no doubt the intention of the Royal Commissioners who produced the Draft Criminal Code of 1879, but, with boycotting rampant in Ireland, such proposals were certain to be received with disfavour. It is certain that, if any such general declaration were accepted, it would have to be qualified by a numerous list of exceptions. For example, the declaration in the Act of 1875 made necessary the creation of several new statutory offences. It was felt that, otherwise, the freedom of individual workmen would be seriously invaded. Hence the "following, watching and besetting," section 7. In the same way the Royal Commissioners proposed a list of specific exceptions, their view being that no offence should be prosecuted except under a section of their code. It may, however, be desirable to consider whether there ever was a law of conspiracy, distinct from conspiracy to commit an indictable offence. So far as trade offences are concerned, Sir James Stephen, in the third volume of his "History of the Criminal Law," has thrown grave doubt upon this question. There is a trace of a doctrine in the English common law that it is criminal (apart altogether from combination) for one man to oblige another to abstain from the exercise of his craft; but before 1825 (when the particular combination statutes were repealed) nobody was ever convicted of having combined with others for the raising of wages as a conspiracy in restraint of trade at common law. Of course, the opposite is assumed in such cases as *Hilton* v *Eckersley*, 6 E. & B. 47, and *Horuby* v. *Close*, L.R. 2 Q.B. 153, but the historical foundation of the common law doctrine seems to be undiscovered. The Scottish case of the cotton-weavers in 1813, mentioned by Hume (i. 491), is very like an authority for the doctrine in Scotland. It differs from the cases of the papermakers, the shoemakers, the colliers, and the cotton-spinners (2 Swinton, p. 1), in being apparently free from charges of actual violence, or other indictable offence. Some further authority may probably be found for the doctrine in the somewhat vague Scots law relating to threats, which is laid down in *Crawford*, Shaw, p. 309, and *Miller*, 4 Irvine, p. 238. But whatever the true history of the doctrine, the question on the merits, whether it is safe to affirm in general terms that no act, innocent when done by one, shall be criminal when done by many, is by no means so simple as may appear at first sight. The proposition is plausible, but entirely illogical, and even incapable of intelligible statement. No single person could commit the act which a crowd proposes to commit. Simultaneous breach of contract by 4000 persons has no resemblance to desertion by a single workman. This was very much the point argued in the gas-stokers' case in 1872, and is to a certain extent provided for by the public service section of the Act of 1875. And many cases will suggest themselves, in which the essence of what is done or threatened consists in the act or threat proceed

ing from a number of persons, arrayed perhaps against one or a small minority. In *Cooper* v. *Macfarlane*, 6 Rett. 697, Lord Gifford is reported to have said :—"I think it is the law of Scotland, under the recent statute and at common law, that where an act would not be unlawful if done by one person, it does not become unlawful or criminal when two or more persons combine to do it." His lordship must have been referring only to trade offences, and as regards them had probably not referred to the cotton-weavers' case. The other aspect of the question is well illustrated by the fact that, as recently pointed out in this *Review*, iii., p. 139, there may be riots without violence; any demonstration of force or numbers may be riotous, as in the Lochs Deer Case, *H.M. Advocate* v. *Macrae*, 15 Rett., J.C. 33. It is desirable that this whole subject should receive further systematic discussion. Freedom of combination must not be permitted to interfere with individual liberty.

XUM

Reviews of Books.

La Vita del Diritto nei suoi rapporti colla vita sociale: Studio comparativo di filosofia giuridica, per GIUSEPPE CARLE, Professore ordinario di Filosofia del Diritto nella R. Universita di Torino; 2a editione riveduta, ampliata e messa in correlazione cogli studi contemporanee (pp. xii. 714). Torino, 1890. [**The Life of Right in its Relations with the Social Life**: A comparative Study of Juridical Philosophy, by GIUSEPPE CARLE, Professor of the Philosophy of Law in the Royal University of Turin; 2nd Edition, revised, enlarged, and put into co-relation with the studies of the present day. Turin, 1890.]

THE late Professor Lorimer, in one of his thoughtful and suggestive introductory lectures a few years ago, startled his hearers and the public by exclaiming "But *what of Italy?* Italy is the land on which since Germany went on the 'war-path' the mantle of scientific jurisprudence seems to have fallen. In no country in Europe is the relation of theory to practice at this moment more intimate, the character of jurisprudence as a branch of the science of nature better understood, or the haphazard 'leap-in-the-dark' legislation on which we pride ourselves, more at a discount than in Italy."(*a*) This statement was as true as it was new, at the time, in the juridical discussions of this country. Since then, however, considerable advance has been made in the study and appreciation of the works of the Italian jurists. Professor Flint has laid open the rich and original thoughts of Vico on the Science of Law, in an admirable chapter in his monograph on the great Neapolitan thinker. The work of the contemporary Italian masters of Criminology, has been sympathetically and competently estimated in the pages of this *Review* by Mr. Charles Scott. And it may also be allowed to refer to the recently published translation of Professor Lioy's "Philosophy of Right," and especially to its bibliographical appendix, in which the principal Italian works on the Philosophy of Law from Vico to the present day are mentioned and

(*a*) "Studies National and International," p. 103.

summarised, in proof of Professor Lorimer's assertion, and as a popular and comprehensive introduction to the study of modern Italian jurisprudence.

But it is necessary to go both further and deeper into detail in order to obtain an adequate idea of the richness of the juridical philosophy of contemporary Italy, and to gather the results of its maturest thought. And if any one book deserves *par excellence* to be carefully studied in these connections, it is Professor Carle's great work on the Vital Nature and Development of Right in its Social Relations. The title of the work might have been happier and more concise, but it accurately indicates the contents and bearing of the subject discussed, which is more summarily indicated as "the Genesis and Development of Right in Society." It is appropriately designated a "Comparative Study of Juridical Philosophy," for its method is historical and comparative in the truest and most comprehensive sense of the term. All the resources and forces of contemporary historical, social, psychological and philosophical science, are here brought to bear with wonderful knowledge and mastery on the fundamental questions of juridical science. The vital and mediating dialectic of the modern Italian genius is seen in activity throughout, and at its best and highest, in this congenial and cosmopolitan study. The learned author has mastered the distinctive positions and principles of all the juridical schools, has read immensely in the relevant literature, not only of his own country, but of France, Germany, and England, and has given special attention to the recent sociological studies; but he has none the less preserved his independence of thought, and he applies great formative power to the arrangement and methodisation of his material. His historical surveys are wide yet accurate: his insight into the organic nature and relations of right profound and vivid; his delineation of the evolution of the juridical idea through its various stages clear and careful; his comparative estimates of the juridical genius and products of the different peoples original and just. The work is full of striking and informative matter, and is, indeed, one of the most valuable contributions to the scientific jurisprudence of the century.

Of such a work it is impossible to give more than the merest outline here. In a general Psychological Introduction fundamental positions, in harmony with Vico's views, are explicated, regarding the relation of the individual and the State, the function of right in human society, its social genesis, development, and life, with the general laws which govern that life; and in a Preliminary Chapter the elements of the juridical life, the primitive opposition of its ideal or spiritual and its sensible or material sides, its organic character, the various aspects under which it may be studied, and the scope and method of the following study, are dealt with. The substance of the work naturally falls into two parts; the first part treating of the historical development of right in the various studia of the social life of mankind, the second part treating of the idea of right in the

juridical and social doctrines of the modern period. Part First surveys, in Book I., the historical development of right in the ancient East, especially among the primitive Aryans, in India, and in Persia. Book II. reviews the passage from the patriarchal group to the Graeco-Roman "city," the philosophical and ideal development of right in Greece (pre-Socratic Schools, Sophists, Socrates, Plato, Aristotle, Stoics, and Epicureans), the historical and legislative development of right in Rome (with special references to the legislative mission of the Roman people, the stages of their jurisprudence, and its relation to the Greek philosophy), and the origins of right among the ancient Germans, with their contribution to the development of social institutions. Book III. traces the development of right in the period of transition from the ancient city to the modern State. In a sketch full of most profound and fruitful views, the difficult subject of the juridical institutions, transformations, and theories of the Middle Ages, and the formation, organising principle, and distinctive characters of the modern State, are analysed and exhibited with great lucidity and insight. But it is in Part Second, in dealing with the idea of right in the juridical and social doctrines of the modern period, that Professor Carle puts forth his special scientific faculty, with most original and instructive results. The origin and classification of the philosophical systems concerning right from the period of the Renaissance, and with particular reference to Hobbes, Grotius, and Kant, receive careful treatment, and lead to a comparative study of the ideal, historical, and positive schools of jurisprudence of modern Europe (down to Hegel, Herbert Spencer, Von Hartmann, and Comte), which, as regards faithfulness of exposition, and sound estimate of their results, could hardly be too highly praised. This comparative study of the schools in their distinctive positions is followed up by a comparative study of the philosophical doctrines held regarding the foundation of right as Law, in which the moral, jural, and utilitarian principles are clearly distinguished and acutely discussed, and a new theory as to their mutual relations and evolutions indicated. This is succeeded by a comparative study of the theories relating to right as a power pertaining to the human person and the juridical activity of man in society, the theories more particularly reviewed being those of Individualism, the Social Contract, and Socialism. The historical evolution, and the chief expositors of these theories are referred to, and they are compared by reference to the origin of civil and political society, to the relations between the individual, the family, and the State, and to the various aspects under which the juridical activity of man is exhibited. From all these points of view, sound and valuable elucidation and judgment of the theories are given, and the whole discussion is most relevant and illuminative at the present time. These comparative studies of the juridical and social doctrines of the modern epoch are completed by a careful attempt to establish an intimate correlation subsisting among the systems, and to point out certain consequences which may be gathered from the constant

relations thus holding among the various juridical and social doctrines. Here the learned author presents the most valuable scientific results of his whole enquiry. Without falling into a mere external syncretism, or applying a superficial eclecticism, he shows, by reference to their essential elements and necessary affinities, that the diverse correlative systems, while having each a proper life and a proper domain of its own, constitute so many moments of one vaster system. This is the logical and historical outcome of the elements that enter into the juridical life, and of the necessary division of labour which has to take practical shape in the bosom of society. And it is thus shown that all the Juridical and Social Schools are only various aspects of that greater struggle which is still carried on between Spiritualism on the one side and Materialism on the other. This point of view forms the transition to the comparative study, in the concluding chapter, of the mental character exhibited by the modern peoples in juridical and social studies. This discussion is a very valuable contribution to comparative national psychology, and is full of subtle discrimination and fine characterisation. The psychological genesis of the modern nationalities is considered both historically by reference to their antecedents and conditions, and analytically by reference to their civilisation and their prevalent mental characteristics. The distinguishing mental characters of the English, the German, the French, and the Italians, as exhibited in their juridical and social studies, are more particularly studied and determined. The English genius is characterised by great sagacity and acuteness in the observation of phenomena and facts, accompanied by an admirably practical judgment in the appreciation of them, and by a consequent tendency to physical, social, and psychological studies, with a special leaning towards the economic aspect of the social life. The political constitution and private legislation of England bear the impress of the character of the people: they are not systematic or preconceived, but the empirical product of natural spontaneity and of historical struggles and agreements, results of the proportioning of power, of utility and experiment. In the juridical and social sciences, the English have been predominantly empirical, individualistic, practical, utilitarian, with a movement advancing from egoism to altruism, with distinct recognition of the reality and evolution of the social organism, great respect for tradition, and the sentiment of individual independence and dignity. As the English genius has many affinities with that of Ancient Rome, the German genius resembles that of Ancient Greece: it is ideal, metaphysical, universal, speculative, in sympathy with the abstractions of thought rather than with the concrete *minutiæ* of facts, seeking freedom in transcendental thinking, and an ideal and cosmopolitical unity on the basis of natural right in a collective, international State; and all this is seen in German jurisprudence and sociology. The French genius, in accordance with the dualism of its ethnic basis, shows a twofold tendency to a rational ideal universality and a traditional and empirical positivism, to speculative radi-

cal theorising and to practical positive individualism. Finally, the Italian genius is marked by a certain intermediate attitude and habit that moves between abstract metaphysical speculation and the patient, minute observation of facts, that leads it to recognise and compare the ideal and the real, and find out their relations and proportions, that issues in dialectically establishing the mean between these extremes, and inclines it by natural preference to civil philosophy and the comparative study of human and social science. All this is exemplified typically in Dante and Vico, and in the modern development of juridico-social science in Italy. Every people thus contributes distinct constitutive elements to the actual world of human society; all the modern peoples have thus been co-operating to the social development; and each of them personifies a juridical and social system in itself.

It would be superfluous to praise such a conscientious and truly scientific work as this; it is a noble monument of vast learning, patient labour, high aspiration, and catholic thinking. It carries the spirit and genius of Vico through the whole domain of juridical and social science by the aid of the large and patient research of our time. Its comprehensive, historical mediation gives organic unity to the whole development of the juridical life and thought of the past, and harmonises the dialectical ideality of Hegel with the concrete reality of the positive schools. As a historical exposition of ideal realism in the sphere of jurisprudence, it only lacks a systematic and synthetic complement to satisfy the demand for ultimate unity and organic integration, and this we confidently expect from the hands of the accomplished author as his maturest constructive work. What we already have from him here can hardly be too highly valued in these days of philosophical bereavement and decay, and it certainly entitles him to take rank as one of the first philosophical jurists of Europe.

W. Hastie.

The Exchequer Rolls of Scotland, Vol. XIII., 1508-1513, with Preface by A. J. G. Mackay, LL.D., &c.

Of this important series of volumes the first twelve were edited by the late Mr. George Burnett, Lyon King of Arms. The volumes themselves, though neither history nor law in the ordinary sense, form a rich mine of "real evidence" with regard to the general, the legal, the political, and the social history of Scotland from 1264 down to the eve of the fateful Battle of Flodden in 1513. And not only has Mr. Burnett presented us with the real evidence itself, but he has furnished forth his goodly volumes with a corresponding number of prefaces. These prefaces, which contain a reasoned and critical digest of the evidence, form a number of almost entirely original chapters in that true and scientific history which is now being written by the various editors of the ancient State Records of Scotland. To the uninitiated,—nay, even to many earnest students of

history, politics, and law,—the contents of these many ponderous tomes may seem dreary and even repellent; but it is too often forgotten that such ancient records, far more than gossiping monkish chronicles founded mainly on hearsay evidence, form the genuine ore from which the fine gold of history is chiefly extracted. To laborious and accomplished record editors and preface writers like Mr. Burnett the country therefore owes a deep debt of gratitude, a debt most inadequately acknowledged. On the lamented death of Mr. Burnett, the Deputy Clerk Register of Scotland was fortunate in securing the services of Mr. J. G. Mackay, formerly Professor of History in the University of Edinburgh, as Mr. Burnett's temporary successor; and Mr. Mackay has accordingly, as a labour of love, undertaken the arduous task of writing a preface to the present volume, the text and index of which had been prepared for the press by Mr. Burnett. And probably no one in Scotland could have accomplished the task more satisfactorily, for Mr. Mackay is not only deeply versed in Scottish history generally, but he has had occasion, in his "William Dunbar," to make a special study of the period which this volume embraces.

King James IV., of the Iron Belt, perhaps the most gifted and most popular, and one of the most ill-fated, of Scottish monarchs, is of course the central figure throughout Mr. Mackay's long and interesting Preface. Other outstanding figures also arrest the attention. Not only do we obtain information about such men as Bishop Foreman, Cardinal Beatoun, Sir Andrew Barton, and Sir Andrew Wood, but we gain interesting though distant glimpses of Louis XII. of France, of the famous Pope Julius II., and other personages of European fame. The subjects which bulk most largely in the preface are biographical and territorial, but it also throws many valuable side-lights on social, economic, and political history. Chief among facts of political interest is the remarkable prestige enjoyed by James IV. on the Continent of Europe. France accounted him her staunchest ally, and Louis XII was his personal friend; he corresponded in familiar terms with the Emperor Maxmilian; he saved the territory of the Duke of Gueldres from invasion by the Archduke of Austria; he powerfully aided his uncle, Hans, King of Denmark, to quell a rebellion; he was in high favour with the Pope and with Mother Church; and, not least important, he had consolidated his own kingdom by extending his royal authority over the hitherto untamed Western Highlands, and the counties and islands of the distant north. Personally as well as politically, James was one of the most remarkable men of his age; he was the chief founder of the Scottish navy, the indefatigable improver of artillery, a lover of art, and an accomplished athlete. On the other hand he was rash, impulsive, extravagant, and self-willed; and, by the irony of fate, his costly artillery was destined to be captured on Flodden Field without having fired a single effectual shot, while his vaunted navy was rendered useless by the insubordination of an incompetent admiral. These arma-

ments well-nigh ruined the country, and the battle of Flodden deprived Scotland at once of her treasure, the flower of her chivalry, and her king.

To the student of law the most valuable parts of Mr Mackay's preface are those which treat of the early land tenures prevalent in Scotland. The oldest of the feudal tenures was that of ward, corresponding with that of knight-service in England; and one interesting illustration is given of the case of lands falling into ward of the Crown. In 1508 the rental of these lands (certain baronies in Forfarshire) was about £247, of which, after deduction of widow's terce and other burdens, including the pittance of £13 allowed to the ward, about £167 found its way to the Royal Exchequer. Year by year the surplus dwindles, whether owing to the rapacity or dishonesty of the receiver or from some other cause, until in 1513 the receiver, the Bishop of Caithness, is found to be in arrear to the extent of £109. It was doubtless such abuses as these that led Drummond of Hawthornden to inveigh against the casualty of ward as an "ungodly custom." For at least two centuries before this period the feu farm tenure, somewhat resembling the English soccage, had been in use, but in the reign of James IV. it became far more widely prevalent. In order to relieve the pecuniary necessities of the king, large tracts of Crown land in Fife and elsewhere, which had hitherto been let annually for a moderate rent or tack duty, were now feued for a much higher feu duty, but with the further result that the property was thus practically alienated in perpetuity, and that, however much it might rise in value, the Crown revenue derived from it remained stationary. Another interesting point clearly brought out by Mr. Mackay is that the feudal casualties might sometimes indirectly prove beneficial to the nation at large. Thus, down to 1508 the Earldom of Sutherland was practically a small independent principality; but as it fell into non-entry from 1508 to 1512, the Crown, as superior, was enabled, almost for the first time, to assert its authority over that remote part of its nominal dominions. Among many similar points of interest two others only can now be noted. The English tenure of copyhold, the land held under which is nominally part of the demesne of the lord of the soil and is entered as such in his title-deeds, never obtained in Scotland (though the word occurs once in a rental of 1509), and is quite distinct from the tenure of feu farm. Lastly, neither this volume nor its predecessors throw light on the interesting question whether the land was held in common by village communities prior to the introduction of the feudal system, and so far back as the reign of David I. (1124-53) there seems to be no trace of any other than the feudal tenure.

Enough has been said to show how admirably Mr. Mackay has acquitted himself of his important and laborious task. His masterly preface affords an indispensable guide to what would otherwise be the bewildering contents of the volume. Let us hope that his permanent successor in the editorship will be as deeply imbued with historical and patriotic spirit.

J. Kirkpatrick

Sprachvergleichung und Urgeschichte, Linguistisch historische Beitrage zur Erforschung d. indogermanischen Altertums; von O. Schrader: Zweite Aufl., 1890 Jena: H. Costenoble.

Starting from the assumption that the history of humanity is, upon the whole, the record of a gradual advance from what is simple to what is complex, and that savage life is relatively simple, the anthropologist has gathered together an enormous mass of facts regarding the manners and customs of savage races. In the work before us, Dr. Schrader confines his attention, except for the sake of illustration, to the Aryan races (he prefers the term "indoger manic" to Aryan), and seeks to find an answer to the question,—of what service is the science of language in an inquiry into the civilisation of the primitive race from which the Aryan races have sprung? The justification of his method depends upon the validity of two propositions:—(1) that the relationship of the Aryan peoples can be explained only on the assumption of a primitive Aryan language; and (2) that the assumption of such a language presupposes the existence of a primitive Aryan race. We are not, however, to affirm that there lived in remote ages a race, one in blood and speaking a uniform language. We must think rather of a language, substantially homogeneous, notwithstanding its dialectic variations, and diffused over a wide area. We must think of each Aryan people as containing an Aryan-speaking element, and thus capable of imposing an Aryan language upon the alien peoples with whom they became incorporated. What, then, are the grounds which will justify us in asserting of a specific word that it belonged to the primitive Ayran vocabulary? We may make the assertion with great probability if we find instances of it not merely in the languages of the Eastern Aryans, but in European languages unexposed to Eastern influences, and if its form be in accordance with the laws of structural modification. Still we must remember that we are ignorant of the laws of word formation which were operative in primitive times, and, accordingly we are left in doubt whether correspondences in structure are primitive, or whether they are due to modifications which have taken place within the individual languages. It is to be kept in view that the philologist, in the same way as the geologist, is dealing with an imperfect record; words may have dropped out, or been supplanted; and, accordingly, it is not always safe to infer from the absence of a word in several of the languages compared that there was no such word in the primitive language. But even if we assume that the word is primitive, we are not at the end of our difficulties, for we cannot from the evidence of language alone be certain as to its meaning. That the primitive Aryans knew something about cooking and something about house building is established by philology: but this fact tells us little about their civilisation, unless we can say what that something was. We must be careful, therefore, not to read modern notions into primitive words—*e.g.*, we must not infer from the fact that the primitive Aryans possessed a word which

in Greek, appears as πόλις, that they inhabited cities with walls and streets. The science of language can give the skeleton only; we must go to history and archæology for the flesh and blood. Our task then is to ascertain from a comparison of the antiquities of the individual Aryan peoples, the capital in civilisation bequeathed to these peoples by the primitive race. It is to be remembered that conclusions based on an examination of the antiquities of one people—*e.g.*, on the Vedas, are wholly misleading. Nor are more satisfactory results attained by singling out a group of two or three peoples, and treating them in the same fashion. Thus to compare the civilisation of Rome, Greece, and India, apart from those of the other Aryan peoples is a certain source of error; and this is *Leist's* mistake in his works *Græco-italische Rechtsgeschichte*, 1884, and *Altarisches jus gentium*, 1889. In the case of these peoples similarity of institutions may be explained by borrowing rather than by derivation from an original source; and thus Leist's theory that the conception *dharma* (*θέμις*) represents a primitive conception falls to the ground. In a series of most interesting chapters Dr. Schrader treats of the food, clothing, habitations and religion of the primitive race; chapter x. of part iv. he devotes to an account of their commerce, and chapter xii. to a description of the family and of the state. The notion of exchange and barter is familiar to the most primitive races. It is replaced by the notion of purchase only when a universal measure of value is recognised. Now the early Aryans were acquainted with a decimal system, up to a hundred, at all events, and with the notion of measuring; that which everyone desired—*i.e.*, cattle, was taken as the standard of value; and it was upon these lines that commerce between groups of the same race developed. But the question arises whether commercial relations existed between branches of the Aryan stock and alien peoples. According to primitive ideas, participation in rights depended upon community of race, and, accordingly, the conceptions of alien and enemy were regarded as identical. In early times, however, the conviction became established that it was a sacred duty to protect the stranger. How was it that the ἀξενία of prehistoric times came to be supplanted by εὐξενία? Rudolph von Ihering and Schrader are agreed that the change was due to the requirements of commercial intercourse. The primitive Aryan, however, regarded the alien as without rights. Still it is possible that there subsisted commercial relations between him and his non-Aryan neighbours. For among very simple peoples we find the beginning of barter, in the agreement by several tribes to a truce for a given time during which articles may be exchanged; or in the still more primitive method, according to which a tribe leaves certain articles in a given locality, and expects an equivalent to be left in their place by the person who takes them. Schrader comes, on purely linguistic grounds, to the conclusion that the basis of the Aryan family was agnatic: that marriage

rested on purchase; and that alongside of marriage by purchase were to be found traces of the very primitive form which we find among many races either in operation or survival—*i.e.*, marriage by capture. He is, further, of opinion that if we do not limit our inquiries to the advanced ideas represented by Homer, the Indian sutras, and the Germania of Tacitus, we shall find that the power of the husband over the wife, constituted by means of purchase or capture, was no mere legal formality, but a hard reality; and that the absence of an Aryan designation for the married pair is due to the fact that the husband was regarded as an absolute master. The wife was his property, and, therefore, what she produced belonged to him; and this conception explains the levirate and similar customs. It explains also the usages with regard to the exposure of children and the burning of widows. Schrader takes the Hindoo joint undivided family as the type of the primitive Aryan family; and he explains the statements of Cæsar, Polybius and Herodotus regarding polyandry, as resting upon a misunderstanding of the nature of the family organisation. One of the outstanding merits of Schrader's great work is its moderation. He prefers proof to theory; and, while we may miss the idyllic picture, which Pictet, Fick, and Max Muller have filled in, while we may regret that the foundation upon which Leist rests his views as to the nature of primitive legal conceptions, has been proved insufficient, we have the satisfaction of dealing with results, based upon ascertained facts. It is interesting to compare Dr. Schrader's treatment of the evidence with Bernhoft's Essay in the last number of the *Zeitschrift für vergleichende Rechtswissenschaft.*

Schrader's work has been translated by Mr. F. B. Jevons, under the title, "Pre-historic Antiquities of the Aryan Peoples."

P. J. Hamilton Grierson.

A Treatise on the Law relating to Fraud and Misrepresentation. By the Hon. Frederick Moncreiff, of the Middle Temple, Barrister-at-Law. London: Stevens & Sons, 1891

In this book Mr. Moncreiff undertakes the task of presenting an exhaustive treatise on the law of fraud and misrepresentation from the standpoint of the remedies provided against these wrongs by English law. The book is written in a clear and attractive style, and criticises judicial utterances with that combination of respect and freedom which might be expected in the work of one whose ancestors have so long been associated with the Supreme Bench. We presume that the author's main design has been to afford some sure guidance to English pleaders in the constantly recurring labour of appreciating, at their true present value, authorities on the subject of fraud, drawn from the period when distinctions between equity and common law actions were still rife. It is hardly possible for a

Scots lawyer to determine with precision how far the author has succeeded in attaining this object. The book certainly affords a deeper initiation into the technicalities surrounding the action of deceit, the action of rescission, and their respective offshoots, than any work familiar in Scotland; and it suggests more than a doubt regarding the accuracy of a statement made by Sir Frederick Pollock, in his book on Torts (2nd Edition, p. 248), to the effect that, in respect of fraud, the principles worked out in the Courts of Equity and Common Law are identical. Mr. Moncreiff, we infer, is not quite of that mind: nor do we suppose that he assents to Sir Frederick's view that, since 1875, "we have in this case a real and perfect fusion of rules of common law and equity, which formerly were distinct, though parallel and similar." If that were so, there would be little justification for the form into which Mr Moncreiff has thrown the result of his labours. But the authorities cited by him prove constant need for vigilance, at the present day, in applying rules formulated under the two separate jurisdictions; and thus he does seem justified, so far as the requirements of English practice are concerned, in choosing the standpoint which he has selected. We are bound to say that this treatment of the subject, according to English forms of action, greatly curtails the value of the book as a work of reference for Scots lawyers; and, even apart from that, it seems to involve a considerable amount of general inconvenience—much of the same ground has to be traversed twice; first, in connection with the action of deceit, and again in connection with rescission; and even the same cases have to be discussed and re-discussed at length, as, for example, *Adam* v. *Newbigging*, at p. 17 and p. 220, and *Burrowes* v. *Lock*, at p. 24 and p. 226. An even more serious result of the author's plan is the close conjunction it involves, when treating of rescission, between actions based on fraud and those based on innocent misrepresentation. While, no doubt, the remedies afforded in these cases are, in great measure, identical, the grounds on which relief is granted are quite different. In the more recent scientific treatises on contract, such as those of Pollock and Anson, innocent misrepresentation is treated as an element affecting contractual relations, much more closely allied to Mistake and Warranty than to Fraud. It is not a tort, but an impediment to true contractual consent, or a representation to be made good as a part of the contract. We do not suggest indifference, on Mr. Moncreiff's part, to this fundamental distinction. He repeatedly quotes *Redgrave* v. *Hurd*, and *Adam* v. *Newbigging*, where the principle was most clearly recognised, and he himself expounds it at p. 310, *et seq.* But it is permissible to regret that the author's plan necessitates the slumping together of two such distinct topics as wilful and innocent misrepresentation, which could so much more satisfactorily be treated under separate heads.

In the first part of Mr. Moncreiff's book, the part dealing with the action of deceit, the most instructive chapter is on "Knowledge and Inten

tion," which involves a detailed discussion of the leading case of *Peek* v. *Derry*. Mr. Moncreiff is no admirer of that decision, and characterises it in trenchant terms. He says: "The judgment in question is not happy. It is, probably, right in point of fact. But the exposition of the law is to be regretted, because it seems to proceed upon a merely verbal or psychological discussion of the meaning of the word 'belief,' and the propriety of the term, 'legal fraud,' while it seems to add nothing to the *meaning* of the statement of law made by the Court of Appeal in the same case; because it is based upon an unsatisfactory examination of the authorities; is possibly wrong even in the matter of verbiage; and is scarcely likely to be accepted as a final statement of the law."

We cannot enter into any discussion of the grounds on which Mr. Moncreiff supports this indictment of the House of Lords, but we may point out that, in *Lees* v. *Tod*, 19th May, 1882, 9 R. 807, Lord President Inglis, at pp. 853-4, appears to lay down, in admirably chosen language, precisely the same doctrine as that enforced in *Peek* v. *Derry*. That judgment, therefore, ought not to impress Scots lawyers as a novelty. Mr. Moncreiff cleverly catches Lord Herschell slipping in *Peek* v. *Derry*, and makes him a witness against himself. He will find that the Lord President, in *Lees* v. *Tod*, supplies the answer both to Lord Herschell's slip and to Mr. Moncreiff's criticism.

In the second division of his book, Mr. Moncreiff includes a classification and review of Company cases turning on fraud and misrepresentation. This, if we mistake not, will prove one of the most valuable portions of his work. There is no other book of reference where this subject is treated with such terseness and lucidity.

One of the most convincing parts of the book is a passage (pp. 16-26), in which the author seeks to prove that there is no substantial difference between the damages awarded under an action of deceit, and the restitution and indemnity awarded under an action of rescission. If this could be proved, the vexed question of Scots law, whether a party can retain a contract tainted by fraud, and claim damages for the wrong done to him, would be merely academic. But it is a sufficient answer to refer to *Amaan* v. *Handyside*, 11th February, 1865, 3 Macph. 526, where a purchaser claimed damages in respect of fraud, on the very ground that to rescind the contract, and make *restitutio in integrum*, would entail as great hardship on him as to submit to the fraud, and that it might even prove a highly lucrative arrangement for the fraudulent party. In that case, Lord Kinloch proceeded, to some extent, on the terms of judgment in *Gray* v. *Hamilton*, 23rd January, 1801, M. Sale, App. No. 2. Damages and restitution are equivalent only where the subject-matter of contract has become a total loss.

One cannot lay down this book without feeling thankful that the Scots law of fraud is free from the technicalities and eccentricities that beset English procedure. When the time for codification arrives, it is to be

hoped that a simple system may be devised, which will embrace only what is good and of permanent utility in the law of both countries.

JOHN F. M'LENNAN.

A Treatise on Extradition and Inter-State Rendition By JOHN BASSETT MOORE, Third Assistant Secretary of State of the United States. In Two Volumes. Boston, 1891.

The reader of these two bulky volumes will find food for reflection before he has got further than the title-page. On most English ears the term "Inter-State Rendition" will fall strangely; and even when the discovery has been made that "Inter-State Rendition" is not a mere synonym for "Extradition," but denotes the reciprocal restoration by the various States and Territories of the American Union of each other's criminals, all who take their stand upon correct speech will deplore that the term "Inter-State" should have been perverted to this use. Every legal student knows that the word in question has been proposed as a substitute for the vague though familiar adjective, "International," and that, were it to displace this latter in denoting the law which regulates the relations of State to State, there would be a gain to precision of language. For States, not nations, are the *persons* of international law. It is unfortunate, then, that in a work the bulk of which is devoted to the International or Inter-State—in the strict sense—topic of extradition, "Inter-State" should be applied to the criminal commerce between communities which, whatever they may be called, are not States in the eye of the *jus inter gentes*. It may, of course, be urged that in America the title to which we have taken exception is quite intelligible; and further, that a substitute could not readily be found. But to this we reply by expressing a hope that the work may find its way into many other than American hands, and by suggesting that some such phrase as "Inter or Intra-Federal Rendition" would have been less ambiguous.

However, to pass from the name to the substance of the book, it would be difficult to summarise in a single expression the contents of this so called treatise, for it is at once a treatise, a volume of juridical styles, a collection of leading cases, a digest of opinions, and an assortment of statutes. No doubt the prime purpose of the book is a practical one, "to minimise the chances of error in technical matters" relating to Extradition. But it is not only to the practitioner, meaning thereby anything from a President or Prime Minister to a detective officer, that these volumes are likely to be of service, the jurist or student will find them a perfect storehouse of reference. Around the topic of extradition arise questions not merely of procedure and technical detail, but questions of philosophical, constitutional, and political importance, all of which have received something more than passing notice from Mr. Moore. First and foremost there is

the question whether a nation is bound, apart from treaty, to deliver up criminals who have taken refuge within its jurisdiction. The reader must not expect in this connection to find any masterly analysis of the nature of international obligation, any lofty theory of international relations, but in place of that he will find a painstaking compendium of the opinion of publicists, statesmen, attorney-generals, and Courts. In such a compendium the opinion of Grotius, if only *honoris causa*, might have been given more explicitly. It is not enough to refer to Heffter and Fœlix, as quoting Grotius on the affirmative side. Grotius laid down (*De jure belli ac pacis*, lib. ii. ch. 21, iv. 1 and 3) that a nation's obligation with reference to criminals seeking asylum in its borders was alternative (*disjunctiva obligatio*)—*i.e.*, either to surrender them to the demanding State, or itself to punish them—a position which does not satisfy the demands of Recognition as conceived, for example, by Professor Lorimer. We are surprised too that Mr. Moore should have omitted to cite an authority, to which he refers in other contexts—viz., the Institute of International Law. That body, in its meeting at Oxford, 1880, declared that "It is not treaties only that make extradition an act in conformity with law, and it may take place in the absence of any contracted obligation." In dealing with the other questions which present themselves in connection with extradition, Mr. Moore pursues an identical method. Thus he masses together all that Presidents and Secretaries of State have said, or Courts decided in reference to the constitutional question whether in the absence of treaty any department of the Government possesses legal authority to seize a fugitive criminal and surrender him to a foreign power; he cites whatever has been written, thought or suggested as to the exemption of citizens from surrender by their own Governments, as to the immunity of criminals from trial on any but the charges on which they have been extradited, and the immunity of political offenders from extradition altogether. It cannot be said that Mr. Moore discusses any of these topics, it is but rarely that he obtrudes his own opinion, and even when an argument is so simple and self-evident that his own expression of it would have sufficed, he goes out of his way to quote it in somebody else's words. This, we think, is a pity, for on the few occasions when he has ventured to discuss a point, he reveals a considerable gift of reasoning and exposition. On the other hand, if it does not rise to the dignity of a commentary, his book must be allowed the merit of completeness as a compendium.

During the last half-century no cause has been so productive of miscarriage of justice in extradition cases as technical defects in the "complaint," the "warrant of arrest," or the authentication of the documentary evidence. These matters, of such vast practical importance, Mr. Moore has dealt with exhaustively, and by embodying in his work a large selection of judicially approved forms he has given it, as already remarked, the character, *inter alia*, of a volume of juridical styles.

XUM

What we have said of Mr. Moore's treatment of extradition holds of his treatment of the so-called inter-state rendition. While he is not unmindful of the broader aspects of rendition, and devotes some space to pointing out how wholly distinct in principle the practice is from extradition, and to dealing with its history, it is the technicalities of renditive procedure that are elaborated with the fullest detail.

From what has gone before it will be obvious that the book is a large one, but it is, we venture to think, larger than it need be. Without going the length of saying that there is deliberate "padding," it must be confessed that along with what is necessary, extant and relevant, there is much that is unnecessary, extinct and irrelevant. Were the book to be reduced by a fourth or even a third of its present compass it would lose nothing in historical completeness or practical utility.

LUDOVIC J GRANT.

Qualification of Voters, and Revised Edition of Mr. A. Graham Murray's Digest of Registration Cases. By ROBERT L. BLACKBURN, Advocate. Edinburgh: WILLIAM GREEN & SONS, 1891.

Mr. Murray's digest was printed in 1877, and there were several subsequent supplements. We do not know that this work was ever offered to the public for sale; but it was extensively circulated by the political agencies for which it was compiled, and it proved of great assistance to registration agents, containing, as it did, a summary of every reported case decided since the Registration Appeal Court was established. Mr. Blackburn has now brought the digest down to date, and he has supplemented it by a brief and, so far as we can judge, clear and accurate statement of the present franchise law. A glance through this summary is sufficient to show the very anomalous state of this branch of the law, and the extremely artificial character of the rules which govern the preparation of the register that settles the government of the Empire. Among many other incongruities, it may be pointed out how, for example, last autumn the Registration Court removed from the register several distinguished Edinburgh lawyers of blameless life, whose only offence was that, having hitherto been on the roll as lodgers, they had ventured *currente termino* to make what Lord Kinnear described as "an advance in life" by taking houses of their own. The present work professes to be compiled for registration agents, *not* for lawyers, a statement which shows the change which has taken place in political organisation. Formerly all registration work was in the hands of the lawyers, now the lawyer is superseded by the "organising secretary." In his preface the author "strongly recommends" the analysis of cases "to the notice of registration agents." He should have waited to allow us to do so: but, perhaps, he has more ready access to the ear of

those "agents" whom he would desire to guide, for rumour credits him with being as much accomplished in the practical work of organisation, as in the work before us he has shown himself to be in registration law and practice.

C. N. J.

Hand-book of the Parochial Ecclesiastical Law of Scotland. By William George Black, Member of Faculty of Procurators, Glasgow. Second Edition, Revised and Enlarged. Edinburgh: William Green & Sons, 1891.

Mr. Black is entitled to congratulate himself on the fact that a second edition of his book has been asked for within four years. This shows, what the perusal of the book confirms, that it possesses a certain degree of utility. The book is short, and states leading points in a fairly accurate manner. It does not pretend to the detail of Duncan or the learning of Connell. There are, however, a good many slips of statement and grammar in Mr. Black's work. Thus, on pp. 112-13, a grass glebe is first said to consist of four soums of pasture land, and afterwards of sixteen soums. The chapter on Dissenting Churches is not well written. We feel sure Mr. Black could do much better. The new matter in this edition cannot be of great extent. Not half-a-dozen ecclesiastical causes of importance have been decided since 1887. The unseemly dispute about seat-rents in the High Kirk of St. Giles cannot be reckoned among these. Mr. Black properly makes a long quotation from the admirable opinion of the Lord President in *Hastie* v. *M'Murtrie* on the question of induction, which he supplements by an interesting illustration from Dr. Sprott's work of the old ceremony of institution by handing over the Bible, the key of the kirk door, and the bell strings. But the important presumptions, relating to the possession of church records, which were dealt with by Lord Wellwood in the case of *Presbytery of Edinburgh* v. *University of Edinburgh*, deserve something more than the hasty reference which Mr. Black gives them on p. 171. The result of the decision in *Dalhousie's Tutors* v. *Minister of Lochlee*, since affirmed on appeal, is correctly given. It may be noted that in this case the question was argued, whether at the date of that glebe being designed—viz., 1803, it was not still necessary to have the concurrence in the designation of the "honest men," referred to in the statute, and in the decision in the case of *Steele*, M. 5131. This has, of course, been disregarded in later practice.

XUM

The English Doctrine of Consideration in Contract. By RICHARD BROWN, Professor of General Commercial Law, St. Mungo's College, Glasgow. Glasgow: W. HODGE & Co.

This pamphlet, which is a republication of the introductory lecture in the Law Faculty of St. Mungo's College, delivered by Mr. Brown, in 1890, will well repay perusal. The first part of it contains a clear and interesting statement of the English doctrine of consideration; the second part makes a spirited attack on it, on the ground that it has failed to attain its avowed object of preventing persons entering rashly into inconsiderate engagements, mainly because all idea of adequacy of value has been dropped out of the notion of consideration, and it has, therefore, become an illusory and technical form. These, and other objections to the doctrine are well stated, and few will be disposed to dispute Mr. Brown's conclusion that it would be matter of regret if the rules as to consideration should ever be received into Scots law.

The Administration of the Public Health Act in Counties, being a Supplement to SKELTON'S HANDBOOK OF PUBLIC HEALTH. By JOHN SKELTON, C.B., LL.D., Advocate, Secretary to the Board of Supervision. WILLIAM BLACKWOOD & SONS, Edinburgh and London, 1891.

Since June of last year, various questions have arisen in connection with the reconstruction of the Public Health Local Authorities in the Counties under the Local Government (Scotland) Act of 1889; and in order to settle these questions opinions have been obtained from counsel and decisions have been given by the Board of Supervision. As a brief record of these opinions and decisions should be made generally accessible, Mr. Skelton has published a small Supplement of 33 pages to his former work. The Supplement will be found very useful by those for whom it is specially intended. The subject most fully considered is that of Medical Officers and Sanitary Inspectors, their appointment and their tenure of office. The opinions on the mode of levying assessments for the purposes of the Public Health Acts, and the rights and duties in connection with existing Hospitals, are explicit and instructive. Mr. Skelton also gives a useful summary of the Housing of the Working Classes Act of last year

Notes on Decided Cases.

Creation of Real Burdens by General Disposition and Notarial Instrument.—The question, whether a real burden can be effectually created by a clause declaring a legacy to be a real burden, occurring in a general disposition and settlement, without a particular description of the lands conveyed—the burden being properly narrated in the notarial instrument containing such particular description and duly recorded has now been determined in the negative by the decisions in *Williamson* v. *Begg*, 14 R. 720, and *Muirden* v. *Cowie*, 18 R. 706. As these cases represent the opinions of both Divisions, the question may be assumed to be finally set at rest so far as the Scottish Courts are concerned.

The question is one of great importance, and in offering an adverse criticism of these judgments one must do so with diffidence. But this is lessened by the fact that the speeches of the judges who took part in the decisions disclose considerable differences of opinion, and also show that in the second case the judgment proceeded more upon the authority of *Williamson's* case, than as approving the principles upon which the Lord President based his decision of that case. Practically the only two judges who offer independent opinions are the Lord President on the one side, and Lord Rutherfurd Clark, who dissented from the judgment, on the other. The facts of the two cases are not precisely similar, as in *Williamson* the amount of the legacy and the legatee's name were not mentioned in the notarial instrument, which merely made a general reference to the burdens in the general disposition; whereas in *Muirden* the notarial instrument specifically set forth the clause declaring the annuity to be a real burden, and specified the amount and the name of the annuitant. Notwithstanding this difference we think it clear from the Lord President's opinion in *Williamson* that his lordship would have come to the same conclusion in *Muirden's* case. His views may be summed up in these three propositions—(1) A declaration that a legacy is to be a real burden, occurring in a general disposition not specifying the lands, cannot create a real burden, because for the creation of such a burden there must not only be a precise specification of the amount and nature of the burden, but a precise specification of the lands over which it is to be created. A declar-

ation in the above-mentioned terms cannot receive effect because it cannot be followed by infeftment, and the only way of effectually constituting a real burden is to insert a provision to that effect in the dispositive clause, so that it shall enter the sasine. (2.) The legacy cannot be made a real burden in the notarial instrument. Schedule L. (Consolidation Act, 1868), gives the form of a notarial instrument in favour of a general disponee, and contains the following provision:—"*If the deed be granted under any real burden or condition on qualification add here*, but always under the real burdens, &c." But this only applies where a real burden is created by the deed; and as (proposition 1) no real burden can be created in a general disposition, the direction contained in the schedule has no application. (3.) Section 19 of the Consolidation Act, which authorises the adoption of the procedure provided by Schedule L., applies not only to the case of a general disposition which does not contain a full description of the lands, but also to a general disposition which particularly describes the lands conveyed. In the latter case only can a real burden be created by recording a notarial instrument in the form of Schedule L. "Accordingly the words of the schedule (above quoted) are completely satisfied by referring them to such notarial instruments as may be executed in creating real burdens where these have been properly constituted."

As regards the first of these propositions: no one will dispute that a real burden cannot be constituted by a general disposition in which the lands are not particularly set forth, or that it is of the essential nature of such a burden that particular lands must be burdened. This admission, however, does not advance the argument one way or the other, because a burden cannot be effectually made real by any disposition, special or general. It is only by the infeftment taken on the disposition that the burden can be made real. If, however, it is meant that a burden is ineffectual, and cannot be made real, because it is contained in a general disposition, we must respectfully demur. We do not think there is any authority for saying that the deed imposing or declaring the burden must contain a specific description of the lands to be burdened; on the contrary, it is thought that principle and precedent alike establish that the essentials of a real burden are complied with by the infeftment itself narrating the particular lands to be burdened.

As regards propositions (2) and (3),—Under the old law, as a general disposition and settlement contained neither obligation to infeft nor precept of sasine the title of the grantee could only be completed by raising an action of constitution and adjudication against the heir of the granter, and thereafter obtaining from the superior a charter of adjudication which would convey the particular lands adjudged. The change made by the Consolidation Act of 1868 (re-enacting the Titles to Land Act, 1858) is to allow the title to be completed by a notarial instrument (Schedule L.) proceeding upon the general disposition itself,—the instrument particularly describing the land, as evidenced by the disposition to the granter and his infeftment,

which must be produced to the notary. This notarial instrument being recorded, the grantee is declared by the 19th section to be in all respects in the same position as if a conveyance of the lands contained in such notarial instrument had been executed in his favour by the granter of the general disposition. Now, by Schedule L it is provided, that "*if the deed be granted under any real burden, condition or qualification, add here,* but always under the real burden." The words, "the deed," plainly refer to the general disposition, and the real burdens and conditions under which it is granted are to be inserted in the instrument. The reason for this is obvious. The burdens can be effectually made real only by appearing upon record so that the grantee may be infeft in the lands only under the conditions which the granter imposed. Taking the schedule and the section together, therefore, we find that the burdens, under which the general disposition is granted, are to be inserted in the instrument, and that when that instrument is recorded, the grantee is to be in the same position as if a conveyance of the lands in the instrument had been executed in his favour. The result is that a disponee receives a special conveyance of the lands under burdens, and these, by appearing upon record are effectually made real.

Lord Rutherfurd Clark puts the matter very clearly:—"The statute provides a form of completing a title in conformity with the general conveyance, or in other words, under the burdens and conditions therein contained. The statutory form of making up titles would be very incomplete if it did not. Hence, in my opinion, the conveyance which the statute conceives to be executed in favour of the grantee is a conveyance under the burdens contained in the general disposition. But an infeftment on such a conveyance makes these burdens real. The notarial instrument is equivalent to a conveyance of specific lands under the burdens contained in the general conveyance, and the recording of the instrument completes the infeftment on the supposed conveyance."

The answer made by the Lord President to this argument, founded on the language of the schedule, is that no real burden can be created by a general disposition, and there is, therefore, none to insert in the instrument. Now, taking the words strictly, it is certainly true that a general disposition cannot create a real burden; but neither can a specific disposition. It is only by the infeftment which follows that a real burden can be created, and if the words are to have any meaning at all, they must refer to burdens *declared* in the general disposition to be real, and which are to be effectually *made* real by being narrated in the notarial instrument and appearing on the record. A burden in the disposition cannot be said to be a real burden, although what is meant is, that when the infeftment, of which the disposition is the warrant, has been duly taken, then the burden will be real. That the words "real burden" are so understood, is shown by the remarks of the Lord President himself: "Accordingly, the words of the schedule . . . are completely satisfied, by referring them to

such notarial instruments as may be executed in creating real burdens where these have been properly constituted." If these words were to be taken literally and strictly they would be difficult to understand, for why should a notarial instrument be executed in creating a real burden, which has been already properly constituted? If it has been properly constituted already, how can it be created? The meaning of his lordship, no doubt, is, that burdens duly declared real in a proper disposition, and which afterwards appear on record, will be real burdens. The provision in Schedule L, therefore, clearly intends that burdens which are declared in the general disposition to be real, will, when inserted in the notarial instrument, which is afterwards duly recorded, be real.

Again, is there sufficient ground for the view expressed by his lordship, that the words of the schedule above quoted refer only to burdens imposed by a general disposition, which contains a particular description of the lands, and that only in such a case does the statute contemplate a real burden being created by general disposition and notarial instrument thereon recorded. There seems to be nothing in the section or schedule to warrant such a limitation. The section provides that "when a person shall have granted a general disposition of his lands . . . whether such general disposition shall extend to the whole lands belonging to the granter, or be limited to particular lands belonging to him, with or without full description of such lands," it shall be competent to record a notarial instrument in the form of Schedule L. These words are perfectly general, and apparently refer to all general dispositions. Accordingly, Schedule L provides an instrument by which infeftment may be taken on all general dispositions, subject to the burdens therein.

We cannot help thinking, with deference, that the Lord President's opinion proceeds on a misconception of the nature of a real burden and its essentials. This was perhaps caused by his dealing separately with the disposition and the infeftment thereon; whereas, for the constitution of any real burden, by special or general disposition, these must be taken together. The strictness insisted on in the constitution of a real burden, is intended for the protection of singular successors in the lands, and it is therefore required that whatever burdens are to affect the lands purchased, should be disclosed by the register: hence the register must clearly show what lands are burdened, in whose favour, and to what extent. If the recorded infeftment disclose this, is there any authority for saying that the burdens to be real must be imposed in a deed which itself narrates the particular lands to be burdened? In disclosing these, all the conditions of a real burden are satisfied, provided there has been produced to the notary, a proper warrant for the insertion of the real burden in the instrument, and, in the case of a general disposition, the granter's infeftments, particularly describing the lands to be burdened.

The view contended for is certainly that which has been understood in practice as effected by the 1868 Act (re-enacting the Act of 1858). Pro-

fessor Montgomery Bell (Lect. ii. 939) says: "Professor Menzies recommended the special disposition, as affording a convenient mode of making provisions for the granter's wife and younger children, real and preferable burdens on the estate. This may now be done by means of the general disposition and notarial instrument, the former declaring the provisions to be real burdens in usual form." In *Storeys* v. *Paxton*, 6 R. 293, the competency of creating a real burden in this manner was clearly assumed on the bench.

The above observations have been made on the assumption (on which the opinions of both the Lord President and Lord Rutherfurd Clark proceed) that prior to 1858 a real burden could not be created by an instrument of Sasine proceeding directly on a general disposition, there having been produced to the notary, along with the general disposition, the granter's own infeftments. But is it clear that this could not have been done? If the general disposition were a disposition and settlement it certainly could not, for that deed contained no obligation to infeft, or precept of sasine, and the disponee, therefore, could not directly feudalise his title thereunder. The reason for this probably was, that as under our ancient law a precept of sasine fell by the death of the granter it would be useless to insert it in a deed which only came into operation at his death; and although this has for long been altered, the old style omitting the precept has been retained.

But if it were simply a general disposition in vague terms, as of all the granter's lands, with an obligation to infeft and a precept of sasine equally indefinite, it rather appears that the disponee could have obtained a real right directly, by expeding on the general disposition an instrument of sasine specifying particularly the lands which came under the general description, as evidenced by the infeftments of the granter produced to the notary. The competency of this is recognised in many works of conveyancing. Thus Professor Menzies (Lect. p. 562) says, "The precept must either in itself, or by implied reference to another part of the deed, define the lands of which possession is to be given. It is not indispensable that there be a full description, or, indeed, any specific description. But the lands must be so indicated that they can with certainty be ascertained, and they must be identified in the act of infeftment. Thus a conveyance of 'all the lands belonging to me,' with a precept of sasine ('equally indefinite') is a sufficient transmission and warrant of infeftment provided my infeftments be produced to the notary in order to ascertain and identify the lands." So also Hendry's Manual (Mowbray's, 3rd Ed. 274), "A real right could be completed on a general conveyance of all lands belonging to the granter, if it contained a precept of sasine, by producing to the notary the granter's infeftments, provided they were read and published and stated in the instrument." (See also Menzies, p. 580; Bell's Conveyancing, i. 589; Bell's Prin., sec. 876; Ersk. Inst. ii. 3, 33, note 45.)

But whether a disponee could or could not directly acquire a real right

in lands by sasine upon a general disposition, there is clear authority that a real burden could be effectually constituted by an infeftment particularly describing the lands, passed upon the deed which imposed the burden, and in which the lands were described in general terms, if the particular lands embraced in the general description were proved by production to the notary of the granter's infeftments, and this was stated in the sasine. In *Graham's Crs.* v. *Hyslop*, August 3, 1753, M. 49, A granted a heritable bond for 1000 merks to B, obliging himself to grant infeftment in "all and sundry lands, heritages and others whatsoever pertaining to me, wherever the same lie in this kingdom." The bond contained a precept of sasine in the same indefinite terms. "The Lords were all of opinion, that a precept to give infeftment in lands described in general to belong to the granter of the precept is a sufficient warrant to give infeftment in every particular tenement, which, by production of the granter's infeftment, is vouched to come under the general description." This decision was referred to on the Bench as authoritative in *Hill* v. *Duke of Montrose*, 11 S. 958, and is approved of in the works already mentioned.

It is matter for congratulation that Lord Rutherfurd Clark should have expressed in an able opinion his dissent from the judgment in *Muirden's* case. It is submitted that the views expressed in his opinion are sound, and it is also thought that in view of the above-mentioned authorities there is room for contending that prior to 1858 a real burden could have been created by an instrument of sasine passed upon a general conveyance containing an indefinite precept.

J. Graham Stewart.

Conditio si institutus sine liberis decesserit.—*Hall and Others* v. *Hall*, 1891, 18 Rett. 690.—By a majority of the whole Court it has been decided, in the case of *Hall and Others* v. *Hall*, 18 Rett. 690, that the *conditio si institutus sine liberis decesserit* is inapplicable to the case of a bequest by a sister uterine in favour of her brothers and sisters uterine, though the provision be made to them as a class. The Lord Justice-Clerk and Lord Young—the only dissenting judges—differed from the rest of the Court on the ground that the extension of the doctrine to such relatives was within the principle already recognised in similar cases: the former judge characterising the decision of the majority as "a direct upsetting by the whole Court of what has been already in principle decided, and, in my view, rightly decided." In spite of this strong expression of opinion, it will hardly be regretted that the judgment of the Court has set precise limits, so far as the question of relationship is concerned, to the application of the doctrine of the *conditio*—a matter upon which there was considerable difference of opinion, if not even conflict in decision. Practically the result is that the legal presumption, which, the will being silent on the

subject is allowed to operate in favour of the children of a legatee who has predeceased the testator, is confined to descendants and nephews and nieces where the testator has placed himself *in loco parentis* to the beneficiaries. Evidently the Court felt that the only alternative to so confining the scope of the *conditio* was to make it universal, and thus practically rescind the rule that a legacy lapses by the predecease of the legatee. And that, even in its curtailed application, the *conditio* is not looked upon with great favour, is evident from the following passage in the judgment of the majority:—"According to the principles of construction of wills which are now received and acted on, it is probable that we should not feel justified in introducing such a rule at all, if the question were now to arise for the first time, for it must be admitted that the effect of the *conditio* is to import into the will something which is not there, although this is accomplished by means of an artificial rule of construction."

But the doctrine of the *conditio* has long had a fully recognised position in Scots jurisprudence. Unknown to the law of England, this principle of construing the wills of near relatives has been borrowed, like so many other Scots legal principles, from the civil law. In Roman law, however, the *conditio* had a more restricted application than it has latterly been allowed in Scotland; for it would appear to have been confined to purely family settlements, and it is at least doubtful whether it was extended to the wills of collaterals. The *ratio* on which the *conditio* was read into a testament may be shortly stated. In making provision for his family (his children or grandchildren), the testator is actuated by what is known as the *pietas paterna*; and in so leaving his property, he is only fulfilling a natural obligation towards those so related to and dependent on him. If his will makes no mention of the children of his own children or grandchildren, to whom strangers are substituted, the law presumes that the substitution is to take effect only in the event of the institutes dying childless. The testator might in express terms have disinherited such descendants; but, as he has not done so, the law interprets his intention as consonant with his duty *ne videatur alienas successiones propriis anteponere*. This method of construing a family settlement was first introduced into Scots law in 1738 by the case of *Montrose Magistrates* v. *Robertson*, M. 6398; and was first extended to the construction of the wills of those collaterally related in 1781, by *Mackenzie* v. *Holte's Trustees*, M. 6602. The doctrine does not in any case apply unless the bequest be of the nature of a family settlement—*i.e.*, the beneficiaries must be called generally as a class; or, if they are named, they must, *de facto*, form a class. Selection of individuals from among a class, *delectus personæ*, excludes the *conditio*. An additional restriction emerges in the case of collaterals, to the effect that the testator in making the settlement must have placed himself *in loco parentis* to the beneficiaries. Several cases have been before the Court bearing on the question as to what relatives—not being ascendants—may comply with this requirement. In *Christie* v. *Paterson*, 1822, 1 S. (N E.) 198, the *conditio*

received effect where the legatees were cousins of the testator; but the judgment in this case was disapproved of by the Lord President in *Rhind's Trustees* v. *Leith*, 1866, 5 M. 104; while *Blair's Executors* v. *Taylor*, 1876, 3 R. 362, and more particularly the case of *Hall*, excluding the wills of brothers and sisters from the scope of the *conditio*, have decided that the only collaterals who, for the purposes of this doctrine, may be *in loco parentis* to legatees are uncles and aunts.

W. HUNTER.

Is the Law of Deathbed Abolished?—*Hay* v. *Coutts' Trustees*, 16th December, 1890, 18 R. 244. The rubric of this case contains the "question whether the Acts 34 & 35 Vict. c. 81 abolished the law of deathbed with respect to written instruments only and not with respect to gifts made without writing?" This ancient law seems hard to kill. The Act of 1871 was certainly passed for the purpose of putting for ever to silence the heir who, with his challenge *ex capite lecti*, had for centuries disturbed the peace of families. But the unquiet spirit apparently will not lie. In 1872 Lord Gifford expressed the opinion that "the present case (that of *Gray* v. *Gray*, 10 M'P. 854) is probably the last action of reduction on the ground of deathbed," and the Lord Justice-Clerk (Lord Moncreiff) agreed with him. The writer remembers that a late well-known Professor of Conveyancing in the western University was wont in dealing with this law to tell his class that he himself was personally acquainted with the last possible case of a challenge *ex capite lecti*. According to his computation it ought to have occurred about the year 1878. But it never appeared, or at all events never found its way into the reports. Perhaps the law of deathbed took effect upon the heir before he had time to take action upon it. But there have been lately reported two examples of attempted resort to this long-disused privilege—the cases of *Wilson* v. *M'Bride*, 10th December, 1890, 18 R. 218, and that quoted at the head of this note. In the former, Lord Rutherfurd Clark ventured to observe—"I suppose this is the last judgment that will be pronounced upon the law of deathbed." But only six days afterwards, in *Hay* v. *Coutts' Trustees*, the other Division of the Court were called upon to deal with an argument upon the question whether the law of deathbed was abolished or not. Lord M'Laren pointed out, that whether by accident or design the Act of 1871 does not in its enacting words contemplate the case of a gift made without writing and reducible on the head of deathbed, and went on to say that should such a case arise for consideration "we shall have to consider whether the enacting words can receive aid from the preamble, or whether they must be taken as they stand." The scope of the old law, as stated *obiter* by Lord Watson in the Lauderdale Peerage case, was "according to all the authorities limited in its application to deeds, instruments, and writings executed

in lecto to the prejudice of the heir *alioquin successurus*" (10 Appeal Cases, p. 754). His lordship, however, was there dealing only with the suggestion, based on the doubts of Stewart, Riddell, and the late Lord Fraser, that the challenge applied to a marriage on deathbed legitimising bastard issue. In *Wyllie* v. *Macbride* an action of reduction of a deathbed deed was dismissed on the ground that the pursuer, who as heir alleged herself to be prejudiced by it, did not come within the scope of the ancient law inasmuch as, although she was heir of the granter, her interest was in reality that of beneficiary under the ante-nuptial marriage contract of her parents. In giving judgment, Lord Rutherfurd Clark observed, "The pursuer is heir . . . but I think that her interest as such is excluded by the marriage-contract." It is difficult to see how the heir can be prejudiced, *qua heir*, except by a deed, instrument, or writing. In no other way can his ancestor deprive him of the heritage. If he does so *in liege poustie*, the heir cannot complain, and if he does so *in lecto* the heir's challenge is abolished by the statute. The giving by an ancestor, while on death-bed, of his whole moveable property to a third party might seriously affect the heir taking the heritage, supposing the ancestor's debts to exceed its value. But the consequence to the heir of his ancestor's creditors taking the heritage from him, would not be an injury to him in his character of heir, but the result of his representing the ancestor generally, and being (if he chose not to renounce the succession), responsible for his debts. The case of *Hay* v. *Coutts' Trustees*, was an attempt to set aside a gift of money made on death-bed, in furtherance of a deed of trust also executed within sixty days of death. In sustaining the gift, the Court held it to form part of the transaction expressed in the deed, and, therefore, protected from any challenge, by the enactment of 1871. It seems to have been assumed that but for that Act such a challenge would have been competent. It is true there was no heritage in the case. The claim was by one of several children, not for her rights as heir, but for a share of *legitim*, and the real question raised was, therefore, not as the Lord President said, whether the gift was a fraud upon the *legitim*, but whether the statute applied to writings made *in lecto aegritudinis*, to the prejudice of the children claiming *legitim*. If the scope of the ancient law of death bed was limited to the case of the heir in heritage complaining of a disposition of heritage to his prejudice, the case of *Hay* v. *Coutts' Trustees* was not, strictly speaking, a case of "death-bed" at all. There is still a law of death-bed—in this sense that a man cannot defeat *legitim*, or rather, diminish the *legitim* fund, or affect the *jus relictæ*, except *in liege poustie*, and except in so far as the disability has been removed by the statute of 1871. The cases under this head, mentioned by Lord Fraser, H. and W. ii. 1006 7, may not be all of them affected by the Act of 1871. As his Lordship points out (p. 1008), the terms of the Act do not (and, indeed, were not meant to), "reach every transaction challengeable by reason of

its being done on death-bed, as is shown by some of the foregoing decisions.

It was certainly Lord Fraser's view that the statute applied only to dispositions of heritage. The decision of *Hay* v. *Coutts' Trustees*, however, shows that he was wrong, because the statute was there applied to a writing relative to cash, and protecting a cash payment. In the same way the principle would probably be applied to such cases as that of the indorsation of bills (Milroy, Hume, p. 285), or the assignation of a moveable bond (*Pyrie* v. *Ramsay*, Stair, iii. 4 24). But the question put by Lord M'Laren, and distinguished in *Hay* v. *Coutts' Trustees*, would remain—viz., whether the statute applies to gifts of moveables without writing; or, as Lord Stair puts it, "the gift of money by the defunct out of his own hand on deathbed." He says, "the will of the defunct is restrained in this respect," and the gift is null. Therefore, the donee must return the money, and it is not merely a question of distribution of the estate *intra familiam*. It is probably not usual to speak of the children entitled to *legitim* having a right to reduce *ex capite lecti*. But the case put above is obviously a real exception to the power of disposition of moveable estate *inter vivos*. Of course, testaments do not affect *legitim*; and there is also a doctrine, based on the case of *Millie* v. *Millie*, 5 Pat. App. 160, that fraudulent contrivances *inter vivos—i.e.*, where the alienation of moveables is not a *bonâ fide* alienation and transfer, but a collusive transaction where the property truly remains with the father, do not affect *legitim*.

The occurrence, however, of a true challenge by an heir in heritage of a deathbed deed is somewhat surprising at this time of day, and suggests the query whether after all another may yet be possible. It was rendered competent, in *Wilson* v. *M'Bryde*, by the fact that since the death of the ancestor the heir had been in minority. It is just possible that there may be in Scotland yet another heir prejudiced by the execution upon death-bed of a deed by his ancestor dying before 16th August, 1871, and who has as valid a reason for having as yet delayed to bring his action.

Contributory Negligence.—*Florence* v. *Mann*. 28 S.L.R. 215; 18 Rett. 247. In an action of damages against a hotel-keeper for injuries received by falling down a hoist, the jury returned a verdict—"Find for the pursuer, but, in respect of there being contributory negligence on the part of the pursuer, assess the damages at £300." This verdict was set aside on the ground that the jury were not entitled, after finding contributory negligence, to find for the pursuer at all; or, after finding for the pursuer, to reduce the damages in respect of contributory negligence. This is clearly correct law, the verdict, according to the established meaning of contributory negligence, being either self-contradictory or ambiguous; but a good deal may be said, on principle, in favour of the view taken by the jury (*Greenland* v. *Chaplin*, 5 Ex 243).

Whether a pursuer should be prevented from recovering, or whether the amount of damages should be reduced on account of contributory negligence, must depend on the definition adopted of that legal fact. The judgment in *Florence* v. *Mann* proceeded on the definition given by Lord Wood in *M'Naughton* v. *Caledonian Railway Co.*, 21 D. 160, that, in order to bar the right to recover, the pursuer's fault must be the direct cause of the accident, and if it is indirect or remote, then it is to be discounted altogether; or, as more neatly expressed by Wharton (§ 133),—"Contributory negligence is a bar, because the plaintiff, by intervening, breaks the causal connection between the injury received by himself and the defender's negligence." The same view has been taken in England, where the plaintiff is held not entitled to recover if his negligent act has been the "proximate cause" of the accident. The disability of the pursuer to recover is a logical result of this view, for he cannot complain of an injury which he has caused himself, and which, but for his own act or omission, would not have happened. Even if the injury complained of is regarded as the joint act of the pursuer and the defender, the same result is established upon the principle that there is no relief *inter delinquentes*. If C is injured by the joint negligence of A and B, and recovers from A, then A cannot enforce relief against B, and it makes no difference that A sues for an injury done directly to himself.

But another view may be taken. The injury to the pursuer would not have happened but for the negligence of the defender—that is, the fault of the defender has been a cause of hurt to the pursuer. If, therefore, fault implies liability, why should not the defender bear his share of the loss which he has contributed to cause? Lord Wood, whose *dictum* was accepted as the leading authority, obviously inclined to the view that there might be liability on the defender for part of the loss, and that the pursuer would have to bear the other part on account of his own fault. Speaking of the fault of the injured party when only remotely connected with the accident, he said, "In a legal view, it (the pursuer's fault), in the question of the abstract right to damages, forms no part of the case—the negligence of the defenders alone being held to have caused the injury—whatever weight it may be entitled to in assessing the amount of damages." The rule of Admiralty law also, that where both ships are in fault for a collision, each can recover half its loss from the other, supplies a strong argument in favour of equitable apportionment of damages. The method of division there adopted is a rough-and-ready one, and one not suited to the facts of most cases of damages for personal injuries. In these cases, as a rule, only the pursuer has been injured, and apportionment would mean that part of the loss lay where it fell, that is on the pursuer, and that part was paid by the defender. The Admiralty rule, however, recognises the principle that liability should always follow fault, and is consistent with the maxim, *injuria non excueat injuriam*. Sir F. Pollock (Torts, 2nd ed., p. 412), indeed, calls this divided

XUM

liability, "a rule of thumb, which frankly renounces the pretence of being anything more," and dismisses it as hardly worth consideration. But, in treating contributory negligence as a complete bar to recovery, he does not give any satisfactory reason for holding, as he may be said to hold, that one act of negligence should negative liability for another. Lord Justice Lindley, on the other hand, while recognising the law to be against divided liability, says that the reason is not easily discoverable, and that he does not profess to understand why damages should not be apportioned (The *Berneira*, L.R. 12 P.D. 58, 89).

The hardship of depriving a person injured by the fault of another of all remedy because his own act has been the proximate cause of accident, is too apparent to allow the disability to be universally enforced. It is unfair that an act of negligence which ordinarily would result in no danger or in trivial damage to the doer, should be converted into the cause of a serious catastrophe by the negligence of another, and that the latter should escape all liability. Thus, in an early English case, a person who supplied the direct cause of injury by trespassing in a garden where spring guns had been set without notice, was held entitled to recover against the proprietor (*Bird* v. *Holbrook*, 4 Bing. 628). If the act of the defendant has been illegal, negligence on the part of the plaintiff, although the proximate cause of injury, will not bar him from recovering damages (*Barnes* v. *Ward*, 9 C.B. 420). Such a case, however, would be a proper one for mitigation of damages. And so in the case heading this note: suppose that the hoist had been left so unprotected as to be a source of danger to people who were not negligent, and suppose that the pursuer, being drunk, fell into it, would not a jury be more justified on principle in finding a modified sum of damages in favour of the pursuer, than in finding for the defender, and in effect allowing him to plead that his negligence might have caused an accident to pursuer, however careful, but that the pursuer happening to be careless, he (defender) was exonered from all responsibility.

A. T. G.

COLONIAL CASE

Dewan Ran Bijai Bahadur Singh v. *Rae Jagabpul Singh* (1890, L.R. 17. Ind. App. 173).—In this case—an appeal from the Court of the Judicial Commissioner of Oudh—the only interesting, if not the only important, point was the sanity or insanity of one Jagmohan, the father of Jagabpul Singh. The intrinsic difficulty of solving this vexed problem was accentuated as usual by a sharp conflict of medical evidence. Two civil surgeons, Dr. Bond and Dr. M'Reddie, had examined Jagmohan. The former came to the conclusion that he was paralysed, but not insane. The latter was strongly of a contrary opinion. The District Judge adopted the view of Dr. Bond. The Judicial Commissioner, on appeal,

preferred the evidence of Dr. M'Reddie. The Privy Council have now reverted to the conclusion arrived at by the District Judge.

It may be instructive to summarise the grounds on which the decision of the Judicial Committee is based. 1. None of Jagmohan's family before or at the critical period had ever treated him as insane. 2. Dr. M'Reddie states in examination-in-chief that Jagmohan "could make no difference between right and wrong, and could not manage his affairs." On cross-examination, he admitted, "I judged his insanity from the appearance of his face, and from his not replying to or understanding questions put to him, and from my experience of insane people." The fact that a paralysed man did not answer questions was obviously a somewhat weak premise from which to draw the conclusion that he did not know right from wrong (*Cf. Harrod* v. *Harrod*, 1854, 1 K. and J. 4), and this faulty inference properly told against the weight of his evidence. 3. "One of the principal reasons," said the late Sir Barnes Peacock, who delivered the judgment of the Judicial Committee, "why, according to the Hindu law, insanity excludes from the right of inheritance is that an insane person is incapable of performing religious duties, and because he is incapable of consenting to the marriage of daughters and other matters of that sort. But in this case this gentleman performed them all." We have here the latest judicial recognition of the modern doctrine that before insanity can be said to vitiate an act, it is necessary to consider—(*a*) the nature of the act, and (*b*) the capacity required to perform it (*Cf. Grove* v. *Johnston*, 24 L.R., Tr. 352).

A. W. R.



Sir James Plaisted Wilson, K.C.M.G.

XUM

ASSIMILATION OF THE LAW OF SALE.

THE Sale of Goods Bill, to which reference has already been made in this *Review* (Vol. I., p. 310), was passed by the House of Lords at the end of last session. It must again go through the Upper House as well as the House of Commons, but the attention given to it by the Standing Committee will not be lost upon its future progress. The bill has not yet been adapted to Scotland, but amendments with this object were intimated for the third reading by Lord Watson, which, although too late for consideration by the House, will form valuable groundwork for adaptation in a future session.

The bill, like its predecessors dealing with bills of exchange and partnership, is a codifying measure, and, while it might be possible to codify, even in one statute, two diverse legal systems, it requires no argument to prove the convenience of assimilation when it can be accomplished without counteracting disadvantage. But in the case of sale special difficulties present themselves of which it is the object of the present paper to offer a possible solution.

The primary difficulty in adapting the bill to Scotland meets us at the very threshold. The first clause, in its opening words, defines a contract of sale of goods as "a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer." By a reference to the 19th and 20th clauses it will be found that a "sale," as distinguished from an "agreement to sell," is made dependent on the intention of parties to be inferred from certain specified rules. The first of these is as follows:—"When there

is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment *or the time of delivery*, or both, be postponed." This is clearly at variance with the principle of Roman and Scottish law, "*traditionibus dominia rerum non nudis pactis transferuntur.*"

Our habit in Scotland has been to view the distinction with satisfaction. We have been told by the heads of our Court that "the expediency of the rule derived from Rome cannot be disputed," and that our system is "simple," and the other "inextricable." Our Scottish doctrine is spoken of as "wholesome," while the English rule is termed a "labyrinth," and a "mass of refinements from which we are fortunately saved." It may therefore shock some legal prejudices to find that Lord Watson proposes to assimilate by yielding the Scottish principle. There are, however, strong reasons for such a course, and to some of these attention may be profitably directed.

In the first place, it may be objected to the Scottish principle that it is inconsistent in its application. Thus, in the matter of risk, the property of a specific article sold does not pass to the buyer upon the completion of the contract, yet the risk does. The seller remains owner, but he is no longer subject to one of the most ordinary incidents of ownership, recognised as such in both Roman and Scottish law, *res perit domino.* The separation of the risk from the property was not established in the time of Stair, who debates both sides of the question, with an evident preference for continuing the risk with the ownership. Pothier furnishes an argument which has often been taken as a key to the apparent inconsistency, and which, being adopted by Bell in his Commentaries, is sometimes attributed to Bell himself. It is said that risk is connected with obligation, not with transference, and that the seller, being debtor for delivery of a specific subject which perishes without his fault, must be freed from the obligation, now become impossible;

while the buyer remains bound for the price, under an independent and *possible* obligation. But the solution is not satisfactory. The obligations of the contract are mutual. If the seller, without fault, is unable to implement his obligation to deliver, it may be a good reason for rescinding the contract, but it cannot be a reason for freeing one of the contractors and holding the other bound. The English rule as to risk, although in its result the same as our own, proceeds upon the consistent and intelligible principle, that the property being that of the buyer, the loss must fall upon him as owner.

But further, the doctrine, if strictly applied, would lead to inequitable results. A purchaser who had paid for the goods would, upon the bankruptcy of the seller, before delivery, be compelled to accept a dividend in lieu of both goods and price. In certain contracts, the common law furnished an equitable relaxation of the rule, on the authority of *Simson* v. *Duncanson's Creditors* (1786) M. 14,204, but in the general case no remedy was provided before the Mercantile Law Amendment Act of 1856. *Simson's* case applied to a ship on the stocks, paid for by instalments, and although the House of Lords has recently thrown doubt upon its authority, the case itself held undisputed sway in Scotland for nearly a century. Lord Justice-Clerk Moncreiff speaks of it in 1881, as a "leading case, establishing the doctrine that payment of the first instalment will suffice to transfer the property;" while Lord Young characterises the result as "a recognised and familiar exception, the expediency or utility of which is obvious." Lord Neaves, at an earlier period, was still more emphatic, holding the opposite doctrine to be "contrary to common sense, and shocking to common justice." It will be observed that in such cases, the agreement partakes of the nature of an executory contract, which, even in England, does not generally pass the property, and it is curious to notice that the exception, which is also applied in England, is founded upon our Scottish case. Wilkinson, in his "Law of Shipping," published in 1843, in describing the

exception, speaks of it as "originating, I believe, in the north of England, *if not in Scotland*," and, in footnote, he gives *Simson's* case as his authority. The Mercantile Law Amendment Act, as interpreted by the House of Lords in *M'Bain* v. *Wallace & Co.* (1881), 8 Rct. H.L. 106, has deprived *Simson's* case of any special value. Until this decision, the case of a ship on the stocks was treated as one of *actual* delivery, and therefore outwith the statute; so much so, that in *M'Bain's* case, the Mercantile Law Amendment Act was never once referred to in the Court of Session in either argument or judgment. In the House of Lords it was all the other way. *Simson's* case was doubted, and judgment was founded solely upon the statute. Perhaps, however, their Lordships could have dealt more tenderly with the old decision, had an alternative remedy not presented itself.

The Mercantile Law Amendment Act has introduced a more general remedy. According to Lord Blackburn, "it renders the distinction between the right of the purchaser and that of one to whom, under the law of England, the property has passed, merely a nominal distinction, not affecting their substantial rights." But the fact that a statute was required for this end, greatly detracts from the value of the original principle, and if we have yielded every substantial distinction, is it worth while contending for the principle itself?

It may be doubted, however, if Lord Blackburn is justified in treating the Mercantile Law Amendment Act as producing practical assimilation in the matter of passing the property. In *Wyper* v. *Harveys* (1861), 23 Dunlop, 606, the whole scope and intention of the Act was defeated, and a subvendee, who had paid the price, was deprived of the goods, because of a general balance due to the seller by the first purchaser, who had become bankrupt. The case was decided by the whole Court, and led to an immense expenditure of legal, almost metaphysical, acumen. It cannot be said to have been badly decided, since the use in the Act of the words

"arrestment" and "intimation" without special interpretation, implied the ordinary effect, which, in the circumstances of the case, the common law attached to the terms. But it is not to be supposed that anything more was meant by the framers than a species of public notice to guard against surprise. If the anomaly of a seller arresting in his own hands was intended to prevent his being placed at a disadvantage with other creditors of the buyer arresting the same goods, the provision was entirely unnecessary. The seller's right of retention for a general balance was not affected by the statute, except in a question with a subvendee, and therefore, no other arrestment could enter into competition. What was wanted was a "limited or modified substitute for the seller's former broad right of retention," to the effect that, if no intimation were given of the sub-sale, the seller might exclude the newly created right of the subpurchaser. For this purpose any kind of public act or notice on the part of the seller would have sufficed, but, by employing the machinery of a diligence, the Act brought the so-called arrestment into collision with the vesting and reductive clauses of the Bankruptcy Act, with most confusing results. In *Wyper's* case the majority of the Court, concurring with Lord Justice-Clerk Inglis, attempted to drive the terms "arrestment" and "intimation" into exact conformity with the common law and the bankruptcy rules, thus creating a series of, what his Lordship himself calls, "legal puzzles." For some of these he found a solution, but others, which he did not touch upon, lay behind, and would have emerged had the circumstances of the case been slightly different.

In another class of cases, of which *Distillers Company (Limited)* v. *Russell's Trustee* (1889), 16 Ret. 479, may be taken as a type, the Scottish principle has operated to prevent a progressive extension of the common law which public policy seems clearly to demand. Constructive delivery of goods in the seller's own warehouse by means of a delivery order, and publicly notified by an entry in the warehouse books, would form an effectual transfer in England, but has

been denied effect in Scotland, even where the seller acts as a warehouse-keeper, and charges the buyer with warehouse rent. The soundness of these decisions may be doubted; but, if legally justified, they furnish an argument for alteration of Scottish law, and assimilation to that of England.

In other branches of the law of sale the spirit of legal progress has freed itself from the retarding influence of the Scottish doctrine. The cases referred to involve suspensive conditions excluding the ordinary effect of delivery as a symbol of change of ownership. Such conditions are fully recognised and explained by our Institutional writers, but they have been looked upon with great suspicion by our Courts. Effect has been denied to them because of supposed injustice to the creditors of the buyer, arising from what has been termed a "conventional hypothec" in favour of the seller for the unpaid price. To this it may be answered, in the words of Lord Ivory, that "creditors are bound to know that many honest occasions of possession may arise in the daily complications of human affairs, without any radical title of property on which they would be safe to rely as a ground of credit."

Suspensive conditions generally belong to one or other of three classes—(1.) There may be a condition, not suspensive of the sale, but suspending the ordinary effect of delivery of possession until the price has been paid. Of this *Hogarth* v. *Smart's Trustee* (1882), 9 Ret. 964, furnishes an example. (2.) A similar suspensive condition may be complicated by a stipulation for periodical payments called hire,—the property not passing until the last payment has been made. This is known as the hire-purchase system. In neither of these cases has the purchaser the option of returning the article and being freed from payment of the price. The condition, therefore, is not suspensive of the contract. (3.) There may, however, be a condition really suspensive of the sale, as in the contracts known as "Sale and Return," and "Sale on Approbation." In each of these delivery is

given without change of ownership and without any binding contract until the occurrence of some further event.

The progress of the law in relation to "hire-purchase" may be seen by contrasting the case of *Cropper & Co.* v. *Donaldson* (1880), 7 Ret. 1108, with that of *Murdoch & Co., Limited* v. *Greig* (1889), 16 Ret. 396. In regard to "Sale and Return" a similar contrast may be instituted between *Brown* v. *Marr, &c.* (1880), 7 Ret. 427, and *Macdonald* v. *Western* (1888), 15 Ret. 988. In *Brown* v. *Marr*, Lord Justice-Clerk Moncreiff supplied, in four articulate propositions, his view of the characteristics of the contract of "Sale and Return." These, however, are founded on the assumption of a resolutive rather than of a suspensive condition, and as applied to this particular class of contracts they were clearly overruled by the subsequent case of *Macdonald*.

The difference of principle in regard to passing the property bulks so largely among the obstacles to assimilation, that only a passing reference can be made to minor points. Prominent among these is the *actio quanti minoris*, which is permitted in England, but is not recognised in Scotland. Its exclusion is occasionally spoken of, even in legal circles, as resulting from the doctrine of tradition, but the presence in the Roman law of the same doctrine, alongside of both the *actio quanti minoris* and the *actio redhibitoria*, proves that the necessity for delivery does not necessarily exclude the buyer's alternative remedies.

Lord Watson proposes assimilation by introducing the *actio quanti minoris* into Scotland, and there is much to be said in favour of the proposal. The non-recognition in Scotland of the action has been called "a traditionary maxim of the law," yet the absence of the remedy often occasions inconvenience, especially where the subject of sale has been partially used, or has been changed in its nature, before discovery of the defect forming the breach. Instances might be cited where the rule excluding the action has been inconsistently applied or altogether ignored, while in some cases the parties have taken the matter into their own

hands, by submitting to arbitration on the lines of English law.

It only remains to point out two particulars in which Lord Watson's proposals are of doubtful expediency. The first does not affect any principle, but may be of some importance in practice. Sections one to five of the Mercantile Law Amendment Act, Scotland, 1856 are to be repealed, but no provision is made for the re-enactment of the power to a seller to arrest in his own hands. It may be said that if goods sold but undelivered belong from the date of the contract to the buyer, it follows that the seller can arrest these goods just as he could any other property of his debtor. Where, however, a radical change such as this is contemplated, it appears safer to make the right of arrestment the subject of express provision. We have seen that under the Mercantile Law Amendment Act the seller's right of arrestment was a mere form. The seller had no occasion to arrest in the ordinary sense, because he continued to hold the higher right of retention. But the proposed alteration of the law will deprive him of this right, except by way of a lien for the price, and hence it is necessary that he should be placed on a footing of equality with other creditors of the buyer.

Again, Lord Watson proposes to add the following subsection to the clause defining sale: "In Scotland this clause shall only apply to out and out sales, and shall have no application to sales which are intended, either directly or indirectly, to constitute a pledge or security." The effect would be to exclude from the operation of the bill an *ex facie* absolute sale, which, by a collateral agreement, is intended to operate a security. This clearly alters the law as laid down by the House of Lords in *M'Bain* v. *Wallace & Co.*, *ubi sup*, and might lead to serious confusion. Lord Watson's object is to assimilate the Scottish practice to that of England, where such a security cannot be constituted except by a registered bill of sale. But we have nothing corresponding to the bill of sale, and the English statutes on the subject have not

worked so smoothly as to make their importation desirable. In questions concerning passing the property and constructive delivery, one rule would hold in the case of an out and out sale, and another in the case of a sale intended as a security. The advantage is not clear, and, in the absence of good reason to the contrary, it seems safer to allow the law as to securities to remain on its present footing.

RICHARD BROWN.

THE EDICT *NAUTÆ CAUPONES STABULARII.*

PERHAPS no portion of the civil law has been more closely copied in the common law of modern States than that chapter of the Prætorian edict which fixed the responsibilities of shipmasters, innkeepers, and stablers, in respect of the property of travellers. It lies at the root of the Scots law of reparation and of the English law of bailments, so far as applicable to these and other persons in the like exceptional position of trust, and it forms the starting-point of the many modern developments of the law of carriers. Speaking of its adoption into the law of Scotland, Stair says: "The evident expediency thereof cannot but make it acceptable anywhere, where the least respect is had to the civil law;" and Erskine is still more emphatic in a passage in his Institutes (iii. 1. 28) that has been often quoted with judicial approval: "It is, with some variations, adopted into our law." Substantially the same liabilities have from a very early period been recognised in English law as attaching to this class of bailees, as may be readily seen from a reference to the celebrated cases of *Calye* and *Coggs* v. *Bernard.*(*a*) Lord Holt rested his judgment in the latter case entirely on the authority of Bracton; but we are now in a position, thanks to the labours of Professor Güterbock and others, to form some idea of the great debt which Bracton (and through him the common law of England) owes to the Roman law, which reached and influenced him through his training in the school of the Glossarists, and his familiarity, in particular, with the writings

(*a*) Smith's Leading Cases, I. p. 132; *ibid.* p. 201, and notes.

of Azo. Judging from internal evidence alone, we should have little difficulty in reaching the same conclusion as Mr. Justice Brett: "It is obvious, therefore, that Bracton, or English judges before him, adopted into the English the Roman law."(*a*) The Edict has also been incorporated into the French and German codes, in the former case mainly through the authority of Pothier, in the latter through the influence of the long chain of civilians who have maintained unbroken to the present day the ascendancy of the Roman system.

The original of so many copies would, in any case, be an interesting subject of study; but a reading of the judgments in the case last cited will serve to show that the Edict possesses something more than academic interest, and that a correct understanding of its meaning and scope may upon occasion prove of much practical importance. As a step in this direction, I have endeavoured to give an accurate, and at the same time readable, translation of the short titles relating to this subject in the Digest, adding the original text for convenience of reference, and some necessary explanations at the end of each fragment. The development of the principles here laid down by Ulpian, Paul, and Gaius, might readily be illustrated from the vast stores of British and American case-law, but this task must be deferred to another occasion.

DIG. IV. ix.—*Nauta Caupones Stabularii ut recepta restituant.*—

Fr. 1 (*Ulpian on the Edict*).

Ait Prætor: Nautæ, caupones, stabularii, quod cujusque salvum fore receperint nisi restituent, in eos judicium dabo.

The prætor announces: "I will grant an action against shipmasters, innkeepers, and stable keepers if they fail to restore to any person any property of which they have undertaken the safe-keeping."

1. Maxima utilitas est hujus edicti quia necesse est plerumque eorum fidem sequi, et res custodiæ eorum committere. Ne quisquam

1. This edict is of the greatest advantage to the public, who must very often rely on the honesty of these persons, and entrust articles

(*a*) *Nugent* v. *Smith*, 1 C.P.D. 19.

putet graviter hoc adversus eos constitutum: nam est in ipsorum arbitrio, ne quem recipiant, et nisi hoc esset statutum, materia daretur cum furibus adversus eos quos recipiunt coeundi, cum ne nunc quidem abstineant hujusmodi fraudibus.

2. Qui sunt igitur, qui teneantur, videndum est. Ait prætor 'nautæ.' Nautam accipere debemus eum qui navem exercet: quamvis nautæ appellantur omnes, qui navis navigandæ causa in nave sint: sed de exercitore solummodo prætor sentit: nec enim debet, inquit Pomponius, per remigem aut mesonautam obligari, sed per se vel per navis magistrum; quamquam si ipse alicui e nautis committi jussit, sine dubio debeat obligari.

3. Et sunt quidam in navibus, qui custodiæ gratia navibus præponuntur, ut ναυφύλακες et dietarii. Si quis igitur ex his receperit, puto in exercitorem dandam actionem, quia is, qui eos hujusmodi officio præponit, committi eis permittit, quamquam ipse navicularius vel magister id faciat, quod χειρίσοφον appellant. Sed et si hoc non exercet, tamen de recepto navicularius tenebitur.

4. De exercitoribus ratium, item lyntrariis, nihil cavetur: sed idem constitui oportere Labeo scribit, et hoc jure utimur.

to their custody. It must not be imagined that this rule bears harshly upon them, for it is of their own choice they admit anyone, and but for this regulation they would have opportunities of acting in concert with thieves against the travellers they take in, seeing that as the law stands such knaveryis not unknown.

2. We must consider first who are held responsible. The prætor uses the word *nautæ*, by which we should here understand the employer of the vessel, though it is usually applied to all who are on board to help in working it; however, it is only the person who trades with the vessel that the prætor has in view. For, as Pomponius remarks, he ought not to be bound by a rower or petty officer, but only by his own acts or those of the captain: though if things are entrusted to one of the crew by his orders, he is certainly responsible.

3. Certain officers on a ship are appointed for the very purpose of superintendence—*e.g.*, pursers and stewards. If a person in such a position receives goods, I am of opinion that an action should be granted against the employer of the ship, because by appointing him to such duties, he sanctions the delivery of things into his charge, even though it is the practice of the employer or master to signal with his hand. Even if the sign is not given, still the employer will be liable for what has been received.

4. There is no express provision with reference to raftsmen and boatmen; but Labeo thinks the same rules should be applied, and that is the law now in observance.

5. Caupones autem et stabularios æque eos accipiemus, qui cauponam vel stabulum exercent, institoresve eorum. Ceterum si qui opera mediastini fungitur, non continetur, utputa atriarii et focarii et his similes.

6. Ait Prætor: 'quod cujusque salvum fore receperint:' hoc est, quamcumque rem sive mercem receperint. Inde apud Vivianum relatum est ad eas quoque res hoc Edictum pertinere, quæ mercibus accederent, veluti vestimenta quibus in navibus uterentur, et cetera quæ ad cottidianum usum habemus.

7. Item Pomponius libro trigensimo quarto scribit parvi referre, res nostras an alienas intulerimus, si tamen nostra intersit salvas esse: etenim nobis magis, quam quorum sunt, debent solvi: et ideo si pignori merces accepero ob pecuniam nauticam, mihi magis quam debitori nauta tenebitur, si a me eas suscepit.

8. Recipit autem salvum fore, utrum si in navem res missæ ei adsignatæ sunt: an, etsi non sint adsignatæ, hoc tamen ipso, quod in navem missæ sunt, receptæ videntur? Et puto, omnium eum recipere custodiam, quæ in navem illatæ sunt, et factum non solum nautarum præstare debere, sed et vectorum,

5. In the same way we are to understand the words *caupones* and *stabularii*, both of those who keep an inn or stabling and of their managers; but unskilled slaves, such as hall porters, cooks, and the like, are not included.

6. The prætor's words are: "anything of which they have undertaken the safe-keeping:" that means any article or merchandise whatever which they have received. Hence an opinion is reported by Vivian that the edict covers everything which is accessory to the merchandise, such as clothes for use on the voyage and other everyday necessaries.

7. Pomponius further remarks in his thirty-fourth book that it is of slight consequence whether the effects we put on board belong to us or to others, provided we have an interest in their safe-keeping; for it is we and not the owners who should be paid for them. Hence, if I have lent money on a maritime risk, and have got goods in pledge for it, the shipmaster will be responsible to me and not to my debtor, if he has received these goods from me.

8. As regards the guarantee of safe custody, is it a condition that the charge of the goods be handed over at the time of shipment, or are they considered to be accepted without any special delivery from the mere fact that they are placed on board? In my opinion the master undertakes the safe-keeping of everything put on board his vessel, and must answer for the acts of the passengers as well as of the crew.

Fr. 2 (*Gaius on the Provincial Edict*).

Sicut et caupo viatorum. — So an innkeeper is answerable for the acts of travellers.

Receptum.—This word, which implies an informal engagement resting on a bare agreement, seems to be the link by which this title is connected with the preceding one, D. iv. 8, *De receptis: qui arbitrium receperint ut sententiam dicant;* it there denotes the agreement between the arbiter and the parties to an arbitration, under which the former binds himself to give a decision in conformity with the terms of the submission (*compromissum*). The expression used in the Edict, *quod salvum fore receperint*, suggests that originally an express guarantee by the innkeeper or shipmaster was necessary to create liability; but the commentary on the Edict makes it plain that the jurists always held a tacit guarantee to be implied in the bare admission of the traveller and his goods into the premises, apart from any undertaking to be responsible, and even without any express intimation to or acceptance by the master or his authorised representative. It seems to have been enough that they knew, or should have known, that certain effects had been brought into the ship or inn (§§ 2, 3, 8), *cf. Chisholm* v. *Fenton*, M. 9241. On the other hand, if the goods have been specially entrusted to the shipmaster or any officer whose duty it is to take receipt of goods, they are at his risk from that moment, and he is liable for loss or damage on shore as well as on board.

§ 1. *Ne quem recipiant.*—The apparent "antinomy" between the statements of Ulpian here and in D. 47. 5. 1. 5 (*nec repellere potest iter agentes*) has greatly taxed the ingenuity of the civilians. Most of them, like the Glossarists, would remove the contradiction by understanding the present passage of setting up the business of innkeeper: they are free to refuse every one—*i.e.*, not to start the trade; but if they choose to go into it, they cannot complain of the strict conditions under which the law obliges them to carry it on. The rendering of the Basilica seems to support this view: ἐν

αὐτοῖς δέ ἐστι μηδένα ὑποδέξασθαι. In the other passage, Ulpian lays down the same rule which is firmly established with us —that the innkeeper, if there is room in the inn, is absolutely bound to admit all travellers who present themselves, and who are prepared to pay for their entertainment, and to conduct themselves properly. See the English case of *R.* v. *Ivens*, 7 C. & P. 213.

The weight of recent authority, however, favours a different interpretation, according to which Ulpian's first statement means that the innkeeper has a legal right to select his guests, while the second adds, quite consistently, that in the interests of his business he cannot turn away travellers: what is permissible in theory is impossible in practice. So Huschke, Puchta, Vangerow (§ 648, note 1). I prefer the first explanation, both on grammatical grounds, and because, in the absence of any distinct authority to that effect, I am not inclined to believe that a Roman *caupo* or *nauta* had a right to say to one person, you shall come into my inn or ship, and to another, you shall not. These *obiter dicta* are too slight and too ambiguous to support so doubtful a proposition.

§ 2. The term *nauta* is used both in the general sense of sailor, and in the special sense of *exercitor*—*i.e.*, owner or charterer of the ship. I have retained the familiar "shipmaster" to represent *nauta* in its restricted sense, though the person it denotes may be neither owner nor captain. *Exercitor*, which I have rendered "employer of the ship" (following the usage of our writers on shipping, though the phrase is not a happy one), is the proper name for the person liable under the edict. It is thus defined in D. 14. 1. 1. 15:—"Exercitorem eum dicimus ad quem obventiones et reditus omnes perveniunt, sive is dominus (*owner*) navis sit, sive a domino navem per aversionem conduxit (*charterer*), vel ad tempus vel in perpetuum." It means any one who carries on the transport of goods and passengers with a ship, whether his own or chartered, and whether commanded by himself or by a captain (*magister*).

The *mesonauta* was a sort of boatswain. He ranked between the pilot and the rowers.

The exact meaning of χειρέμβολον, which occurs nowhere else, is not certain. It may have been, as Faber says, a signal of assent given by the captain or other officer in charge to the seamen when they took in cargo, or admitted a passenger. The point here seems to be, that though it had been the practice in some way to signify approval of their acts, yet the omission of the sign will not relieve the master of liability, the true ground of his responsibility being the powers he had permitted the men to exercise.

§ 5. *Stabularius* was often used of one who kept an inn and stabling in connection with it, "innkeeper and postmaster" being as common a combination as with us.

Institor means a manager or agent appointed by the proprietor of a business to conduct it or attend to some of the details.

§ 6. The strict obligation of the innkeeper or shipmaster under the edict was not limited to the luggage which a traveller takes with him, but extended to goods which are handed over to be forwarded alone.

§ 8. The text does not indicate how the extent of the loss had to be proved, but the gloss says it was by the oath *in litem* of the party. We may infer, however, from hints in other titles, that this "dangerous and clumsy" mode of proof was not sufficient *per se*, though it might be admitted to supplement evidence *aliunde* as to the possession and value of the articles claimed. The credit of the party, and the question whether it might be presumed from his station in life that he would have with him things of the value in question, would also be proper points for consideration. The matter has not advanced much further in our own law, *cf.* Bell's Com. i. 500.

Fr. 3 (*Ulpian on the Edict*).

Et ita de facto vectorum etiam Pomponius libro trigensimo quarto

As regards liability for the acts of passengers, Pomponius expresses

scribit. Idem ait, etiamsi nondum sint res in navem receptæ, sed in litore perierint, quas semel recepit, periculum ad eum pertinere.

1. Ait Prætor: 'nisi restituent, in eos judicium dabo.' Ex hoc edicto in factum actio proficiscitur. Sed an sit necessaria, videndum: quia agi civili actione ex hac causa poterit: si quidem merces intervenerit, ex locato vel conducto: sed(*a*) si tota navis locata sit, qui conduxit ex conducto etiam de rebus quæ desunt agere potest: si vero res perferendas nauta conduxit, ex locato convenietur: sed si gratis res susceptæ sint, ait Pomponius depositi agi potuisse. Miratur igitur, cur honoraria actio sit inducta, cum sint civiles: nisi forte, inquit, ideo, ut innotesceret Prætor curam agere reprimendæ improbatis hoc genus hominum: et quia in locato conducto culpa, in deposito dolus duntaxat præstatur; at hoc edicto omnimodo qui recepit tenetur, etiamsi sine culpa ejus res periit vel damnum datum est, nisi si quid damno fatali contingit. Inde Labeo scribit, si quid naufragio, aut per vim piratarum perierit, non esse iniquum, exceptionem ei dari. Idem erit dicendum, et si in stabulo, aut in caupona vis major contigerit.

the same opinion in book 34. He also observes, that where the master has once accepted things, the risk is on him, though they have not been taken on board, but have perished on shore.

1. The words of the edict are: "I will allow an action if they fail to restore," and it grounds an action on the case. But we have to consider if it is required, because an action at common law is maintainable in this behalf: if money has passed, action will lie on the contract of letting or hiring; that is, if the whole ship has been let, the charterer can sue on the contract of hire for anything deficient; whereas if the master has contracted to carry goods, he will be liable on the contract of location: but, if he has taken charge of the goods gratuitously, Pomponius says, the action on deposit will lie. He is, therefore, surprised that the prætor has introduced a special action, there being actions under the common law available: unless, as he suggests, the prætor did it to prove how zealous he was to put down the dishonest practices of that set of persons: and also, because in the contract of letting and hiring there must be fault, and in deposit there must be wilful wrong to create liability; whereas, under the edict, he who has received goods is responsible in every case for any loss or damage that ensues, though there be no fault on his part, except it be due to a *damnum fatale*. Accordingly, Labeo remarks, that

(*a*) Mommsen conjectures *scilicet* for *sed*—a probable emendation.

2. Eodem modo tenentur caupones et stabularii, quo(*a*) exercentes negotium suum recipiunt: ceterum si extra negotium receperunt, non tenebuntur.

where the loss is caused by shipwreck, or an attack by pirates, the master must in fairness be allowed to plead this defence; and the same is true of inevitable accidents occurring in a stable or an inn.

2. Innkeepers and stablers are liable in like manner when they take charge of anything within the line of their business; but if they receive something outside its scope, they will not be liable.

3. Si filius familias aut servus receperit et voluntas patris domini intervenit, in solidum erit conveniendus. Item si servus exercitoris subripuit vel damnum dedit, noxalis actio cessabit, quia ob receptum suo nomine dominus convenitur. Sin vero sine voluntate exerceant, de peculio dabitur.

3. If a son in power or a slave has received a thing with the express consent of his father or master, these last will be liable *in solidum*. If a slave of the employer of the vessel is guilty of theft or wrongful damage, a noxal action is incompetent, because his master is personally liable on the ground that he has undertaken the charge. But if the son or slave acts without authority, the liability of the father or owner will be limited to the amount of the *peculium*.

4. Hæc autem rei persecutionem continet, ut Pomponius ait, et ideo et in heredem et perpetuo datur.

4. The object of this action is the restoration of the effects, as Pomponius says, and it therefore transmits against heirs, and does not suffer prescription.

5. Novissime videndum, an ejusdem rei nomine et de recepto honoraria actione et furti agendum sit: et Pomponius dubitat: sed magis est, ut vel officio judicis vel doli exceptione alterutra esse contentus debeat.

5. Lastly we have to consider whether the injured party can bring both the prætorian action *de recepto* and the action for theft in respect of the same thing. Pomponius has doubts on the point; but the better opinion is that he should be restricted to the one or the other, either at the instance of the judge, or of the other party pleading fraud.

(*a*) *Quo* is the reading of the best MS., but *qui* (F^3) seems to give the sense required.

§ 1. Before the promulgation of the Edict, the liabilities of *nautæ*, &c., were dependent on the ordinary principles of contract recognised in the civil law. The legal relation between them and the persons they received would vary according to the circumstances of the case. In the ordinary case the guest or passenger paid for certain services—*i.e.*, there was a contract of location; or else he paid nothing, and the host or carrier was then in the position of a depositary; or the contract might take the form of mandate; or, lastly, one of the innominate contracts might arise from the fact that a counterprestation was made consisting of something other than money. Whatever form the relation assumed, an action at common law was available on certain conditions. Why then was a new remedy required? Several considerations are suggested in the text:—(1.) The plaintiff in the *actio locati* must allege and prove fault (*culpa*), and in the *actio depositi* fraud (*dolus*); such an *onus* it would be often very hard for the traveller to discharge. His interest requires a prompt remedy; the edict therefore shifts the burden on to the shoulders of the defendant, and everything is presumed against him. Nothing but a demonstrable *damnum fatale*, or proof of negligence on the part of the traveller, will free him from his obligation to restore what he has received. From this point of view, the edict may be regarded as a statutory modification of certain contractual obligations in favour of the party most requiring the assistance of the law. The French Code adopts the principle that the deposit of a traveller's effects with the landlord of a hotel is a *dépôt nécessaire*, and should therefore be surrounded with such special protection as the civil law accorded to a *depositum miserabile*, made under stress of fire, shipwreck, or other calamity. (2.) Ulpian justifies the rigour of the edict more than once on the practical ground that the *nautæ* and *caupones* of his day were a dishonest set, and that their business gave them exceptional facilities for collusion with the professional thief. Horace and Martial make similar charges.(*a*) Some of the

(*a*) See especially Horace's description of the celebrated journey to Brundisium, Sat. i. 5. *Cf.* Martial, i. 57; iii. 57.

German civilians say that the modern hotel-keeper has improved, and the edict should therefore be reconsidered in his interest: surely such writers have not travelled far, either within the "Fatherland" or beyond it. The modern tendency has been all the other way—to extend the edict to the various forms of land transport—coaches, railways, and all common carriers.

Sine Culpa.—The plaintiff in an action under the edict is liable, even though he can show that there has been no fault or carelessness on his part. The recipient of the goods is said in the text to be liable for *custodia* (1 § 8, 5 pr.), and to bear the risk (4 pr.). *Custodia* in opposition to *culpa* denotes a special degree of vigilance, exceeding the duty of an ordinarily careful man. The custodiary is therefore absolutely responsible for theft and for every injury to the thing held by him, whether the wrongdoer be a servant, a fellow-passenger, or any other person, known or unknown, provided the theft or damage was not accomplished by means of pure accident, or such violence, as the most careful surveillance could not avert, *cf.* D. 19. 1. 31 pr., "*custodia adversus vim parum proficit.*"

Damnum fatale . . . vis maior.—These phrases, which are here used as synonymes, contain the only limitation of the unqualified responsibility of the person receiving the goods. There is some difficulty in fixing the precise meaning of the terms. *Vis maior* is exactly "the act of God" (*cf.* D. 19. 2. 25, 6: *Vis maior, quam Græci θεοῦ βίαν appellant*), and may be defined, in the words of Esher, M.R., as "an extraordinary circumstance which could not be foreseen, and which could not be guarded against" (*cf. Nugent* v. *Smith*, 1 C.P.D. 441). It includes natural events and other inevitable accidents (*casus quibus resisti non possit*, D. 13. 6. 18), and also physical compulsion by a third party. The principal texts from the *Corpus Juris* are cited by Voigt, Die xii. Tafeln, i. 431. n. 8.

As to what constitutes "inevitable accident," in modern law, see Erskine's Inst. iii. 1. 28; Bell's Com. i. 499; and

the cases of *Nugent* v. *Smith*, *supra*, and *Nitro-Phosphate Co.* v. *St. Catherine's Dock Co.*, L.R. 9 Ch. D. 503.

§ 5. According to the rule about the concourse of actions, stated in D. 44. 7. 32, and 50. 17. 130, we should conclude that there was no *consumptio actionis* as between two actions arising out of the same act of theft, the one concluding for restoration of the property, and the other for a penalty. But the gloss explains that this rule did not apply where the action for reparation did not arise at common law, but was based, as in this case, on the prætor's special jurisdiction.

Fr. 4. (*Paul on the Edict*).

Sed et ipsi nautæ furti actio competit, cujus sit periculo, nisi si ipse subripiat et postea ab eo subripiatur, aut alio subripiente ipse nauta solvendo non sit.

1. Si nauta nautæ, stabularius stabularii, caupo cauponis res receperit, æque tenebitur.

2. Vivianus dixit, etiam ad eas res hoc Edictum pertinere, quæ post impositas merces in navem locatasque inferentur, etsi earum vectura non debetur, ut vestimentorum, penoris quotidiani, quia hæc ipsa ceterarum rerum locationi accedunt.

The action of theft is maintainable by the shipmaster, because the risk of the thing is on him, unless he stole the thing himself and then has it stolen from him, or unless he is insolvent, when the theft takes place.

1. If shipmasters, stablers, or innkeepers receive things from others in the same trade, their liability is not affected.

2. Vivian has laid it down that the Edict covers things brought on board after goods have been shipped and entered, such as clothes and provisions, though freight is not charged for them, because such things are incidental to the contract to transport the goods.

The person who sued the penal action on theft must be one who had an interest in the thing not being lost (Inst. IV. 1. 15; D. 47. 2. 14). Obviously the shipmaster has such an interest, for he must restore the goods or compensate the owner. The owner of the goods, on the other hand, has not an interest so long as the shipmaster is solvent; but if he becomes insolvent, as the *periculum* is no longer his, the owner is entitled to bring the action.

Fr. 5 (*Gaius on the Edict*).

Nauta, et caupo, et stabularius mercedem accipiunt, non pro custodia, sed nauta ut trajiciat vectores, caupo ut viatores manere in caupona patiatur, stabularius, ut permittat jumenta apud eum stabulari: et tamen custodiæ nomine tenentur. Nam et fullo et sarcinator non pro custodia, sed pro arte mercedem accipiunt, et tamen custodiæ nomine ex locato tenentur.

The shipmaster, innkeeper, and stabler are paid, not for exercising watchfulness, but the shipmaster for carrying passengers, the innkeeper for allowing travellers to lodge in his inn, and the stabler for letting horses be put up in his stables; and yet they are liable for safe custody. It is the same with a fuller or a tailor; they are not paid for custody, but for their skill, and yet they are responsible under the contract of hire for safe keeping.

1. Quæcumque de furto diximus, eadem et de damno debent intelligi: non enim dubitari oportet, quin is, qui salvum fore recipit, non solum a furto, sed etiam a damno recipere videatur.

1. What has been said of theft must be taken to apply also to any damage done: for there can be no doubt that when one undertakes the safe keeping of a thing, he must be held answerable, not only for theft, but for deterioration.

As the remainder of the title goes into matters of procedure which are quite obsolete, and only demand our attention for the side lights thrown on the main topic, it will be convenient at this point to distinguish very shortly the various legal remedies referred to. This involves a reference to the title of the Digest (xlvii. 5), *Furti adversus nautas caupones stabularios*, and, as it is extremely short, and illustrates other points incidentally, I have appended it to the present title.

Up to this point only one action has been treated of—that which was technically known as the *actio in factum de recepto*. As we have seen, it was introduced by the edict against persons exercising the trades there specified; it was based on the bare admission of travellers and their effects, which was held to imply an obligation to answer not for negligence merely, but for every loss and damage which might have been avoided by a specially watchful care; and it concluded for the restoration of the effects, or,

in default, full compensation for the loss actually sustained. But, besides this, the Roman law allowed a penal action against the same persons for damage occurring on the premises through fraud or theft on the part of their employees. It was an *actio in factum quasi ex delicto* or *maleficio;* it was grounded on the fault committed by the master in employing dishonest servants; it was directed to the recovery of a penalty of double the value of the thing lost or damaged; and, being penal, it did not pass against heirs (see Inst. iv. 5. 3; D. 47. 5). The text numbered 7 in this title also appears to deal with the same or a very similar action. It is obviously quite a different action from the *actio de recepto*, and has only an incidental connexion with the edict at all. Ulpian discusses the *actio de recepto* in the fourteenth book of his Commentary on the Edict, and the penal action in the eighteenth. The juxtaposition of the two sets of excerpts in the present title is certainly confusing. Some of the chief differences between the two actions are—(1) that the action on the edict is reparative, and therefore transmits against heirs; (2) it lies for damage done by other travellers; and (3) it covers damage done on shore as well as on board, provided the goods have been handed over, whereas the reverse is true of the quasi-delictual action.

Lastly, as against the actual wrongdoer, the traveller had the following remedies:—*Actio furti, condictio furtiva, actio legis Aquiliæ*, according to circumstances. If he availed himself of any of these, he could take no further proceedings against the master of the ship or inn. (See *infra*, Fr. 6, § 4 and D. 47. 5. 1. 3.) If, on the other hand, he proceeded first against the shipmaster or innkeeper, and recovered damages, he was bound to cede to them his rights of action against the true delinquent.

Fr. 6 (*Paul on the Edict*).

Licet gratis navigaveris, vel in caupona gratis deverteris, non tamen in factum actiones tibi

Though you pay nothing for your passage by ship or your entertainment in an inn, still you will be

denegabuntur, si damnum injuria passus es.

1. Si servo meo in nave vel in caupona utaris et damnum mihi det vel furtum faciat, quamquam et furti actio et damni injuria mecum sit, hæc tamen actio, quia in factum est, etiam servi mei nomine adversus te competit. Idem dicetur, et si communis sit: tu tamen, quod mihi præstiteris ejus nomine, vel communi dividundo vel pro socio actione, aut si partem ejus vel totum conduxisti, etiam ex conducto habebis me obligatum.

2. Sed si damnum in eo datum sit ab alio, qui in eadem nave vel caupona est, cujus factum Prætor æstimare solet, non putat Pomponius ejus nomine hanc actionem utilem futuram.

3. In factum actione caupo tenetur pro his, qui habitandi causa in caupona sunt: hoc autem non pertinet ad eum, qui hospitio repentino recipitur, veluti viator.

4. Possumus autem furti vel damni injuriæ actione uti cum nautis, ut certi hominis factum arguamus: sed una contenti esse debebimus, et si cum exercitore egerimus, præstare ei debemus actiones nostras, quamvis ex conducto actio adversus eos competat exercitori. Sed si absolutus sit exercitor hac actione, deinde agatur cum nauta, exceptio dabitur, ne

allowed to bring the actions on the case if you have suffered any wrongful damage.

1. If you employ my slave in your ship or inn, and he steals from me or causes me wrongful damage, although I am answerable for theft or damage committed by him, yet I can bring the prætorian action on the case against you on account of my slave. The same principle holds if I am only part-owner of the slave. But if you have paid me anything on his account, you will have a claim upon me enforceable by the action for division of common property, or by the action on partnership, or on hiring, if you have hired his services, either totally or partially.

2. But if my slave has been wrongfully damaged by a fellow-servant, employed in the same ship or inn, for whose acts the master is regularly responsible under the ediet, Pomponius is of opinion that this action is not available on his account.

3. An innkeeper is responsible in the action on the case for all who make a stay in the inn; but he is not liable for one who is entertained in passing, as a traveller.

4. The action for theft or wrongful damage may be brought against all the sailors, in order to fix the act upon an individual: but the injured party must be satisfied with one action, and, if he goes against the employer, he is bound to cede to him his rights of action against the wrongdoers, notwithstanding that the employer has a competent action against them on

sæpius de ejusdem hominis admisso quæratur. Et contra, si de admisso unius hominis actum sit, deinde in factum actione agatur, exceptio dabitur.

the contract of service. If the employer gets *absolvitor*, and the sailor is sued after that, he can plead this defence, that the alleged offence of one person cannot be the subject of repeated actions. On the other hand, if the wrongdoer is first sued, and then the action on the case is brought, the same defence will be sustained.

Fr. 7 (*Ulpian on the Edict*).

Debet exercitor omnium nautarum suorum, sive liberi sint sive servi, factum præstare: nec immerito factum eorum præstat, cum ipse eos suo periculo adhibuerit. Sed non alias præstat, quam si in ipsa nave damnum datum sit: ceterum si extra navem licet a nautis, non præstabit. Item si prædixerit, ut unusquisque vectorum res suas servet, neque damnum se præstaturum, et consenserint vectores prædictioni, non convenitur.

The employer of the ship must answer for the acts of all his crew, whether freemen or slaves; and it is quite reasonable he should, seeing that he employs their services at his peril. His responsibility, however, is limited to wrongful damage done on board; for what the crew may do on shore he is not liable. Further, if he has given notice that all passengers are to take care of their own effects, and that he will not be responsible for loss or damage, and if the passengers have assented to the notice, no proceedings can be taken against him.

1. Hæc actio in factum, in duplum est.

1. This action on the case is for double damages.

2. Sed si quid nautæ inter se damni dederint, hoc ad exercitorem non pertinet. Sed si quis sit nauta et mercator, debebit illi dari: quod si quis quos vulgo ναυταπάταις dicunt, et huic tenebitur, sed hujus factum præstat, cum sit et nauta.

2. The employer, again, has no concern with damage caused by one member of the crew to another. But one who is at once a seaman and a trader, will be entitled to sue; and if a man "works his passage," the shipmaster is liable to him, and also for him, because he, too, is one of the crew.

3. Si servus nautæ damnum dederit, licet servus nauta non sit, æquissimum erit, in exercitorem actionem utilem dare.

3. If the slave of a seaman does wrongful damage, it is quite fair, though the slave is not one of the crew, that an action against the employer should be allowed in a form adapted to the case.

4. Hac autem actione suo nomine exercitor tenetur, culpæ scilicet suæ qui tales adhibuit: et ideo et si decesserint, non relevabitur. Servorum autem suorum nomine noxali duntaxat tenetur: nam eum alienos adhibet, explorare cum oportet, cujus fidei, cujus innocentiæ sint: in suis venia dignus est, si qualesquales ad instruendam navem adhibuerit.

5. Si plures navem exerceant, unusquisque pro parte, qua navem exercet, convenitur.

6. Hæc judicia quamvis honoraria sunt, tamen perpetua sunt: in heredem autem non dabuntur. Proinde et si servus navem exercuit et mortuus est, de peculio non dabitur actio in dominum nec intra annum. Sed cum voluntate patris vel domini servus vel filius exercent navem vel cauponam vel stabulum, puto etiam hanc actionem in solidum eos pati debere, quasi omnia, quæ ibi contingunt, in solidum receperint.

4. The employer is personally liable in the action under the Edict, because the engagement of such hands amounts to fault: accordingly he is not freed by their death. For his own slaves, however, he is liable only in the noxal action. The reason is that he is bound, when employing other people's slaves, to satisfy himself of their honesty and good character, whereas he may be excused for employing his own slaves on board his vessel as he finds them.

5. If several persons jointly employ the ship, each may be sued for his share.

6. Though these actions are of prætorian origin, they do not prescribe; but they will not be granted against heirs. Accordingly, after the death of a slave who traded with a vessel, the *actio de peculio* will not lie against his owner even within the year. But, if a son or a slave has the consent of his father or master to his managing a ship or keeping an inn or stabling, I think the father or master is liable to this action *in solidum*, because they have drawn every penny of the profits.

Fr. 7 pr. :—The most important point to be noted here is the power which the person receiving the goods had of contracting himself out of the strict liability which the law imposed on him, provided—(1) he gave public notice beforehand of the limits of the responsibility he was prepared to incur, and (2) the traveller was either made aware of this announcement before entering the premises, or at least assented to it when brought under his notice by allowing his effects to remain. As has been remarked already, this text must be

taken as directly applying only to the claim against shipmasters and others arising out of the delicts of their employees.

DIGEST XLVII. 5.—*Furti adversus nautas caupones stabularios.*

1. (*Ulpian on the Edict*).

In eos, qui naves cauponas stabula exercebunt, si quid a quoquo eorum quosve ibi habebunt furtum factum esse dicetur, judicium datur, sive furtum ope consilio exercitoris factum sit, sive eorum cujus, qui in ea navi navigandi causa esset.

An action is allowed against the employer of a vessel and the keeper of an inn or stabling, if a theft is alleged to have been committed by them or their employees, or if the employer of the ship or one of the crew has aided and abetted the theft.

1. Navigandi autem causa accipere debemus eos, qui adhibentur, ut navis naviget, hoc est, nautas.

1. By the crew we must understand the persons employed to sail the ship—that is, the sailors.

2. Et est in duplum actio.

2. The action is for twice the value.

3. Cum enim in caupona vel in navi, res perit, ex edicto prætoris obligatur exercitor navis, vel caupo ita, ut in potestate sit ejus, cui res subrepta sit, utrum mallet cum exercitore honorario jure, an cum fure jure civili experiri.

3. When a thing is lost in an inn or a ship, the Edict has made the innkeeper or employer of the ship responsible; so that the person whose property is purloined has the option of suing the employer by prætorian action or the thief at common law.

4. Quod si receperit salvum fore caupo vel nauta, furti actionem non dominus rei subreptæ, sed ipse habet, quia recipiendo periculum custodiæ subit.

4. If the shipmaster or innkeeper undertook the safe keeping of the thing, it is he, and not the owner of the stolen property, who can bring the action for theft, because his undertaking makes him answerable for the safety of the thing.

5. Servi vero sui nomine exercitor noxæ dedendo se liberat. Cur ergo non exercitor condemnetur, qui servum tam malum in nave admisit? et cur liberi quidem hominis nomine tenetur in solidum, servi vero non tenetur? nisi forte idcirco, quod liberum quidem hominem adhibens statuere debuit de eo, qualis esset, in servo vero suo igno-

5. The employer of the ship is freed from any claim for the acts of his slave by making a noxal surrender. Why should the employer not be liable for admitting such a rascal into his ship? Why, again, is he liable *in solidum* for the acts of a free man, and not for those of his slave? Perhaps the reason is that in engaging a free man he is bound

scendum sit ei, quasi in domestico malo, si noxæ dedere paratus sit. Si autem alienum adhibuit servum, quasi in libero tenebitur.

6. Caupo præstat factum eorum, qui in ea caupona ejus cauponæ exercendæ causa ibi sunt, item eorum, qui habitandi causa ibi sunt: viatorum autem factum non præstat. Namque viatorem sibi eligere caupo vel stabularius non videtur nec repellere potest iter agentes: inhabitatores vero perpetuos ipse quodam modo elegit, qui non rejecit, quorum factum oportet eum præstare. In navi quoque vectorum factum non præstatur.

to ascertain his character, but in the case of his own slave he is acquitted, just as when a household slave does some mischief, by offering to make a noxal surrender; but if he employs another man's slave he is responsible for him as though he were free.

6. An innkeeper is answerable for the acts of all the servants in the inn and the guests who lodge there; but not for travellers. For an innkeeper or stabler does not select travellers, and cannot turn away wayfarers: he does make some sort of selection of permanent guests by not turning them out, and so he should answer for their acts. Neither is there liability for the acts of passengers on a ship.

It may be observed, in conclusion, that these titles make no direct reference to the defence of contributory negligence on the part of the plaintiff, which figures so prominently in the modern cases. That is, doubtless, an accidental omission, for the doctrine of contributory negligence was thoroughly elaborated by the Roman jurists—*e.g.*, in the title, *Ad legem Aquiliam* (D. ix. 2). The stringency of the law against innkeepers and carriers is, of course, no justification for remissness or recklessness on the part of their guests and customers.

JAMES MACKINTOSH.

BILLS OF LADING: A MERCANTILE REVOLT.

THE mercantile community is in a state of unrest and discontent on the subject of Bills of Lading. The coming legislator, who shall solve this burning problem, and reconcile the two extreme sections, into which it has at present divided the commercial world, will be entitled to all the beatitudes of a peacemaker, and will earn the gratitude of chambers of commerce all over the country.

Everybody knows that a shipowner at common law is a carrier subject to the common law liability, which imposes upon him practically the responsibilities of an insurer of the goods he carries, protecting the owner of these goods against all accidents and risks. When this law first came to be established by the Roman Prætor in the Edict *Nauta, Caupones, Stabularii*, it was under conditions, as regards intercommunication between foreign countries, and even between portions of the same state, very different from those which now prevail. From time to time, shipowners have endeavoured to limit the liability so imposed upon them by having a variety of exceptions introduced into, or endorsed on, bills of lading, either directly or by reference to a charter party containing them. The purpose and effect of these exceptions were to relieve the shipowner from a large number of the risks incident to sea carriage. These exceptions have been found to cover not only loss from the natural and ordinary perils of the sea and navigation, but also loss caused by negligence or error of judgment on the part of the captain, officers, and crews of the ships, and loss from defects in, or injury to the machinery or equipment of

the vessel, as well as from her general unseaworthiness. It is also not uncommon to stipulate that the vessel in certain circumstances may deviate from her voyage, and over-carry a particular cargo or parcel of goods. The bill of lading which in primitive commercial times was little more than a simple acknowledgment of goods shipped, to be delivered to the consignee at the termination of the voyage—the act of God and the king's enemies, and the dangers of the seas alone excepted—has in these latter days attained a complexity of structure, and a subtlety of evasion from responsibility, more ingenious and comprehensive than grammatical or easily intelligible. Whenever the Courts have found a shipowner liable for injury to goods from some cause not covered by existing exceptions, the shipowning interest has displayed its fertility of resource in devising more and more comprehensive exceptions, till at length the mercantile community, as distinguished from the shipowning interest, has risen in revolt against what it considers to be intolerably oppressive and unreasonable conditions. Of course, it may be said that these are really matters of contract, and that merchants are free, when making their arrangements for shipment, either to accept or to reject the stipulations submitted to them. But on the other hand, it is urged that the shipowning interest is so solidly combined that it enjoys substantially the privileges of a monopoly. The merchants seriously contend that they are practically helpless; they have no alternative but to accept the conditions imposed by shipowners upon them for the carriage of their goods, at least in most of the general and ordinary trade routes. I have now before me several sets of bills of lading which expressly bear that the shipowner is to be free from almost every conceivable liability or risk, even where arising from gross negligence on the part of his servants, in short, freeing the shipowner from liability for every loss not directly resulting from his own personal act or default. The immunity claimed by owners under what is known as "the negligence clause" in a bill of lading was

under the consideration of the Court of Session in the recent case of *Adam* v. *Morris* (Nov. 26, 1890, 18 Rettie, 153). In this case certainly the owners did not escape liability, although the negligence clause in the bill of lading seemed wide enough to protect the owner against the captain's negligence or fault in all matters connected with the navigation of the vessel. The Court held "that although the accident in question was within the exceptions of the charter-party exempting the defenders from liability for 'the accidents of navigation, even when occasioned by the negligence' of their servants, yet, as the master had neglected the duty of at once communicating the fact of the accident to the pursuer, thereby depriving him of the power of preventing further damage by immediately removing the cargo," the owners were liable for the damage caused by the delay in communicating or failure to communicate. It will not be surprising, however, to find that the negligence clause in future contracts of affreightment and bills of lading has been further widened so as to cover even such *laches* on the part of masters as was exhibited in *Adams'* case.

The London Chamber of Commerce has, for a number of years past, been actively dealing with this question. At first, it was thought that in concert with the representatives of shipowners as a body, a model bill of lading might have been adopted, which, while protecting shipowners against ordinary and inevitable sea risks on the one hand and extravagant and unreasonable claims at the instance of merchants on the other, would still leave the incidence of liability upon the carriers for all the other consequences of the voyage more or less within their control, or within the control of their servants. It was found, however, that all such attempts were unavailing, and the conclusion was arrived at, that nothing short of legislative enactment would secure the object for which the merchants were contending. The final report of the Chamber on this subject contains the following paragraph expressing the

views and aims of Merchant Shippers in that Association :—

"With reference to the exemption clauses in bills of lading injuriously affecting the interests and common law rights of merchants and shippers, the committee feel convinced that if the merchants are unable to form a combination strong enough to combat and defeat the encroachment of shipowners, a legislative measure is the only practicable remedy for the just complaints, which have so long and so loudly been made. A conference between merchants and shipowners to agree on bill of lading conditions would not attain the end in view. In the first place, it was some time ago declined by the shipowners, and in the second, even if an agreement were arrived at, it would be binding on nobody. Individual shipowners or shipping companies would disregard the conditions agreed upon at their own will, and in a very short space of time, the existing state of matters would be resumed."

The draft bill which the London Chamber of Commerce now proposes to adopt with a view to its introduction into Parliament aims at providing a remedy for the complaints referred to in the paragraph just quoted. The bill contains a provision intended to preclude parties from contracting themselves out of its operation, and it proposes to enact that every shipowner shall be liable to the owner or consignee of goods, or the indorsee of a bill of lading, for all injury, damage, or loss "caused by the want of ordinary and reasonable care on the part of the shipowner, master, crew, servant or agent of such shipowner, and the *onus* of proving that such injury, damage, or loss as aforesaid was not occasioned by want of ordinary and reasonable care shall be on the shipowner." Speaking broadly, the object of the Bill is to establish the existing common law liability against shipowners in such a form as to prevent shipowners contracting themselves out of it, with the additional (and in marine matters very important) proviso, that in the event of injury or loss to goods the *onus* of proving that it did not

arise from want of ordinary and reasonable care should rest upon the shipowner.

The merits of this Bill do not depend so much on mere abstract principle as upon a balance of fairly equitable considerations. Carriage by sea, under even ordinary circumstances, is attended by more than the ordinary risks which are experienced on land, and it is subject to many special and peculiar conditions to which land carriage and the custody of goods on shore are not subject. Every one is more or less familiar with these contingencies of sea carriage, and looking to their character it seems only reasonable that the owners of goods themselves should bear the risk of such contingencies in general, seeing that the owner of the goods may protect himself against loss by insuring against perils and injuries arising from particular as well as from general average. The question really resolves itself into one of insurance. Shall the shipowner be, as at common law he substantially is, and as proposed by the present Bill he to a large extent would be, insurer of the goods carried against all ordinary contingencies, or shall he be carrier in consideration of freight alone? Or, on the other hand, shall the owner of the goods cover his risk, as he may by an insurance of both general and particular average, caused from any of the perils insured against? The balance of equity seems to be that if the owner provides a vessel reputed to be and having all the appearance of being seaworthy for the particular voyage and trade; selects a master and crew, with the ordinary care and diligence of a business man; and places these at the service of the owners of the goods he offers to carry, he can scarcely in equity be asked to undertake the risks and contingencies of a voyage in which there are so many elements of danger and loss beyond his control. It is not immaterial to keep in view in relation to this question that the legislature has already made pretty ample provision for the protection of general interests in relation to sea carriage. A shipowner is compelled to comply with a great number of regulations for the protection of the

public using the vessels, either for personal conveyance or for the carriage of goods, and the Board of Trade in the interest of the community is ever on the alert to see that these regulations and conditions are fully complied with. After all it comes to be very much a matter of the amount of freight for carriage *plus* insurance for risk, and this is a matter best left to free competition and the law of supply and demand.

It is unnecessary to deal in detail with the sections of the proposed Bill. Suffice it to say that they are framed throughout so as to throw the weight of liability and *onus* of proof upon the shipowner in respect of damage to goods carried, and that upon the general lines already indicated. Whatever may be the fate of the Bill, it is difficult to conceive that the legislature should by any hard and fast rules interfere so far with the freedom of contract as to prevent shippers and shipowners from making bargains for the conveyance of their goods on the one hand, and the use and service of their vessels on the other, upon such terms and conditions regarding the risks incidental to sea carriage as the exigencies of commerce, or the circumstances of any particular trade or voyage, may necessitate from time to time.

JAS. B. SUTHERLAND.

THE FRENCH BAR.

II.

THE Assize Courts and Correctional Tribunals form the grand arena of the advocate for the display of his forensic talent. Private prosecution is permitted in these Courts, so that between public and private accusations the members of the French Bar are very actively engaged with criminal business. Some of these suits are trivial in character, and, as British lawyers would say, of the nature of petty police offences. but whether petty or important, advocates are exclusively employed in their prosecution and defence.

In criminal trials, involving death or transportation, French advocates frequently lay the foundation of their reputation. The preliminary steps in such cases often rest with a junior member of the Bar; and if so, he has frequently the choice of his "senior." Then, it is his desire to secure the co-operation of an eminent "leader," under whose prestige he may, as he hopes, become better known. For example, in a famous case, the junior counsel, when enlisting the services of a distinguished advocate, thus appealed to him,—"Let me do only what is really necessary. I have no other ambition in this great case than to sit beside you, and may be, to spare you some fatigue." And it is an excellent trait of the French Bar that "seniors," even in cases where there may be no *honoraria*, come willingly to the aid of their younger brethren.

The characteristic features in the eloquence of the modern French Bar show great improvement upon the days of the Parliaments. The style is no longer heavy, interlarded with

platitudes, and set off with quotations from classical literature. The satire of Racine and the sarcasm of Voltaire proved the death of the old school of forensic speech, with its empty exordiums and unmeaning magniloquence. Cicero is credited with the opinion that, to such as had the gift of eloquence, a knowledge of law was unnecessary. Supported by such an authority, French advocates in former days, it is feared, under rhetorical display often concealed a lack of legal insight. But nowadays, the thorough mastery of the Codes and of the principles of Roman law, with which the Codes are saturated, is indispensable. Simplicity and precision of argument are the points upon which stress is placed, at least in civil debates, and the issues of a case, no longer hid in the mazes of rhetoric, are presented to the Court clearly, moderately, yet firmly and with effect. Eloquence still distinguishes the French Bar, but, free from artifices foreign to advocacy, it is an eloquence of purity and power, greater and stronger than marked its career in olden times. Soundness of argument is, as a French writer observes, at the root of good pleading, and it is in this respect that the French Bar, in the opinion of its own members, has made the greatest advancement. But eloquence is not attained without great pains, and, paradoxical as it seems, the barrister, betraying in Court no use of the midnight lamp, has perhaps laboured most upon his argument. It is not an uncommon custom among members of the French Bar to prepare in writing speeches intended for important cases. So, after the death of a leading advocate, the learned brother entrusted with his memorials, may from his MSS. discover the labour, undreamt of at the time, the deceased advocate had spent upon his best efforts. This practice of writing out an intended speech explains another observed among the "juniors" at the Parisian Bar of taking down the prominent parts of the address of some eminent pleader, not for reporting purposes, as might be imagined, but by way of acquiring forensic style.

French advocacy, after the example of Roman oratory,

is full of life and movement, to which tone and gesture are invaluable aids. The Criminal Courts have almost solely contributed to develop and emphasise this special feature. No more congenial sphere can well be imagined for its display than the floor of a *Cour d'Assises*. Leaving the civil forums, where jury trial is unknown, because distrusted by the law, the French advocate seems to enter into another atmosphere, when called upon to discharge the part of defending counsel in a criminal trial. Here, he is entirely unfettered, and has full scope for his oratory. Not upon unsentimental judges, but upon the emotional hearts of feeling jurymen, does he lavish his wealth of words and force of appeal. The records of the French Bar for centuries back are replete with orations of its greatest advocates. M. Berryer published in 1838 a collection of speeches regarded by him as models for imitation. From his collection, take as an instance the peroration from the *plaidoirie* of M. Berville in a prosecution against the popular poet Béranger and his publisher. This eminent advocate, in closing his address to the jury, pronounced by M. Berryer one of his most *glorieux modèles*, declaimed :—

"Tell me, gentlemen, is it not something scandalous to harass these men of genius [such as Béranger], to whom we are so vastly indebted, and by whom France will yet become famous? Is it not almost sacrilege to worry them with such prosecutions, to invade their hours of leisure, so profitable to all, to weary their life, and in the end to blast their genius? . . . Yet a day is coming when men will ask how France treated her poet, and what honours and laurels she conferred on Anacreon's peer! What will the answer be? Ah! gentlemen of the jury, for what purpose are we now before the *Cour d'Assises?*"

Here is another illustration taken from the *Mémoire* of M. Paillet, published in 1881. M. Paillet early left the provincial Bar of his native district for the Metropolis, where he crowned a distinguished career by receiving the appointment of Dean. One of his best, but as it happened unsuccessful,

efforts, was made in a celebrated prosecution against Marie Lafarge for the poisoning of her husband. His final words to the jury were :—

"Be brave, however, poor Marie, be brave! I am assured that Providence, who has so wonderfully sustained you throughout this long and trying ordeal, is not now going to forsake you. No, for you will yet be spared for the sake of your family, whom you love so dearly, as well as of all your friends; even for your very judges [the jury], you will live to be a signal witness of the justice of man, when your case has been entrusted to their pure hands, their enlightened minds, and their appreciative and compassionate hearts!!!"

These illustrations indicate the warm, passionate, and almost ecstatic character of French eloquence. They suggest the dramatic nature of its delivery. No English barrister addresses a jury after the style of these examples, which the French so aptly describe as *spirituel*. As illustrating the extraordinary zeal which comes so natural to French advocates, a ludicrously pathetic story is related. In pleading for a vagabond, whose guilt was clear and who ultimately confessed, the young advocate presented the jury with such a sad picture of the unhappy mode of the rascal's life as to draw from him the only hot tears, perhaps, he had ever shed, together with the exclamation—"Oh, dear! I never knew I was such an unhappy fellow!"

But the French system of jury trial in criminal cases cannot be considered as ideal. The presiding judge does not sum up the evidence to the jury. From this he was interdicted by a law in 1881, because of the abuse by judges of their power in charging "dead" against the accused. The jury, accordingly, are left to themselves between the contending appeals to their verdict by the *Ministère public* and the prisoner's counsel. No wonder such a system, while conducing to the most impassioned and effective oratory, often of high order, has a powerful influence for the prisoner on a susceptible French jury. Whatever the terms of their oaths, the jury may, and often do, return verdicts more

in accordance with their sentiments at the moment than with the evidence. Sensitive to a degree, and without judicial aid, the jury, by the fault of this system, virtually control the punishment as well as decide the guilt of prisoners. Considering the sentences meted out by the Penal Code too severe, they rather acquit than condemn, or at least shelter themselves under a verdict "with extenuating circumstances," which, in a capital case, for instance, reduces the punishment to penal servitude for life, or a term of years. Of these verdicts, the writer observed a flagrant instance. In a trial for murder, long premeditated, with intent to rob, and without a tittle of palliating, but, on the contrary, full of aggravating circumstances, the jury brought in this verdict,—"Upon the question of murder—Yes; premeditation—Yes; and theft—Yes." Yet to this verdict they added the rider of mitigating circumstances! Such an unfortunate feature of jury trial in France tends to have an injurious effect on advocacy, inducing barristers to plead cases unduly and extravagantly. Imagine an English advocate endeavouring to persuade a jury in a clear case of murder to return a verdict with such a rider, on the plea, among others, of the barbarous nature of capital punishment, describing it as social vengeance, to be viewed in the same category as private retaliation. Yet this illegitimate use of advocacy is permitted in a French Court, and is to some extent, it is thought, responsible for the notoriety of French jurymen for the character of their verdicts. In the removal of this stain upon the criminal administration of the country, the Bar is, or ought to be, interested; for, it cannot surely be a source of satisfaction to the Bar that they unwittingly favour the escape or prevent the fitting punishment of malefactors. It is bribery, according to the Italian jurist, Filangieri, to seduce judges by an artificial pathos, and he would doubtless esteem anything but the clear and fair statement of either side as a species of corruption. The present French jury system, it cannot be denied, constitutes a grave temptation to the advocate to invoke the aid of

artifices inconsistent with the dignity of his profession. For amendment of that system (it need not be, as some desire, abolition), it is hoped that the French Bar may press in its own interests as well as that of the nation.

The administrative system of the French Government plays such an important part in French jurisprudence that, in view of its bearing upon the Bar, a reference to one branch of it is essential. One cannot enter a French Court-room, civil or criminal, without observing an advocate discharging the duties of the *Ministère public*. The State is apparently not satisfied that the Bench can competently perform its duties without some supervision and assistance, and accordingly in all Courts, except those of Commerce and Peace, a member of the *Ministère public* is a prominent and important functionary. So much so, we find the head of the staff attached to each Court draws the same salary as its principal judge. The chief of the service is the Minister of Justice, who is the administrative judge of the common law, from which it results that where the law is silent on certain points, reference must be made to him for its solution. Under the President of the Republic he is the highest judicial functionary, (*a*) and is represented in the Courts of Cassation, State Council, and Appeal Courts by a Procurator-General, while in the Tribunals of First Instance, his delegate is styled the Procurator of the Republic, an officer subject to the orders of the Procurator-General of his jurisdiction. Each Procurator-General has certain subordinates, divided into the Advocates-General, who attend to proceedings in Court, and the Substitutes of the Procurator-General, who perform all the official work connected with his *parquet*. Procurators of the Republic may have one or more assistants, according to the importance of their Court. Exclusive of the Court of Cassation and *Conseil d'État*, which possess a Procurator-General and six Advocates-General, there are in France

(*a*) In a decree of 30th March, 1808, he is, it may be interesting to notice, designated as *notre grand-juge*.

twenty-six Courts of Appeal, and over 350 Tribunals of the First Instance. Many of these Courts and Tribunals in large towns consist of several chambers, in every one of which the Minister of Justice is thus represented by members of the *Ministère public*. Thus the *Cour d'Appel* at Paris, with nine chambers, has a service of seven Advocates-General distributed by their chief, the Procurator-General, over the various chambers as public interests require. In the provinces, the Advocates-General usually correspond in number to that of the chambers forming the Courts of Appeal. In each of the eighty-six Departments of France there is a *Cour d'Assises*, in which the duties of the *Ministère public* may be fulfilled by a Procurator-General when this Court is held in a town where a Court of Appeal usually sits, or by a Procurator of the Republic in other towns. The Procurator-General or his subordinate occupies a seat on the Bench, and in all cases, before judgment, the Court is addressed by the member in attendance. All members receive their appointment from the Chief of the State, on the recommendation of the Minister of Justice, and in the same way are removable. The Procurator-General must be thirty years of age, and his subordinates twenty-five, on their appointment, and every member of the service must be an advocate of two years' standing. It is thus obvious from the necessities of the service that the *Ministère public* makes a heavy drain upon the Order of Advocates. Many enter the Bar with the object of participating in the service. Of all criminal matters within the range of the respective Courts it has full charge, preparing and following forth indictments, having surveillance of police and officers of Court. It is also charged with maintaining order in the Courts. Each Procurator-General possesses absolute authority, subject only to the control of the Minister of Justice, within the bounds of his jurisdiction. Each member of his Court staff enjoys, *stricti juris*, the anomalous privilege, after relating the instructions of his superior, of stating his own opinion in Court. The magistrates are subject to the orders of the *Ministère public* in reference

to business and other Court arrangements. It is irresponsible, being independent of the Courts, except that power is given to the united chambers of a Court of Appeal to ordain a Procurator-General to take up a criminal charge, which, from improper motives, he might be reluctant to press. The civil functions, again, of the service embrace the interests of persons absent or in ward, and all cases concerning public order, State lands, communal property, and the like.

Every civilised country, in some form, in the public interest, entrusts certain officers with the prosecution of offences against the criminal law, and also with judicial proceedings relative to the property of the State. But a system whereby, as in France, private litigants in purely civil proceedings come under the influence of an institution of the elaborate nature of the *Ministère public*, in addition to qualified judges, naturally excites our surprise. In private litigations, its intervention seems unnecessary, and, in so far as matters of public policy in civil suits are concerned, the method seems preferable by which, as in Britain, these are left to the cognisance of the law officers of the Crown. For the existence of the *Ministère public* in reference to criminal administration there is justification. In this respect the service stands to France in much the same relation as the Fiscal system does to Scotland, with which Scotland is peculiarly identified. Although much more complex, it does not work, however, so satisfactorily as the Scottish mode of public prosecution. On the authority of M. Le Berquier, one intimately acquainted with the subject, the tendency of the service is either callous indifference or undue severity towards offenders; while their duties being, in their penal functions particularly, to a great extent routine, they acquire, he says, a habit of mind worse than insensibility.(*a*) But impartiality prevents us from overlooking the fact that the intricate and secret machinery, of which the service is a part, for tracking crime, proceeds from principles utterly repugnant to British laws.

(*a*) *Vide* Le Barreau Moderne; Français et Etranger, Jules Le Berquier, Paris, 1882.

From the moment of arrest, an accused person in France, as is well known, is presumed and treated as guilty of the charge for which he is apprehended. Thenceforth police, judge of instruction, and *Ministère public*, combine to complete the proofs against the unfortunate *prévenu*. It is a wholesome feature of criminal trials in Britain that there is an absence of the vindictive sentiment on the part of the public prosecutor. But, it seems to us that, in France, very much as it is said to be in the United States, he strives for conviction. Even the presiding judge, armed with the greatest latitude of interrogatory, examines the prisoner in the same spirit of hostility which characterises the whole administration of the French criminal law in relation to the accused. The *Ministère public* cannot be selected for special condemnation.

But the *Ministère public*, as we have indicated, forms one of the principal fields of labour sought after by the Bar. The service is a most important one: yet the salaries paid by Government to its members seem, at least *hors de Paris*, exceedingly moderate. The highest salary drawn in the service is by the Procurator-General of the Court of Cassation. It is 35,000 francs or £1400, while the Advocates-General in that Court receive £800. The salaries attached to the Court of Appeal at Paris are next in importance. The Procurator-General there has 25,000 francs or £1000. His subordinates, according as they are Advocates-General or Substitutes, receive £528 or £444. In all the provincial Courts of Appeal his salary is £760, and those of his Substitutes, similarly, £320 or £240. The Procurator of the Republic in the Parisian Tribunals of First Instance has a salary of £800, while his Depute has £320. The salary of this functionary in the provincial towns varies according to their population. Above 80,000, he receives £400; below this, but above 20,000, £280; and in the still smaller towns, £200; the half, generally, to the Depute. Looking to their status as members of the Bar, the salaries which, to use a Gallicism, the members of the service "touch," cannot be.

in spite of their number, an excessive item of the Republican Budget.

The Judiciary, or, as it is termed in France, the Magistracy, offers some remarkable points of contrast. The French, as a people, believe that "in the multitude of counsellors there is wisdom." Rejecting Courts of single judges, except in Courts of the Peace, they place their faith in collegiate benches. Of this, the Court of Cassation, with its forty-nine judges, is the best example. There, there is always a "full" Bench, while a "full" Bar rarely corresponds to the *sederunt*. In all Courts of Appeal, the quorum is five, and on certain occasions nine judges, including the President. The quorum in the Tribunals of First Instance is three. It is imperative for the Bench to sit, in every case, with an unequal number of judges. The law of 1883, which reorganised the Magistracy, contains a provision, somewhat of a reflection upon it, to the effect that no judge can sit in a case where one of his relatives to the third degree acts as advocate or solicitor. Perhaps, to the French mind, it conveys no reflection, and is solely regarded as removing all inducement, however remote, to partiality in judgment. Such a rule, if adopted, say, in Scotland, would disorganise the Supreme Courts every day of their sitting. The numerical strength of the judges prevents such a contingency in the French Courts. Again, with reference to the French Courts, it is a curious fact that the Commercial Tribunals, which deal, in the first instance, with all mercantile disputes, are not composed of trained lawyers, but of notable merchants. Such an arrangement is a survival of the period when trade was despised. It is claimed, however, for the judges of these Tribunals, who, by the way, are unpaid, that their decisions are popular with the merchants, as proved by the comparative rarity with which they are overturned. The superior solicitors, the *avoués*, are not allowed to practise before them, so that to them as well as to the Bar, a large sphere of usefulness is closed. Many advocate their abolition and the extension of the jurisdiction of the Tribunals of First Instance, by which all commercial cases may be dealt with

ab initio by qualified judges; and in the interest of the Bar the change is desirable.

The Magistracy of the ordinary Tribunals is not highly remunerated. The First President of the Court of Cassation has a salary of £1400, the Presidents of its three chambers £1000, and the ordinary *conseillers* £720. The First President of the Parisian Court of Appeal receives £1000, the Presidents of the separate chambers £550, and the remaining judges £440. In the provinces, the First President of the same Court receives £760, other Presidents £400, and the counsellors £280. The salary of the President of the Metropolitan Tribunal of First Instance is £800, the Vice-Presidents £400, which is also the salary of the Judge of Criminal Instruction, and other judges £320. Out of Paris, the Presidents of this Tribunal receive £400, Vice-Presidents £280, and other judges £240; in towns of 80,000 inhabitants, £200, with a scale descending with the size of the town to £120.(*a*) It is difficult to account for the insignificant salaries French judges receive. Perhaps, like German professors, they are content with small incomes. In many cases they have, of course, a competency independent of their judicial office. Numerically, the Magistracy is strong, but this hardly affords a reason for its seemingly inadequate remuneration. Nor can it be that, owing to the codification of the laws the judges administer, their work is simple and formal; for, in the matter of procedure, French law is intricate, while case-law upon the Codes now receives attention, rendering intimate knowledge essential. It might be plausibly suggested that the Republic votes as much as can be devoted to the ordinary administration of justice in view of the additional cost of the Administrative Tribunals, the abolition of which is urged by many in France as anomalous, if not *bizarre*. Be the reason for the moderate remunera-

(*a*) The salaries of the Magistracy and the *Ministère public* are fixed by an Act of the French Government, passed on 30th August, 1883, making certain changes in the judicial system.

tion of the Magistracy what it may, it is satisfactory to observe that no class in France is more highly respected than the judges. Unlike the *Ministere public*, they are irremovable, unless on account of age. Judges of the Court of Cassation must retire at seventy-five, and in other Courts at seventy. Their irremovability has long contributed to their honourable position in the history of France. To be a judge, and to be worthy of the traditions of the Magistracy, is the ambition of many a French barrister. Undoubtedly the judicial body reflects lustre upon the French Bar.

It is not promotion to the Bench, however, which a leading member of the Parisian Bar values so much as to have been the Dean of its famous Order. The *Bâtonnat* is the prize of his profession. It is the reward of, generally, a long career, exemplified by the talents and qualities which characterise the successful advocate. As Dean, he is the head of an illustrious family, a pattern for all its members, the first among his peers, and, by common consent, the most eminent advocate in France,

"On Fame's eternal bead roll, worthy to be fyled."

None of the judicial offices approaches the Deanship of the Parisian Order in distinction. This is not surprising. The position of the Magistracy is very different from that of the British judges. The Woolsack has no counterpart in the Presidency of the Court of Cassation. So, few barristers in good practice are attracted to the Magistracy even by its highest positions. It sometimes happens, indeed, that a judge resigns in order to resume, or it may be to begin, a practice at the Bar. Efficient lawyers, no doubt, fill the Magistracy. The training of a French advocate is to a large extent magisterial. "*Par sa tenue et ses habitudes*," says M. Le Berquier, "*l'avocat français est presque un magistrat; les barristers* [English] *sont des hommes du monde.*" On an emergency he may be asked by the Court to supply, for a sitting, the place of some judge or member of the *Ministère public*, temporarily absent. In

this way by actual experience as a *juge suppléant* he may qualify for permanent appointment. The Magistracy is, as it were, a branch of the French Civil Service. An advocate, desirous of rising, by promotion, to the superior judgeships will enter the service early. But an advocate whose aim is success as a pleader will be unattracted by it. So the pre-eminent distinction associated with the office of Dean among the members of the Parisian Order is accounted for. The Dean generally holds office for two years. In the provinces the position is of minor importance. The roll of Deans of the Parisian, or rather of the French Bar, remounting, as far as authentic data go, to 1617, is adorned by great names in French advocacy, among which the elder Dupin, Paillet, Chaix-D'Est-Ange, Berryer, and Liouville are conspicuous.

In conclusion, let it be acknowledged that the French Bar not only holds, and that justly, the first position among the countries of Continental Europe, but that it is also the worthy rival of the English Bar, to which, in devotion to the principles of truth and honour, it does not yield. "*La Probité est tout l'avocat*" is the motive spring of its life, true of it to-day as in the past. Within its membership, loyalty to the profession and to each other has been and is its most signal quality, than which, as one of its most famous Deans well and rightly said, nothing is more essential to any career, but most of all to that of the Bar.

G. W. Wilton.

Current Topics.

Lord President Inglis.—Since the date of our last issue the legal profession in Scotland has sustained a serious loss through the death of its venerable and venerated chief. John Inglis, Lord Justice-General of Scotland, and Lord President of the Court of Session, died at Glencorse, on the 20th of August last, in the 81st year of his age. Born in 1810, he passed to the Bar in 1835, and after having held successively the offices of Solicitor-General, Lord Advocate, and Dean of Faculty, he was raised to the Bench as Lord Justice-Clerk in 1858. Eight years afterwards he was appointed to the offices of Lord President and Lord Justice-General on the removal of the late Lord Colonsay to the House of Lords. The long period of years, during which he thus presided over the Supreme Civil and Criminal Courts of his country, was devoted by him to the most conscientious discharge of his important judicial duties, and he had thereby succeeded in acquiring the confidence of the public and the profession to a degree that could hardly be exceeded. As a jurist and municipal lawyer, it is doubtful if there is any one who can be named as his superior in the long list of eminent men who have preceded or sat with him on the Bench of the Court of Session. He was distinguished alike for profound knowledge of the law in its history as well as doctrine and practical application, for grasp of principle, for balance and solidity of judgment, for power of lucid exposition, and for patience and urbanity in hearing combined with rigid impartiality in deciding causes.

It is not our intention, however, to attempt to describe the late Lord President's public services at present. As is well known, the judicial opinions delivered by him during his long tenure of office are contained in numerous volumes of the Law Reports, and many of them are of great importance. In order to estimate them with anything like thoroughness, and to show their bearing upon the development of the law, time and careful study are required, and haste must be avoided. We hope to be able to publish in our next number a sketch of his professional career and an estimate of his judicial services.

But reference ought to be made here to the great interest which the Lord President at all times took in the subject of education, both legal and general. Next to his work as a judge, it was the subject to which he devoted most of his time and attention, and many and great were the services rendered by him to the Scottish Universities. In particular, he was successful, as Lord Advocate, in carrying through Parliament the Universities Act of 1858—a statute which has conferred such inestimable benefits on these seats of learning. As a reward in some measure for his academic services, as well as on account of his eminence as a lawyer, he received the honour of being chosen by the students of both Aberdeen and Glasgow Universities to represent them as Lord Rector, and ultimately, of being elected by the graduates of Edinburgh University to the high office of Chancellor. This latter office he retained till his death. It is gratifying to us to be able to state in this connection, that the Lord President took from the beginning a kind interest in the success of this *Review*. His portrait appears in our first number.

Law of Arbitration.—Some time ago attention was called to the difficulties which the House of Lords had experienced in digesting the phrase, *delectus personæ*, in that chapter of arbitration law which deals with agreement to refer. The phrase had, at least, a respectable antiquity. But in the case of *Adams* v. *Great North of Scotland Railway Co.*, 27th November, 1890, 28 Sc.L.R. 579, the much more modern phrase of "constructive corruption" may be said to have received its death-warrant. There is no such thing as constructive corruption as a ground for the reduction of a decree-arbitral. The things mentioned in the Regulations of 1695 are corruption, bribery, and falsehood, and these words just mean bribery, falsehood, and corruption, in the mind of the arbiter. They are not to be applied to a personified decree-arbitral. The great object of the Regulations of 1695 was to secure the finality of awards upon fact and law. Of course, a dishonest arbiter could not be final, and that is, in substance, what the Regulations say. But then the Regulations do not exhaust the grounds for reduction of a decree-arbitral. Before and since the date of the Regulations it was, and is, possible to reduce on the ground that the arbiter has gone *ultra fines compromissi*, dealt with matters not submitted to him, or has violated some express condition of the submission, or some condition which the law implies in every submission. It is under the last head that the objectionable phrase of "constructive corruption" has crept in. For example, in *Alexander*, 7 M'Ph. 492, the second ground of reduction was that the arbiter had declined to put into the award a description of the subjects which he had valued, as he was bound to do under the Lands Clauses Acts. Nobody suggested that the arbiter was not perfectly honest, and yet, from a confused notion that it was necessary

to bring the case under the words of the Regulations, the offensive phrase of "constructive corruption" was used. In other words, as Lord Watson ironically puts it in *Adams'* case, "for the purpose of doing justice, it is necessary to call a man 'corrupt,' who is not corrupt, but honest, to call a man 'bribed' who never listened to an improper suggestion from any quarter, to call a man 'false' who never uttered a falsehood." Again, in the *Holmes Oil Co.* case, 17th July, 1891, 28 Sc.L.R. 942, where the arbiter had refused to receive certain evidence, Lord Watson expressed himself to a like effect. It is interesting in grammar, if not in law, to observe that, so far as can be ascertained, the phrase, "constructive corruption" was first used by Lord Thurlow, in the Scots appeal case of *Colquhoun and Corbet*, 1784, 2 Paton's App. 626. But it was there used in a sense totally different from that now objected to. The robust mind of Lord Thurlow loved to call a spade a spade, "*et Rolet un fripon*" as Boileau says. By constructive corruption he meant that it appeared, from internal evidence, from a construction of the decree-arbitral, that the arbiter was corrupt. It was, therefore, only his Lordship's ungrammatical way of describing a kind of actual corruption. It would appear, however, from the Lord Chancellor's speech, in the case of the *Holmes Oil Co.*, that the ground of challenge there made would, in English law, be described as "misconduct," which sounds almost as bad as corruption.

Enquiry into Insanity. — In the brilliant novel which Marion Crawford has just devoted to the question of hypnotism, one of the characters says, "A lunatic asylum is not a club in this country. There is a great deal of formality connected with getting into it and a great deal more connected with getting out." This statement seems hardly accurate. The procedure by reception order and urgency order under the English Lunacy Act, 1890, is by no means characterised by any excess of formality. Two medical certificates and, in some cases, a personal interview with the judicial authority, are the not unreasonable precautions demanded by the law. Even where the procedure by judicial inquisition is resorted to, although the alleged lunatic is entitled to demand an inquiry before a jury, yet, as explained in section 91 of the statute, this right is subject to the discretion of the judge, who, on personal examination, will decide whether the alleged lunatic is mentally competent to form and express a wish for an inquisition by jury. Where there is no jury, the alleged lunatic must in every case be personally examined by the masters in lunacy, along with such other evidence as they think fit. Where there is a jury, however, it is directed that the alleged lunatic shall be examined before the evidence is taken, and also at the close of the proceedings before the jury consult as to their verdict, "unless the judge who tries the issue otherwise directs." The judge also decides whether these examinations shall be in private or in

open Court. It may seem at first sight that too much is thus entrusted to the fallible mind of a judge, when dealing with the personal liberty of a citizen. But, in the great majority of cases, science has now so little difficulty in diagnosing the existence of insanity, and the risks to a patient of public jury trial are so obvious and grave, that the English statute expresses the common sense of the matter. The real security against injustice, conspiracy, oppression, and cruelty in the administration of the lunacy laws lies, not in the fanciful right to conduct an exciting and injurious litigation, but in constant visitation and superintendence of asylums by impartial commissioners, invested with adequate authority. This, which has always been the distinguishing merit of the Scottish system, is now to some extent introduced into England. The subject, as regards Scottish practice, has recently been much considered in the distressing case of *Dewar* v. *Dewar*, 18 R. 90, and in the House of Lords, June 25, 1891, 28 Sc.L.R. 917. Of the merits of this particular case it is undesirable and unnecessary to say anything; we trust Dr. Dewar may before long be perfectly well. But the decision of the Court of Session, affirmed on appeal, is of great importance as establishing the discretionary power of the Court at common law to decide the method of inquiry into cases of alleged insanity. The respondent to a petition for *curator bonis* appeared by counsel, opposed the petition, and insisted that the question of his insanity should be tried by a brieve of cognition, or at least that he should have an opportunity of cross-examining the petitioner's witnesses. The Court refused this, and the appointment was made upon certificates and reports obtained in the usual way, although in unusual number. The appeal taken from that judgment was properly described by Lord Watson as "a groundless appeal." Although Lord Herschell seems to be in error in supposing that the matter was decided by *Bryce* v. *Graham*, 3 W. & S. 323, which was a case of convalescence, there were ample precedents for refusing a judicial inquiry, although insisted on by the respondent. It is quite true that, as Professor Bell has pointed out (Principles, section 2121), the petition for *curator bonis* is intended to secure an interim or temporary remedy, not a judicial curatory of a permanent character. This is recognised in *Dewar* v. *Dewar*, where Lord President Inglis said: "As a general principle of our law, a man of full age is not to be deprived of the management of his own affairs, except by the verdict of a jury finding him incapable of managing them." There is a superficial anomaly in refusing judicial inquiry to a man, against whom a *prima facie* case of temporary incapacity is made, but granting it where the *prima facie* case is that of permanent and hopeless incapacity. It is an anomaly, however, which works beneficially for those mentally afflicted. It may be noted that the statement based by Lord Fraser (Parent and Child, p. 544) on the unreported case of *Gordon* v. *Scott* is overruled by the decision in *Dewar* v. *Dewar*.

Sedition in India.—Accounts are to hand of an interesting jury trial before C. J. Petheram, at Calcutta, in which the *Bangobasi*, an orthodox Conservative Hindu newspaper, was charged by the Government with the offence of sedition under section 124A of the Penal Code. The charge was based on a series of articles, the first of which related to the Age of Consent Bill, passed for the protection of Hindu girls on 19th March, 1891. This measure, while obviously necessary in the interests of humanity and Christian morality, has been a severe shock to native prejudice, and was described by the *Bangobasi* as having placed the country in a condition of absolute helplessness, their religion, rites, and customs being all at the feet of the conqueror. The next articles dealt with the periodical famines, the diseases prevalent among the poor, the general distress and poverty, the frequent riots, and railway accidents. A climax was reached in two articles, headed, "What will be the end?" and "Universal Destruction is certain;" and a concluding article, headed, "Hurribole," dealt with the question rising out of the Manipur affair. Mr. Jackson, of the Calcutta bar, made an able speech for the defence. He pointed out that loyalty was a principle with his clients, who were totally opposed to "Monkey Tolah," or the party of progress in India. "Although the ruler is a Mlecha (barbarian), still he is the sovereign," was one of the oldest Hindu proverbs. Lord Lansdowne had proclaimed that religion must yield to morality, but the Hindus contended that child-marriage was less immoral than the marriage of cousins favoured by the English, and that native asceticism was preferable to the drunkenness of the English. Mr. Jackson strongly condemned the political party in England, nicknamed the "Howling Dervishes," who take up one Indian fad after another, in equal ignorance of them all. He urged that there was too much foundation for the strongest language concerning the chronic poverty and distress. The language of the *Bangobasi* was not so strong as that used by the English press about the Ilbert Bill, and while strongly condemning the Government policy, seemed to suggest emigration, rather than armed resistance, as the remedy for the faithful. The charge of the Chief-Justice is not well reported. It emphasised the distinction between mere disapprobation of the Government policy, even where civil commotion was predicted as a likely consequence, and the deliberate intention to create disaffection, which Sir James Stephen has defined as "a disposition inconsistent with a desire to render obedience to the Government." Unfortunately, there had been some blunder as to supplying a sufficient number of specially qualified native gentlemen to act on the jury, and the judge felt himself bound to concur with Mr. Jackson's criticism on this head. In the result the jury was unable to agree, the majority for a conviction being 7 to 2. The Chief-Justice refused to take anything but a unanimous verdict, and the jury was discharged, about a thousand natives present cheering and clapping their hands. It is very difficult for those at home to criticise Indian administration with either intelligence or fairness. There would seem to be a great deal of

disloyalty in certain quarters of our Indian Empire. But it is matter for regret that the advisers of so able and liberal a Viceroy as Lord Lansdowne should have attempted a press prosecution in which success was not assured.

The Removal of Colonial Judges.—In *re H. F. Gibbons* (*Times*, 2nd March, 1891), the Judicial Committee of the Privy Council had under consideration an application altogether unprecedented in character.

In November, 1881, Mr. Henry Frederick Gibbons, barrister-at-law, was appointed judge of the Eastern District Court of Jamaica. He was transferred to the Northern District in January, 1882, and to the Southern District in November, 1883. On the 20th September, 1884, Mr. Gibbons had an altercation and fracas in the precincts of the Court house at Mandeville, with a solicitor named Daly Lewis. The Governor, Sir Henry Norman, called upon him for an explanation, and ultimately suspended him from office on the advice of the Privy Council of Jamaica. Thereupon Mr. Gibbons returned to England, and demanded an investigation into his conduct. Lord Derby, who was then Secretary of State for the Colonies, directed Sir Henry Norman to appoint a Committee to inquire and report, and Sir Henry Norman appointed the Chief-Justice (Sir Adam Gib Ellis), Mr. Justice Curran, and another gentleman, to act as Commissioners. Mr. Gibbons was present during the inquiry. In due time the report of the Commissioners was made and sent to England, and on 20th April, 1885, the Secretary of State for the Colonies required Mr. Gibbons to resign as an alternative to being dismissed. Mr. Gibbons resigned and returned to England. Shortly afterwards he raised an action against Sir Henry Norman, which was referred by consent to the arbitrament of Lord Herschell. After a careful inquiry Lord Herschell decided in favour of the Governor, on the ground that his act had been ratified by the Secretary of State. But his lordship's award contained the following passages: "I think that, on the occasion in question, even taking the most adverse view to him, and accepting for the moment to the full the story as told against him, Mr. Gibbons acted under very great and previous provocation, and that if he lost his temper upon that occasion he lost it under circumstances that might well have made even one not in the habit of losing his temper, lose it on that particular occasion. . . . I do not consider that what he did, though it was done within the precincts of the Court, was done at all in his judicial capacity; it might just as well have occurred half-a-mile from the Court. It arose no doubt out of a transaction that took place in Court, but in that transaction it appears to me that Mr. Daly Lewis was the person absolutely and entirely wrong." It appeared, therefore, that in Lord Herschell's opinion, *Mr. Gibbons was not to blame for the occurrence of the incident that led to his dismissal from office.* In the application that we are now considering, a strenuous effort was made to induce the Judicial

Committee of the Privy Council to reopen the whole question of the circumstances under which Mr. Gibbons was dismissed. The case for the appellant was put in various ways:—

1. It was pointed out that, while there was no authority in support of the application, it was also true that there was no authority directly against it. In *ex parte Robertson*, 11 Moo. P.C. 288, leave to appeal was refused on the ground that the petitioner, who had been appointed Commissioner of Crown Lands in New South Wales, by the Governor-General, under the great seal of the Colony, held office *during the pleasure* of the latter. But Mr. Gibbons received his appointment from the Crown, Jamaica Statutes, Law 22 of 1874, sec. 19;(a) he was eligible for the office of judge of the Supreme Court, sec. 22; and it seemed, therefore, to be a fair inference that his appointment was to be held *during good behaviour*.

2. While—regard being had to the decision of the Judicial Committee *in re Nawab of Surat*, 1854, 5 Moo. Ind. Appeals,—it was clear that any reference, under sec. 4 of 3 & 4 Will. IV. c. 41, must originate with the Crown, Mr. Gibbons' case seemed to fall within the meaning of the words in the preceding section, "all *complaints in the nature of appeals* from the determinations of *any judicial officer*." This contention received support from *Morgan* v. *Leech*, 1841, 3 Moo. P.C. 368. In that case the facts were as follows:—By the Charter and Letters-Patent constituting the Supreme Court of Bombay, the judges of the Supreme Court had power to admit as attornies or solicitors persons admitted as such at Westminster, or who were practising in the Court of the Recorder of Bombay at the time when the charter was published. The Chief-Justice admitted a person not possessing either of the above qualifications, and a number of the attornies in his Court appealed to the Privy Council. It was held that, though the grievance was not strictly appealable within the charter, the appeal could be entertained under the section in question. Mr. Gibbons' case differed from *Morgan* v. *Leech* slightly, if at all. In the latter an officer of Court was improperly admitted; in the former an officer of Court was alleged to have been improperly removed.

3. If the Privy Council had jurisdiction to entertain the appeal, then there were good reasons why the appeal should be entertained.

(*a*.) In 1868, the Governor of Singapore suspended a judge of the Supreme Court. The matter was brought before the Secretary of State for the Colonies, the Duke of Buckingham and Chandos; a memorandum with reference to the practice of the Privy Council in the removal of colonial judges was prepared by the Judicial Committee; and all the papers relating to the incident, together with observations on the memorandum by Lord Chelmsford, Dr. Lushington, and Sir Edward Ryan, were published and laid before Parliament (*Parl. Papers*, 1870, c. 139). In the course of his observations, Lord Chelmsford said: "It seems to me that it

(*a*) Repealed by Law 43 of 1887.

would be better that the matter should be brought before the Privy Council than that the final decision should rest with the Secretary of State, because the reasons for the determination in the latter case are not made public (publicity in an accusation of a judge being always desirable), and because an impression sometimes prevails that there is an inclination in the Colonial Office to uphold their Governors upon any subject of complaint which arises in the colonies."

Mr. Gibbons' case was one of those to which Lord Chelmsford's opinion applied with peculiar force.

(*b.*) Under *Burke's Act*, 22 & 23 Geo. III. c. 75, sec. 2, the holder of any *patent* office in the colonies has a right *strictissimi juris* to appeal to the Privy Council against his "amotion" or removal by the Governor.

In *ex parte Robertson (ubi sup.* at p. 295), the Judicial Committee said: "We think that statute (22 & 23 Geo. III. c. 75) applies only to offices held by patent *and* to offices held for life or for a certain term. . . . In the opinion of their lordships it is not a matter of great importance whether this office may be said to be held by patent or not; but the question is, What were the terms on which the office was held with reference to its continuance and duration?"

Mr. Gibbons did not hold by patent. He did hold during good behaviour. Therefore, but for the accidental absence of a condition, which "in the opinion of" the Privy Council "is not a matter of great importance," he would have had an absolute right to prevent the Secretary of State from finally adjudicating on his case at all. The Judicial Committee, however, held—(1) that the dismissal of Mr. Gibbons was a purely administrative act, which could not be reviewed by any Court of law; and (2) that the letter of resignation put the petitioner out of Court.

A. W. R.

Summary of Legislation.—The legislation for the year 1890-91 is of more political than legal interest. The Acts establishing land purchase in Ireland and free education in England overshadow by their magnitude the other statutes. The Tithe Act, the Factory Act, and the Savings Banks Act are important political measures of the second class. Scotland, besides receiving a large sum of money from the Exchequer, both generally and for the Highlands, has obtained the Trusts Act and the Local Loans Act. One of the few Irish statutes which were non-political and non-contentious, that for the Local Registration of Title, will have the most beneficial effect.

In what follows the statutes are referred to only by the number of the chapter.

1. Power was given last December to Poor Law Guardians in Ireland to raise loans on the security of the poor rate for the use of any electoral division, in which the occupiers of land were generally unable through

poverty and the extent of the failure of the potato crop to procure an adequate supply of seed potatoes. The seed was sold only to occupiers at under £15 rateable value, not more than twelve hundredweights to each, and only where the ground was ready for sowing. The guardians may impose rates to recover the net price in two instalments, in 1891-92, but these may be postponed till 1895. 2. Power is given, where the promoters of an undertaking under the Tramways (Ireland) Acts have obtained the necessary presentment from the grand jury, to enter into agreements with a connecting Railway company for the transfer of the undertaking. 3. This measure has been suggested by such cases as that of *Dr. Barnardo* in the English Courts, and *Delaney* v. *Colston* in the Court of Session. Severe restrictions and conditions are imposed in cases of practical abandonment on the right of the parent to an order for either the production or the delivery of a child. On the other hand, where custody is refused, the Court is to regard such legal right as the parent may nevertheless possess to have the child brought up in a particular religion. 4. The power of Local Authorities in providing technical or manual instruction are extended to schools beyond their own district, and now include the payment of scholarships and fees. 5. Only one explanation in the Army Annual Act may be noticed. The law for compelling a soldier to maintain his wife, or child, or bastard child, applies where the order for maintenance was pronounced before the man enlisted. 8. Tithe rent charge is to be payable only by the owner of the land, notwithstanding any contract between him and the occupier, and any contract between them to another effect is to be void. In the case of current contracts, binding the occupier to pay, he will of course remain liable to repay to owner any sum properly paid by the latter under the new law, and these repayments are recoverable by distress. The rent-charge which an owner refuses to pay is recovered, not by distress, but by a receiver of the rents and profits. Further, the occupier of the land is not liable in the rates assessed on the tithe. The tithe, so far exceeding two-thirds of the annual value of the land, may be remitted by the County Court. 9. The orders of the Scottish Boundary Commissioners are not to come into operation, so far as the registration of sasines is concerned, until 15th May, 1892, saving, however, registrations which have been made between the dates of particular orders and the date of this Act (11th May, 1891). 11. Four months' absence in the performance of duty is not to disqualify for the parliamentary or local government franchise. 12. Town Councils, County Councils, &c., have power to oppose Provisional Order Bills under the Railway and Canal Traffic Act, 1888. 15. The customs entry relating to imported goods is a "trade description" under the Merchandise Marks Act, 1887. The Board of Trade is to undertake prosecutions under the Act in cases affecting the general interests of the country, or of a section of the community, or of a trade. 16. Army schools are admitted to the benefit of endowed charity schemes for scholars of elementary schools. 17. In England, regular payment

out of land to a charity for twelve consecutive years is *prima facie* evidence of perpetual liability. 19. Power is given to the Queen in council to prohibit the catching of fur seals by British ships in Behring's Sea. 20. The Pollen Fishery in Ireland is protected by prohibiting capture below a stated size. The pollen is a genus of salmonidæ, well known in England as the fresh water herring. There is a large export trade from Ireland. 21. The Savings Banks Act proceeds closely on the lines recommended after inquiry into the recent frauds. The appointment of a thoroughly independent Inspection Committee is secured, and its functions defined Absentee trustees are made impossible. The limit of deposits is raised, but the conditions of special investments on behalf of depositors are made more strict. 22. An Act, not extending to Scotland, gives optional powers to urban authorities to provide museums for the reception of local antiquities, and other objects of interest, and also of gymnasiums with all the ordinary apparatus. 23. Power is given to the managers of reformatories and industrial schools to apprentice or emigrate well conducted children. 26. There was a convention in 1815 by which the British Government became bound to pay interest and sinking fund on a considerable portion of the Russian loan made in Holland through the intervention of Hope & Company. There is still due by Britain about £516,529, and as the Czar wishes to get rid of the loan, power is given to the Treasury to borrow the required amount from the National Debt Commissioners. 28. The hour of Mr Waddie's triumph has come at last. The practice of the Scottish Fishery Board to brand herring barrels on the coast of Northumberland is declared to be legal. 29. The Presumption of Life Act, 1881, is repealed, and it is re-enacted so as to include the case of absence where no estate has vested in the absentee. (See the *Peterhead Case*, 10 Rett. 763.) The claim of the absentee is barred after thirteen years after registration or possession. Policies of insurance are excepted. 30. Provision is made for the prosecution of persons falsely assuming the name of law-agent or notary public; and also for giving to law-agents a charge for costs on the property recovered or preserved for the client in the action. 31. Where mails are carried under convention it is made a serious offence for the master, crew, or passengers of a British mail ship to convey letters other than the mails. 32. Police Commissioners may resolve to assume the management of highways within the burgh, and the County Council may require them to do so. This removes, at least to some extent, the grievance alluded to in *Juridical Review*, Vol. II. p. 390. 34. Mr. R. B. Finlay's admirable Local Authorities Loans (Scotland) Act is too technical for detailed notice. It authorises the creation of redeemable stock, which will facilitate both borrowing operations and repayment. 37. By the Fisheries Act, 1891, the Belgian Declaration respecting the North Sea fisheries is confirmed; the powers of local fisheries committees under the English Act of 1888 are extended; and the East Anglian Salmon

Fisheries have a Stour district added. 38. The Stamp Duties Management Act is mainly consolidation, but the maximum punishment for criminal offences in relation to stamps and dies is reduced to penal servitude for fourteen years, and the fraudulent impressing of a stamp from a genuine die is made a criminal offence. 39. The Stamp Act is also mainly consolidation. The Court has now discretion as to costs in appeals from adjudication. Where the consideration for a conveyance is payable periodically for a definite period, exceeding twenty years, the aggregate amount for stamp duty is to be taken as the amount payable in twenty years, as is already the case in perpetuities. The duty payable on an award is calculated on the sum or value awarded. The difference of duty between English and Scottish leases for one year is removed. 40. Brine-pumping has become so important as to require a public statute organising compensation districts for subsidence, including depreciation of land, structural damage to buildings, &c. The Compensation Board is elected equally by the County Council, the Sanitary Authority, and the brine-pumpers. 41. Statutory authority is given to the regulations as to common grazing drawn up by a committee elected by the crofters of any township in a crofting parish. The regulations require the approval of the Commission who may hear the landlord. 43. Power is given to companies and local authorities to pay compensation in cash for loss arising from forged transfers, or transfers under a forged power of attorney, of shares, stocks, or securities issued by them. This Act has been suggested by the decision in the case of *Barton*, 24 Q.B. Div. 77, where effect was refused to a forged transfer, even after the lapse of ten years.

44. The Trusts Act for Scotland will receive in a subsequent number the detailed notice which its importance deserves. 46. The Post-Office Act for the first time authorises local authorities to contribute land and money to the erection of an improved post-office, and rural sanitary authorities to guarantee the Postmaster-General against loss caused by giving additional post facilities in any contributory place. 48. The Irish Land Purchase Act will also be made the subject of a separate article. 49. This Act defines the maximum charges to which the returning officer at a Parliamentary election shall be entitled. Steamers and boats may also be employed, where necessary for access to the poll. 51. Where words have been used imputing unchastity or adultery to a woman or girl, it will not now be necessary to prove special damage to render these words actionable. This suggestion for the amendment of the English law has been made by many eminent judges from the time of L.C.J. Holt in 1704. It does not make actionable mere words of abuse. The plaintiff is not to recover more costs than damages, unless the judge certifies reasonable cause. The law of Scotland required no change. 52. The County Councils in Scotland may sanction the adoption by a District Committee of the Waterworks Clauses Act, 1847, and may also alter existing special water supply districts. 53. All ex-Chancellors are *ex officio* judges of the English Court of Appeal, and

must sit there if the Chancellor asks them. The House of Lords may call in nautical assessors in Admiralty cases. 51. Power is given to volunteer corps, and to town and county councils, to purchase land for military purposes, including rifle and artillery practice, storage of arms, drill, &c. 56. This famous Act establishes a fee-grant in aid of elementary education at the rate of 10s. for each child between three and fifteen, and where the grant is accepted, no fees are chargeable to children, except for the excess where the fees previously charged exceed 10s. 58. The arrangements for granting public money to assist the construction of small harbours, piers, and boatslips in the Highland counties are of great interest. The County Council must get as much local subscription and free labour as they can, and if possible a free site. The plans and sections require the approval of the Board of Trade. The clauses of the General Harbours Act, 1847, are incorporated. The rates leviable are limited by the Burgh Harbours (Scotland) Act, 1853, and there is an express power to lease them. Any deficiency in income to meet annual expenditure will be provided out of the general purposes rate in the county, but not to a greater extent than 1d. per pound. This is the principle of county responsibility which the Marquis of Stafford proposed to apply to the land question. 62. The London County Council Act again indicates the gigantic dimensions of this greatest experiment in local government. They take power to spend over £2,000,000 on capital account in the year and large powers to lend money to vestries, district boards, commissioners, guardians, asylum managers, school boards, &c. A good deal of their money is raised by "Metropolitan bills," at currencies running from three to twelve months. 65. Among other practical amendments of the English Lunacy Act, 1890, the Lord Chancellor is empowered to authorise, where desirable for due administration, the chairman of board of guardians to sign orders for the reception of persons as pauper lunatics. 66. The Local Registration of Title (Ireland) Act is a necessary complement of the Purchase Act, and is, intrinsically, of the highest practical utility. Its main object is to provide a cheap and simple land registry for those occupiers of land who on purchase come at once within the operation of the Registry Acts. But it also substitutes for the record of title established in Ireland in 1865 an improved system of registration which may be made use of by any owner who prefers the system of registration of title to that of registration of assurances. Mr. Walter Craig's lucid paper on this subject (*Jurid. Review*, II., p. 325) makes it unnecessary to say more. 69. The Penal Servitude Bill most properly reduces the minimum term to three years, and gives complete discretion to the Court to sentence to imprisonment not exceeding two years, even where required to award penal servitude. It was only in 1864 that the minimum was raised to five years. Licenses are also dealt with; and the power of photographing given by the Prevention of Crime Act, 1871, is applied generally to all prisoners. 70. Markets and fairs are transferred to Mr. Chaplin, or the Board of Agriculture, and

his first word is, "Provide adequate accommodation for weighing cattle." 71. Further facilities are given for carrying out schemes for the accommodation of labourers under the Labourers (Ireland) Acts, 1883 to 1886. 72. In calling in gold coins the Mint is directed to hold loss of weight exceeding 3 grains from the standard weight as *primâ facie* evidence that the coin has been lightened otherwise than by fair wear and tear. 73. Mortmain is dead and yet liveth. Land may be assured by will to charitable uses, but the trustees must sell it within a year from the testator's death. Similarly, trustees are not to carry out any direction to invest personalty in land for behoof of a charity. 74. The Foreign Marriage Act, 1891, gives a new power to the marriage officer to refuse solemnisation where the marriage appears to be contrary to international law. 75. The debates in Parliament have made every one familiar with the contents of the new Factory and Workshop Act. It increases the responsibility of the local sanitary authority. Much to the disgust of the Lancashire spinners, the half-time age is raised to eleven. At last Parliament have had the courage to adopt the Belgian law, that a woman is not to come to the mill within four weeks after child-birth. 76. This Act consolidates portions of ten groups of statutes which contained the law of public health applicable to the Metropolis. The important section, 100, authorises the County Council to proceed where the sanitary authority is in default.

XUM

Reviews of Books.

Les Théories Politiques et le Droit International en France. Par Ernest Nys, Professeur à l'Université de Bruxelles, &c. (Bruxelles, P. Weissenbruch, 1891.)

This is a learned and suggestive contribution to the study of political science by Professor Nys, already favourably known as an author, and as the translator of the late Professor Lorimer's works into French. The first four chapters are devoted to the history of political science in France: the remaining four, nominally devoted to the history of international law in France, show that this branch of law was practically unknown in that country down to the end of the eighteenth century. The early problems of political science, apart from the theories of Aristotle, Plato, and other great Greek philosophers, as M. Nys points out, were few and simple—whether, as maintained by John of Salisbury, the friend of Becket, kings received their power from the Church; whether it was lawful to slay tyrants and heretics (the doctrine that our Queen Elizabeth was menaced with); whether the ancient ideal republics could be realised in actual life. One of the earliest and soundest of political philosophers, Thomas Aquinas, so far back as 1270, declared his ideal of government to be one combining the monarchical, the aristocratic, and the popular element, and taught that, if the people can make, they can also unmake a king. But Aquinas was not a Frenchman, and such constitutional doctrine is enunciated by few French authors. Among these few is Jean Buridan, professor at Paris about the middle of the fourteenth century, who ventured to lay it down that an unlawful edict of an unjust king ought not to be obeyed. Foremost among writers on political science, from the end of the fifteenth century onwards, were the lawyers; but the zeal they displayed against the *noblesse* and the Church, both of whom they rightly deemed enemies of progress, betrayed them into the fatal error of unduly exalting the royal prerogative, and thus laying the foundation of absolutism. It was writers of this school who first set up the "divine right" of kings, a doctrine which the Stuarts tried to transplant to English soil, and who laid down

the maxims that the king's will is law, that the king holds his crown of God alone, and that the inhabitants of his kingdom ("citizens," as they are usually called in republics), are his "subjects." It need hardly be said that, in a country where such doctrines are held, political science can have no existence. One of these lawyers, Jean Ferrault, *procureur royal* at Mans, makes this plain in a few sentences: "The King of France has no superior in temporal things; he may tax his subjects without any authority; he is the sole lawgiver." And another writer of the same school lays it down that "*Rex Franciae primus et major est inter totius orbis reges.*" Such doctrine led Marino Cavalli, Venetian ambassador at Paris, to declare that the French seemed to lack the sentiment of liberty, and that they were incapable of governing themselves; but, as M. Nys shrewdly points out, it was rather the characteristic French love of method and uniformity than lack of independent spirit or ability which led the nation to submit to a centralised despotic government. As another example of the bombastic and pernicious doctrines of the same school, may be mentioned the statement by Besian Arroy, doctor of theology of Paris, early in the seventeenth century, that the kings of France, as successors of Charlemagne, were lawful sovereigns of nearly the whole of Europe. In his third chapter M. Nys stigmatises the Lutheran doctrines as being, on the political side, destitute of vigour and of dignity, while he holds that Calvinism led logically to a rigorous democracy, placed Henri IV. on the throne, prevented the triumph of the Ligue, and saved France from ruin. In his last four chapters the author shows that such extravagant notions as that the King of France is superior to all others, that he cannot lawfully cede any part of his territory, that most other kings are usurpers, and the like, are incompatible with the existence of international law, and that France has produced scarcely one publicist of first-rate eminence. Bossuet he rightly brands as one of the worst members of a bad school, to whom the most Christian Louis XIV. used to send his maxims of despotism to be put into a religious cloak. On the other hand, the author mentions several honourable exceptions to the prevailing corruption and servility, notably Jean Bodin (1530-96), father of modern political science, whose "*Six Livres de la République*" are full of sound and excellent matter. Bodin, for example, advocates religious toleration, condemns slavery, and examines the various forms of government. He uses the historic method, and founds a philosophy of history; and his book is well worthy of perusal even at the present day. M. Nys also gives a very interesting historical sketch of the representative system of government, tracing it back to Spain in the eleventh century; though he might have gone a century or two further back to the reeve and four *legales homines* of each Anglo-Saxon township who attended the hundred and shire moots. That system was in vogue in France for several centuries, and from a very early period no taxes could be imposed without the consent of the States General; but these assemblies were gradually discontinued by the kings, until at length the arch-despot

Louis XIV. could say, "*l'état, c'est moi!*" One misprint has escaped the author's notice—our old friend Peter de la Mare, first Speaker of the House of Commons, figures as "Warr." Otherwise the book is well and correctly printed, and it is eminently readable and instructive.

J. KIRKPATRICK.

Prichard and Symonds, with Chapters on Moral Insanity. By D. HACK TUKE, M.D. London: J. & A. CHURCHILL.

Moral insanity, that sorely vexed question, is the main subject dealt with by Dr. Hack Tuke in these three essays, of somewhat unequal merit, which he has reprinted in book form. In the introductory memoir an interesting and appreciative account is given of the lives and teaching of Drs. Prichard and Symonds, two worthy doctors of the good old school, physicians who practised physic, but as a part of philosophy, and were doctors at once of medicine and of letters. Prichard has probably never received the recognition which his great talents and sober thinking deserved; but, by those to whom his works are familiar, he will always be regarded as one who did more for the philosophical study of insanity than, perhaps, any other English writer; with the general, it is to be feared, his reputation is merely that of the inventor of an eccentric theory, destined to become the fad of the "mad doctor," or the criminal's last refuge. As his doctrine of moral insanity has been frequently misquoted and ridiculed, chiefly by those who have not taken the trouble to read his books, it may be of interest to give in his own words his definition of that particular form of mental disorder with which his name will always be associated. "By that term," he wrote, "I distinguished the mental state of persons who betray no lesion of understanding, or want of the power of reasoning and conversing correctly upon any subject whatever, and whose disease consists in a perverted state of the feelings, temper, inclinations, habits, and conduct." Dr. John Addington Symonds, whose fame is now swallowed up in that of his gifted son, was the friend and critical disciple of Prichard. His writings are distinguished for their excellent qualities of sound judgment and vigorous common sense. In his essay on "Criminal Responsibility in relation to Insanity." He maintained that "it is not the business of the mental physician to determine the question of responsibility, that all he is called upon to declare is whether the man is sane or insane—in short, what he said was this, if we declare him to be unsound in mind, 'let moralists and legal judges settle the question whether he is responsible for his actions.' The alienist must in each case inquire—'(1.) As to delusions, whether they were of so gross a nature as in themselves to argue a diseased state of the understanding; or whether, though of an insulated nature, and not involving the whole mind, they

had a direct bearing on the crime. (2.) As to cases without manifest delusions, whether the state of the emotions and moral feelings was so perverted, either with reference to the ordinary standard, or with reference to what was the patient's temper and character, as to indicate a morbid condition, that condition telling in particular on the power of self-control. (3.) As to the impulsive forms of mania these ought not to be admitted except on the strongest evidence.'"

Dr. Hack Tuke, as might be expected, treats his difficult subject from the physician's point of view; his style is somewhat loose and scrappy; the cases which he adduces are far from being complete or convincing; and it cannot be said that there is anything that is particularly new or profound in his arguments or propositions; but, for the most part, his views are stated with moderation and good sense, and they are creditably free from medical prejudice. A fair notion of his methods and conclusions may be gathered from the following extracts:—"Those physicians who have had large experience of the insane are essentially agreed as to the existence of a group of cases of a very peculiar and painful character. Any difference of opinion there may be has far more reference to the best name by which to label them, than to the clinical fact, and rests mainly upon the definition of psychological terms." "When all is said that can fairly be urged against moral insanity, it remains a clinical fact, however rare, that there are certain persons who are insane and unaccountable, but in whom there is no disorder of the intellectual faculties which can be regarded as sufficiently marked to establish the fact of insanity or imbecility in the eye of the law." "I am not concerned to uphold the doctrine of moral insanity in too absolute and literal a sense. Grant, if you like, that there is no sharp line of demarcation between intellect and emotion; and grant further, if you will, that every so-called case of moral insanity, if tested and retested in the most rigorous and exhaustive manner by medical and legal experts, could be made to yield some proof or indication of intellectual enfeeblement or delusion. it is quite sufficient for my present purpose to maintain that disease of the brain may wreck the moral nature, while the patient would not be placed under medical care or legal restraint on the ground of weak-mindedness, delusional insanity, or mania."

J. Carlyle Johnstone.

The Principles of Commercial Law, with an Appendix of Statutes annotated by means of references to the Text. By Joseph Hurst and Lord Robert Cecil, of the Inner Temple, Barristers-at-Law. London, 1891.

This is a composite work, there being chapters on Principal and Agent, Carriage by Land and Sea, Merchant Shipping, Guarantee, Marine, Fire, Life, and Accident Insurance, Bills of Exchange, and Partnership, by

Mr. Hurst; and, on Contract in General, Companies, Sale, Stoppage *in Transitu* and Lien, Pledge, and other Chattel Securities, by Lord Robert Cecil. The authors, in the preface, "trust that the present work may prove useful to all interested in the subjects discussed." It will be thus anticipated that the work is intended for the general reader for practical reference. An elementary Manual of Mercantile Law would be a better name than the common misuse of the term "principles" to indicate elements. The chapter on contracts in general is a clear abstract of the rules in English law applicable to the formation, operation, and discharge of contracts. But it is somewhat useless in its present place. On the one hand, it cannot for the student fill the place of Anson or Pollock; nor, on the other hand, does the general reader, who consults it for practical purposes, wish to know the subtleties of the English doctrine of consideration, or the niceties of the statute of frauds, or the evasions of that Act which Courts of Equity have legalised. To the following statement exception must be taken. At page 34 it is remarked:—"None of the duties arising out of a contract affect others than the parties thereto. Nevertheless, one duty is imposed by a contract on all the world. For every one is bound not to induce either party to break the contract. And if, to serve his own ends, any one does persuade a party to a contract to break it, he commits an actionable wrong against the other party." Now the duty referred to is not imposed by the contract at all. The author seems to have overlooked the distinction between a right *in rem* and a right *in personam*, in fact, between property and contract.

The chapters on the practical subjects are written with great clearness, and contain an accurate statement of the elementary rules involved. Careful reference is also made to the leading cases, as well as to the pages of such works as those of Mr. Benjamin and Lord Blackburn. Sometimes, however, the treatment is rather meagre; thus the chapter on bills of exchange comprises little more than the text of the Act, with comments rarely interspersed. But this treatment is exceptional, and the work undoubtedly shows care and accurate knowledge of the subjects, and will be useful for general practical reference.

W. J. N. L.

Index of Cases Judicially Noticed (1865-1890). By GEORGE JOHN TALBOT, Fellow of All Souls' College, Oxford, and HUGH FORT, of the Inner Temple, Esqs., Barristers-at-Law. London: STEVENS & SON.

This is a useful enough book. It publishes in permanent form the results of a careful "noting-up" of all cases cited in any English judgment reported between 1865 and 1890. It thus not merely gives the history and

development of the law embodied in a decision, but it forms a convenient guide to the group of authorities on a particular question. We fail, however, to see why, if Colonial, Indian and American cases when cited are included in the Index, Scottish cases, except appeals in the House of Lords, should be excluded. There are, perhaps, not a great many decisions of the Court of Session (not carried to appeal) which have been cited in the English Courts. But these, such as some of Lord President Inglis' judgments on the Income-Tax Statutes, have generally been important. So, also, with the decisions on the Employers' Liability Act. For the purposes of this Index there is no rational distinction between Scottish cases in the Lords and in the Court below. An appeal judgment may no doubt be regarded as an imperial decision, but the object here is to trace the continuity of law. If Scottish appeals, such as *Aberdeen Railway Co.* v. *Blaikie* (here misprinted Blakie), are cited in English decisions, there is no reason why Court of Session judgments should not also be cited. It would appear that the Scottish appeal, *Caledonian Railway Co.* v. *Ogilvy*, 2 Macq. 229, is among all the indexed cases one of the most frequently cited in English judgments. Again, in the case of English decisions noted in this Index, why not give the Scottish judgments in which they have been cited? To give the English and not the Scottish citations of a decision presents an incomplete view of its history. Take *Addison* v. *Gandassequi*, *Armstrong* v. *Stokes*, *Elbinger Actien Gesellschaft* v. *Claye*, *Hutton* v. *Bulloch*. This interesting group of cases has just been commented on by the Court of Session in *Bennett* v. *Inveresk Paper Company*, 28 S.L.R. 744. Surely the Scottish decision, though in no sense binding, is a valuable illustration. Again, *Russell* v. *Niemann*, *Gray* v. *Carr*, *Ireland* v. *Livingstone*, were all dealt with in *Delaurier* v. *Wyllie*, 17 R. 167. This criticism applies especially to judgments in English appeals, because these are certainly binding on the English Courts, and they have been frequently applied and commented on in the Court of Session. For example, can it be supposed that the full import of *Mersey Dock Trustees* v. *Gibbs*, is understood without a reference to the luminous opinion of Lord President Inglis in *Virtue*, 1 R. 285? The workmanship of this book seems to be accurate and exhaustive on the lines indicated. We are glad to be informed that Sheriff Hamilton Grierson is preparing an index of Scots cases overruled and judicially noticed.

Penological and Preventive Principles, with Special Reference to Europe and America, &c., &c., by WILLIAM TALLACK, Secretary of the Howard Association. London: WERTHEIMER, LEA & Co., 1889.

We have much pleasure in calling attention to Mr. Tallack's valuable and interesting book. It represents the inquiries, experience, reflections of twenty years' loyal service in the cause of humanity in prisons and the

treatment of crime. How changed is the position now as compared with the time when Charles Reade denounced "the clandestine shambles of the nation." Mr. Tallack states his First Principles of Administration, which are founded on the facts of human nature and the teachings of the New Testament. He then points out that existing prison systems are all more or less unsatisfactory. Next, he deals in detail with separation and classification; with what the Wisconsin State Prison Directors called "the indescribable horror and agony incident to imprisonment for life;" with the question of Recidivists, or Revolvers, as they are called in America; with prison labour, officers, visitation; with conditional liberty and aid to discharged prisoners; with juvenile delinquency; and with the police in their relation to prostitutes, public-houses, and pawnbrokers. These topics are discussed in no sentimental spirit, but with the intelligent moderation which comes from contact with many classes of experiment and many schools of thought. We quote the following sentence as bearing on a recent statute: "The chief essential in every system of sentences is that they should be very gradually but certainly cumulative in their prescription of the maximum periods of legal control, whilst at the same time they should be very elastic in permitting the needful modifications of individual treatment throughout these periods." On p. 262 he makes some practical remarks on the question of juvenile emigration. The Lord Advocate should make his deputes and stipendiary magistrates pass an examination in this book. The subject has always attracted the best men in each generation, and it has now reached something of the proportions of a science.

Robertson's Handbook of Bankers' Law. 5th Edition. Revised by Bremner Patrick Lee, M.A., Advocate.

The fact that the late Mr. Robertson's little handbook has reached a fifth edition since its publication in 1862 is the best evidence that it has been found useful by bankers and others. Its author was not a lawyer, and the book makes no pretensions to value as an authority. Its aim is to enable a man of business to acquire an elementary knowledge of the law applicable to banking transactions, or to be used by him as a work of reference. The last edition in 1881 had the advantage of being revised by the late Mr. W. D. Thorburn. The work of the present editor appears to have been confined to making such alterations in the text as were rendered necessary by the statutes and cases of the last ten years. Of the latter there seem to be about a hundred, and so far as can be judged from a brief inspection, their effect seems to have been carefully noticed. For a good chapter on bills we are told that Mr. J. D. Sym is mainly responsible.

F. P. W.

XUM

Les Roumains Hongrois et la Nation Hongroise. Réponse au Mémoire des Etudiants Universitaires de Roumanie. Publié par les Etudiants de l'Université Roy. Hongroise des Sciences de Budapest, &c., &c. Budapest, July, 1891.

This is a vigorous and dignified reply by the great body of the Hungarian students to a recent publication by the Roumanian students, in which they seek by a good deal of false history and unfounded political complaints to promote the cause within Hungary of a *Roumania Irredenta*. They accuse Hungary of illiberal policy and of injustice towards the Roumanians. They say that, although they number 2,392,525 souls dispersed in twenty-five counties of Hungary, they are excluded from local administration, and their language is tabooed. They claim to be the autochthonous inhabitants of Transylvania. The Roumanian production seems to us hysterical and childish. The arguments of the Budapest students, ethnological, philological, and political, are crushing in force, and their tone of sympathy with the young kingdom of Charles I., in spite of misrepresentation and attack, is worthy of all praise. The Roumanians will not succeed in creating an Ireland in the Banat. The Roumanian regiments (notably the 63rd), are among the smartest and most loyal in the Imperial army.

The Court of Session and Sheriff-Court Annual, 1891-92. Edinburgh: Skinner & Co.

This is the third issue of a most handy book of reference. It is larger and more ambitious than Mr. Burness's old Parliament-House Book. It contains, not only what may be called the practical statutes of indispensable utility (such as the Companies Acts, the Entail and Conveyancing Acts, the Bankruptcy Acts, the Procedure Acts, the Trust Acts, the Local Government Act, the Bills Code, the Partnership Code), but also a great mass of information for daily reference, such as List of Trust Investments, Table of Fees, Stamps, Rate of Interest, &c., and a Digest of Practice in the Court of Session and the Sheriff Court. It is creditable to the Editorship that the Trusts Act, 1891, is already incorporated. The only suggestion that occurs to us is that the Acts of last session relating to Custody of Children, and Registration of Writs might have been noted.

Notes on Decided Cases.

Bankruptcy—Trust.—The decision in the special case *The Heritable Reversionary Co., Limited* v. *M'Kay's Trustee*, July 14, 1891 (28 Sc.L.R. 929), settles, so far as the Scotch Courts are concerned, a question which has for a good while been exercising the minds of owners of property as well as of creditors in bankruptcy. This question was whether heritable property held in trust on an *ex facie* absolute title, recorded in the public registers, could be appropriated by the creditors of the trust-disponee upon his bankruptcy, or whether it could be revindicated on repayment of the debt by the real owner or his representatives. The question has now been answered in accordance with the first alternative, by a majority of three judges to one—Lord M'Laren being the dissenting judge. The judgment is based to a considerable extent upon the authority of preceding cases (such as *Wylie* v. *Duncan*, M. 10,269, and *Jeffrey* v. *Paul*, 1 Sh. & M'L. 767), and gives effect to a supposed principle that in heritable property the title of a trustee in bankruptcy, as well as all other singular successors, must be determined by the state of the public registers. Creditors are presumed, to have advanced their money to the bankrupt on the faith of the records. The supposed principle has been sometimes expressed by the maxim—a trustee in bankruptcy succeeds to property vested in the bankrupt, *tantum et tale*, as it stands upon the record. To some extent also the judgment proceeds upon a construction of the vesting clause (sec. 102) of the Bankruptcy Act, 1856. As Lord Kinnear puts it: "The statute gives to the trustee for creditors all the right which the common law gives to a *bonâ fide* purchaser."

That the judgment in question is one of wide-reaching importance is obvious. Nothing is more common, for instance, in Scotland than for borrowers of money to grant a security over their heritable property by way of *ex facie* absolute disposition, qualified by a private letter or declaration of trust, granted by the lenders, bearing that the property will be restored upon the debt being repaid. Such disposition is then put upon the register, while the letter of trust is usually allowed to lie undisclosed in the debtor's repositories. The effect of this kind of security

is that the lender, or security-holder, obtains all the advantages of an owner in relation to the property. He can sell, lease, or otherwise deal with it as his own, subject only to a personal liability to account. Not unusually the property conveyed is of greater value than the advance or advances it is intended to cover, and rarely, in practice, does a lender seek to alienate the property unless the borrower's circumstances render it necessary to secure himself from loss. Now, so long as the lender continues solvent, no difficulty arises—at least none of which the debtor or his representatives can complain. If the creditor have realised the security, he must account for and hand over the balance of the proceeds to the owner. But the lender may himself become insolvent. What happens then? Briefly stated, the effect of the judgment under notice will be, that on the lender's bankruptcy, his creditors may take the whole subject of security (whether it be of greater value than the sum lent or not), as part of the bankrupt's estate, and appropriate it for division among his general creditors, the true owner having no remedy beyond a common ranking for the value of the personal obligation to re-convey.

It may be conceded that the judgment in question is in accordance with a number of earlier decisions, but that it is in accordance with equity or the practical requirements of the mercantile community at the present day cannot be admitted. It is possible that the case may be carried, by final appeal, to the House of Lords, but failing that, or failing a reversal there, it is to be hoped that the law will be put on a more satisfactory footing by Act of Parliament. In the opening words of his opinion Lord M'Laren forcibly observes: "If it were possible to approach this question uninfluenced by the supposed tendency of previous decisions and professional impressions, I can hardly conceive that a Court of Justice would give countenance to the proposal to divide trust-property amongst the creditors of a trustee." And his Lordship concludes:—"I should think less highly than I do of our system of property law if I believed that it compelled us to give to creditors a right which the bankrupt himself could not conscientiously give, and which he never professed to be able to convey."

There is no sound reason, I think, for distinguishing heritable from moveable or personal property, in regard to the vesting of bankrupt property in a trustee for creditors. Property of the latter kind, whether corporeal or incorporeal, does not pass to the trustee, where it has been held by the debtor on a mere title of loan or trust. There was a time, indeed, when a bankrupt's creditors attempted to vindicate for themselves such property, on the ground of *reputed* or *fictitious* ownership—that the debtor had obtained credit on the faith of his possession. But by a series of decisions, beginning with *Gordon* v. *Cheyne*, 1824, 2 Sh. 675, and coming down to *Watson* v. *Duncan*, 1879, 6 Ret. 1247, the Courts negatived these claims. The simple and equitable rule applied was, that creditors can take no higher right than their constituent, that they stand in his shoes and must take *tantum et tale* as he held. Surely the same rule ought in equity

to prevail in the case of heritable property, possession of which can only be effectually obtained by registration of title.

It is an interesting fact that it was in the case under notice that the late Lord President delivered his last important judgment, and that it is characterised by almost all his accustomed force and cogency of reasoning.

HENRY GOUDY.

Liferent subject to Forfeiture.—*Chaplin's Trs.* v. *Hoile*, 18 R. p. 27. The question raised in this case was whether, in the case of a liferent not protected by a trust, a clause of forfeiture, contingent on sale or mortgage, was valid to prevent an effectual sale by the liferenter of his liferent interest. It has been decided in the affirmative.

By the terms of Mr. Chaplin's settlement beneficiaries having an interest thereunder (other than fiars) were prohibited "from selling, mortgaging, or otherwise disposing of such interest," it was declared that "such sales or mortgages, if made, shall be void," and that all parties signing deeds of sale or mortgage, "shall thereby forfeit and lose all benefit under this settlement, and shall give place to the next in succession."

The general question at issue being whether a testator may lawfully appoint a right of usufruct conferred by him to terminate on any event which he chooses to name, it is difficult to suggest a reason for holding that his power in this direction is limited. The admitted instances of contingent forfeiture or determination, which are more or less common in practice, show no common principle which can be appealed to in order to exclude other standards of duration more arbitrary and capricious in character. In England the efficacy of such clauses of forfeiture or cesser seems to be clearly established. In Scotland the opposite view seemed to receive some degree of countenance from certain dicta in the case of *Kirkland* v. *More*, 13 R. 798, where Mr. Chaplin's settlement was formerly before the Court. The question there was whether a party having a prospective right of liferent under the deed was bound to assign it to his trustee in sequestration. It was held that in view of the clause of forfeiture he could not be called on to do so. The opinion of the late Lord President, however, seemed to cast a doubt on the efficacy of the clause in the case of a liferenter in possession, as distinguished from the case of a liferenter *in spe*. His Lordship said: "Perhaps it was hardly in the power of the testator to make that declaration;" while Lord Shand expressed a direct opinion that had Kirkland, the bankrupt, been in possession of the interest to which he was entitled under the settlement, a transfer by him of his interest would not have been challengeable, no trust being interposed. Lord Shand apparently resorted to this

distinction in order to meet an argument founded on the decision in *White's Trustees* v. *White*, 4 R. 786, where the principle was enforced that an alimentary interest can be effectually created only through the medium of a trust, and that if the beneficiary be directly clothed with the provision, all protective conditions and restrictions — *e.g.*, a declaration that an annuity shall not be assignable — are ineffectual to frustrate his deeds and the diligence of his creditors. As the Lord President said: "I do not think that anybody, by a mere conveyance to an individual, can exempt that individual from the diligence of his creditors as regards the property conveyed." It was unnecessary, however, to invoke such a distinction in order to elide the principle of *White's* case, for a radical enough difference exists between mere protective restrictions and clauses of forfeiture. The former seek to maintain the right in the beneficiary in all events, without any effectual machinery for the purpose; the latter absolutely to terminate the right in certain events named. There is no analogy between the case of a fee and that of liferent in this respect, for it cannot be said that any particular limit of duration is repugnant to the gift of an interest which is in its own nature limited and temporary. In the case of a fee the requirements of entail law require to be followed, if purchasers, mortgagees, and creditors are to be excluded. The substantial difference between a liferenter with the usual common law powers and an heir of entail in possession (prior to the enabling statutes) was, perhaps, not great, but in principle is perfectly clear. The title in the latter case being one of ownership, the publication of a prohibition in the sasine was not sufficient, but publication also in the special Register of Taillies was required. As regards the manner in which the interests of creditors may be affected by conditions of forfeiture of liferent, on the other hand, contingent, say on bankruptcy or the institution of diligence, the record speaks for the terms of the title in the case of heritable estate, while, in the case of moveables, creditors would seem to be at no greater disadvantage than in dealing with a party subject to an alimentary trust, of which in the ordinary case they can have no information. It seems impossible to find at common law any principle on which to restrict a granter's right to refer the duration of the interest which he creates to any contingency he may appoint; and the decision in *Chaplin's* case negatives the idea of any such restriction. Thus Lord Rutherfurd Clark says: "If the granter is entitled to give a liferent which will determine on the occurrence of a certain event, I think that he may make it to determine on the occurrence of any."

The terms of the settlement in *Chaplin's* case gave rise to some difference of opinion on the bench regarding the effect of the forfeiture clause on creditors of the liferenter, Lord Young expressing great doubt whether creditors could sell without incurring forfeiture, while Lord Rutherfurd-Clark was inclined to think that the terms of the clause did not exclude the diligence of creditors, and was of opinion that adjudging

creditors would, in that case, be entitled to sell after obtaining decree of declarator of expiry of the legal. It is thought that Lord Rutherfurd Clark's views are right on both points. The scope of the clause seems to extend to voluntary alienations only, and in England it has been clearly settled that where the language of a clause restrictive of alienation does not extend to alienations *in invitum*, the attachment of the property by a creditor does not occasion a forfeiture (*Rex* v. *Robinson*, Wightw. 386; *Lear* v. *Leggett*, 2 Sim. 479). Again, the clause of forfeiture, striking as it does at the act of transfer from the beneficiary to another by way of sale or mortgage, does not seem to apply to a sale by an adjudging creditor, where the transfer from the beneficiary is effected by neither of these modes, and where the creditor sells not as representing his debtor, but in his own right. It will be observed that the case of *Chaplin's Trustees* does not in terms decide the validity of a clause forfeiting a liferent in the event of sequestration or other transfer for behoof of the creditors of the liferenter.

W. J. CULLEN.

Title to Sue.—*Renton Football Club* v. *M'Dowall and Others*, 13th March, 1891, 18 R. 670. This was an action of reduction, in which the pursuers and defenders were both unincorporated societies established for the pursuit of athletics. The defenders stated as preliminary defences—(1) That the pursuers had no title to sue, and (2) That the defenders were not duly convened. The action was raised at the instance of the Renton Football Club and certain of its office-bearers and members, while the defenders called were the Scottish Football Association with certain of its office-bearers and members of committee. The action concluded for reduction of a minute of the business and professional committee of the association, declaring the Renton Football Club guilty of professionalism, and expelling it from the Association. In consequence of the actings of defenders the Renton Football Club averred it had suffered great pecuniary loss, for which it was entitled to reparation. Appearance was entered for the Secretary of the Scottish Football Association, for certain of the members of the general committee, and for all the members of the professional committee called as defenders, but no appearance was entered *eo nomine* for the Scottish Football Association. The defenders averred that the pursuers did not represent and had no right to use the name of the Renton Football Club for the purposes of the action, but the pursuers averred that they were duly authorised at a meeting of the club to raise the action. Lord Kincairney allowed the pursuers a proof before answer of this averment, indicating, however, that if it were proved he would sustain their title to sue, and he repelled the defenders' plea that they were not duly convened. His judgment was sustained on a Reclaiming Note by the First Division.

The judgment at once commends itself as an eminently rational one, and it appears, on examination, to be fully justified by the decided cases on this branch of the law. The defenders' argument came to this, that unincorporated societies with descriptive names could only sue or be sued, whatever the number of their members might be, if all of them joined in the instance or were called as defenders. The Court has negatived this contention, and in so doing has repudiated the distinction, found in most books of practice, between mercantile firms and other unincorporated societies in the matter of title to sue and liability to be sued. It is generally laid down that an unincorporated society may sue or be sued—(1) in the names of all the partners or members; (2) in the names of the society (when that name is descriptive), and three or more of its members, provided *the society is a trading or mercantile company;* (3) in the name of the company itself when the name is not descriptive, but consists of the names of one or more of the individual partners or members. The effect of the decision is to extend the application of (2) by removing the limitation confining it to trading or mercantile firms. In principle, there certainly seems no reason why a charitable institution or an athletic club, which has suffered patrimonial loss, should not have the same facility of application to the Court as a mercantile firm. In the cases dealing with this branch of the law, it is, indeed, true that the question has generally arisen with a mercantile company. But there are cases in which the limitation of the rule to such companies has not been recognised (*Somerville's Trustees* v. *Edinburgh Bible Society and Others*, 8 S. 370; *General Assembly of Baptist Churches* v. *Taylor*, 3 D. 1030). The object of the rule requiring certain individuals to be joined in the instance, when the action is raised by a society with a descriptive name, is the protection of the defender. Such a society is not subject to diligence under its descriptive name, and the defender is entitled, if the action is to proceed at all, to see that there is some one against whom he may enforce any decree he may obtain in the original or any counter action. But the reason for this rule applies with equal force to all unincorporated societies, and there is nothing in it justifying a distinction between business firms and football clubs. The defender's right, in each case, is simply to see that the society is fairly represented in Court.

Much the same may be said of the defenders' second plea—that they were not duly convened.

The Scottish Football Association is composed of clubs whose collective membership amounts to several thousand persons, and it was admitted to be a constantly fluctuating body. To sustain the defenders' argument that all the members of this huge agglomeration should be called, would have been tantamount to shutting the door of the Court in the face of the pursuers. The defenders rested their argument chiefly upon the cases of *M'Millan* v. *The General Assembly of the Free Church*, 24 D. 1282, and *M'Millan* v. *The Free Church of Scotland and Others*, 2 M. 1444. M'Millan had been deposed by the Free Church Assembly, and he brought

two actions for redress. In the first action he called as defenders the General Assembly, with its Moderator and Clerks as its representatives, and also as individuals. It was dismissed, however, upon the ground that the Assembly not being a corporation, but a voluntary association chosen and met to transact its business and then to dissolve, could not competently be convened in an action for damages. He then raised a second action against the "general association or denomination calling themselves and known as the Free Church," and the Moderator of the Assembly and the two principal Clerks as representing the Association. This action was also dismissed, upon the ground that the Free Church was simply an aggregation of individuals, whose sole distinguishing characteristic was that they met together for Christian worship according to a particular form, that it was, therefore, not such a society as could have any *persona standi*, or be subject to diligence or any decree granted against it. It is worthy of notice, however, that the General Assembly of the Church of Scotland may sue or be sued by its Moderator and Clerks (*Cruickshank* v. *Gordon*, 5 D. 909), and the judgment of Lord Deas in the first of the *M'Millan* cases contains strong reasons for extending the privilege and liability to other similar bodies. Should such a question again arise and be discussed in the light of *Somerville* v. *Rowbotham*, 24 D. 1187, and the present case, it is thought that a different result might very probably be reached.

J. J. C.

Criminal Proceedings a Bar to Civil Action. — By the Salmon Fisheries Act, 1844, it is made a statutory offence to take salmon without leave of the owner of the fishing. The penalty is pecuniary, but may include forfeiture of tackle. The bailiffs have power to seize and detain tackle. It has recently been decided by the Second Division of the Court that a civil action brought in the Court of Session by fishermen for the recovery of nets which were alleged to be wrongfully detained by the owner of a fishery, may be barred by prosecution subsequently instituted by the owner against the pursuers under the above-mentioned statute, and conviction obtained thereon, the sentence including both money penalty and forfeiture of nets (*Kennedy* v. *Wise*, June 21, 1890, 17 R. 1036). The civil action also concluded for the value of the nets and damages for their wrongful seizure. It will be observed that the issues in the two proceedings were different, and not necessarily conclusive the one of the other. Nevertheless, a prior action is excluded by a subsequent action, and the jurisdiction of the Supreme Court is excluded by that of a summary Sheriff Court. The result is so extraordinary that it seems desirable to examine the reasons given by the learned judges. But these, after repeated perusal of their opinions, it is impossible to discover. The Lord Justice-Clerk and Lord Young refer to the fact that before evidence was led in

the prosecution, the magistrate was asked to sist in respect of the dependence of the civil action. But this merely strengthened the case of the pursuers. They say also that there was an appeal against the conviction, but no appeal was competent except under the Heritable Jurisdictions Act. The Lord Justice-Clerk says: "I think we are bound to assume that his [the inferior magistrate's] decision was right. We have no power to set it aside." It may be pointed out that he was not asked to set it aside, but to exercise his own jurisdiction. Lord Young took another view: "I think these two questions of fact were properly and competently answered in the most fitting Court to try them. *I* do not think it is reasonable to retry them. . . . *I do not want* to go into a case where the facts are not materially different." It is not surprising in these circumstances to find Lord Rutherfurd-Clark's judgment reported as follows:—"I prefer to deal with the case by itself, and I agree that the defender should be assoilzied." The Court seem to have acted on a presumption (which may have been well-founded) that the pursuers had no substantial case. This, however, is not a safe or usual ground on which to deal with questions of jurisdiction. It reminds one of Lord Braxfield telling his clerk to decern against the pursuer and see "hoo the deevil would look." What makes the judgment in *Kennedy* v. *Wise* more serious, is that their Lordships were dealing with and reversing a careful interlocutor by Lord Kincairney, in which he pointed out how completely the facts differed from the earlier cases of *M'Lellan* v. *Miller*, 11 Sh. 187, and *Gilchrist* v. *Anderson*, 1 D. 37. The first of these cases was decided by a bare majority against the opinion of Lord Fullerton. It was decided in conformity with the opinion of Lord Gillies, on the ground that the pursuer, who had been convicted of theft, must first bring a criminal action with the concurrence of the procurator-fiscal. This shows that the action was different in its nature from *Kennedy* v. *Wise* which resembled the case put by Lord Moncreiff in dismissing *Gilchrist* v. *Anderson*:—"If the pursuer proposes to make a civil question on the simple fact of the detention of the letter of credit, and the refusal to give the money to him, it should have been on a very different summons from that now before the Lord Ordinary." Both these cases were in fact actions for the conviction. And both were raised after the date of the conviction. In *Kennedy* v. *Wise*, it is a conviction on a subsequent complaint that is held to oust the action for detention of the nets. As Lord Kincairney justly observed: "I do not know of any authority for pressing a summary conviction to that extent. I cannot ascertain from the procedure following on the complaint or from the conviction, assuming it to be correct, whether or not the defender was justified in seizing the pursuer's nets *brevi manu* and in withholding them." Even in purely criminal business a judgment in the Sheriff Court is not binding on the High Court, and does not constitute *res judicata* between the Crown and the accused (*Fleming*, 5 Irv. 289). On the other hand it would appear from *Little* v. *Smith*, 8 D. 265, and 9 D.

737, that a declaration by an accused person is even inadmissible as evidence in subsequent civil proceedings relating to the same matter. Of course proceedings for penalties under the Salmon Fisheries Acts in Scotland are criminal and not civil in their nature (*Tay District Board* v. *Robertson*, 15 R. 40). Accordingly, *Kennedy* v. *Wise* had no resemblance to such cases as *Vernon* v. *Watson*, May 13, 1891, 2 Q.B. 288, where an order to repay misappropriated money under the Friendly Societies Act, 1875, followed by imprisonment in execution, was justly held to bar a subsequent action to recover the money.

W. C. S.

Exclusion of Jus Relictæ.—The rule laid down in the old case, *Miller* v. *Brown*, M. 6456, that for the exclusion of the *jus relictæ* by deed, no *voces signatæ* or express mention of that right are necessary, has been confirmed by the recent case of *Stewart's Trustees*, 28 Sc.L.R. 824. This decision, however, has extended the rule somewhat further than was necessary for the decision of the older action. In *Miller* there was an express renunciation by the wife of claims otherwise competent to her on her husband's estate. She renounced "all right to any of the goods, gear, or other effects belonging to her husband, or to any aliment or other provision of law competent to her as his wife, so that he might freely dispose of his effects, heritable and moveable, without her consent," and it was accordingly found that "the words of the deed were sufficiently broad to comprehend *jus relictæ* equally as if it had been expressed." In *Stewart's Trustees*, however, there was no express renunciation by the wife of any of her legal rights, and the Court, in coming to the conclusion that the *jus relictæ* was excluded, considered the deed as a whole, and deduced from its general scope the intention of the parties that the wife was to have no further claim upon the husband's estate after his death than was expressly provided to her in the deed.

Although the deed in question—an ante-nuptial marriage-contract—was framed and executed according to the forms in use in Cape Colony, it was clearly apparent therefrom that the intention of the parties was to retain his or her estate independently of the other spouse. It provided that there should be no community of property, that each should retain his or her estate as if there had been no marriage, that all bequests left to one spouse should be the exclusive property of that spouse, that each should have full liberty to dispose of his or her estate by will without hindrance by the other, and concluded by the husband settling upon his wife a provision of £3000 payable on his death and giving security therefor. The article which made this provision ended with the words, "the intent of the whole of this settlement being, that the said *A* shall receive the full sum of £3000 hereby settled upon her, but neither more nor less."

While the words "this settlement" might either refer to the settlement

of the £3000 in the particular article, or to the whole contract, when read along with the prior provisions the reasonable interpretation was that those words referred to the deed as a whole. This view was clearly in conformity with the preceding articles by which each spouse was to retain and dispose of his or her own estate, and thus the intention of the parties was obviously that the wife should have no other claim upon the husband's estate than the provision made for her in the deed. Very likely the lady, who is described as of Rondelosch in the Cape Division, never heard of the *jus relictæ*, but, as Lord Curriehill pointed out in *Keith's Trustees*, 19 D. 1040, the words of such a contract must be read with reference to the rights given by the law of the husband's domicile at the date of the contract. The intention of the parties having been thus ascertained, the rule of law settled in *Miller* that no particular words are necessary for the exclusion of the *jus relictæ* was clearly applicable.

J. Graham Stewart.

Heritable Securities—Titles to Land Consolidation Act, 1868. Sec. 117.—*Hughes' Trustees* v. *Corsane*, 18 R. 299.—In a note on the previous case of *Hare* (*Juridical Review*, Vol. III. p. 85), it was pointed out that the opinion expressed or acquiesced in by six out of the seven consulted judges in that case, to the effect "that the 117th section of the Titles to Land Consolidation Act, 1868, makes heritable securities moveable only in cases of intestate succession," appeared to be in conflict with the practice prevailing ever since the Act was passed, and also with an express decision in the case of *Guthrie* (8 R. 34). In the latter case the succession was not intestate, the deceased having left settlements disposing of his whole estate, yet the First Division decided that a heritable security, which formed part of his estate, was subject to the operation of the Act, and in the distribution of his estate must be dealt with as personalty and not heritage. In order to clear up the apparent discrepancy between this judgment in *Guthrie*, and the subsequent opinion in *Hare*, a special case was submitted to the Second Division, in which the same question as had been decided in *Guthrie* was again put, with the result that the opinion in *Hare* has been set aside, and the judgment adhered to and affirmed. The judges who took part in the decision in *Hare's* case were conferred with, and declared themselves satisfied that the present judgment did not in any way conflict with it. It was not, however, the decision in *Hare's* case which created the difficulty, but the opinion which accompanied it, and which did not appear essential to its soundness. Hardly any attempt was made to reconcile the opinion and judgment. Lord Kingsburgh, after acknowledging the difficulty the opinion had created, proceeded, "But it appears to me that the provision of the Act to which I have referred,

although it may only refer to cases of intestate succession, puts the direction of a person who gives a general direction as to what is to be done with her 'heritable' and 'moveable' estate, in the same position as if she had provided that the law—*i.e.*, the Act of Parliament—should determine what the meaning of these general terms should be." This passage is not characterised by his Lordship's usual lucidity and grip, but put briefly it seems to mean that while the Act may *only* refer to *intestate* succession, it may also embrace *testate* succession. As the matter now stands, therefore, the opinion expressed in Hare's case may be regarded as having been relegated to the category of "pious opinions," a firm and reverential belief in which is not to be considered as involving a denial of anything to the contrary.

J. G. CURRIE.

Fixtures as between Seller and Purchaser.—*Cochrane* v. *Stevenson*, July 10, 1891, 28 S.L.R. 848. There is some novelty in the discussion in this case how far in a question of fixtures between seller and purchaser it is safe to use cases involving the relation of heir and executor. According to the ordinary statements of the law in the text-books such an application would be legitimate. "Questions between vendor and purchaser . . . are governed by substantially the same rules as obtain between heir and executor" (Rankine on "Leases," p. 259. See also "Landownership," p. 114, and authorities there cited). This view is considerably modified by the opinion of Lord Kyllachy, followed by that of Lord M'Laren in the present case. According to them the relation of seller and purchaser, being one of contract, is ruled by the intention expressed in, or to be implied from, the terms of the agreement; and "in such cases there may be elements of construction available which may altogether supersede the legal presumptions." Thus, for example, if the fixtures in dispute are of great value, or are of a special nature, such as family portraits, such circumstances, which would have little bearing either way in a question between heir and executor, might be conclusive of an intention to omit the articles from a conveyance. In *Cochrane's* case three pictures of comparatively small value, which were attached to the walls of a dining-room designed in wainscot panelling, were claimed by the purchaser of a mansion house under a disposition in ordinary terms. All three were painted on canvas stretched on wooden frames in the ordinary way, and enclosed in outer frames which were attached to the wall by means of small plates and screw nails covered by dust mouldings. While, however, the frames of two of them were ordinary gilders' frames, behind which the panelling was continued, though in a rough condition; there was evidence to show that the frame of the third, which was a portrait of Charles II., had belonged to a mirror in which the painting had been substituted for the glass, and that this mirror frame bore a relation to the fixed decorations of the

XUM

mantelpiece, while behind it the panelling was altogether discontinued. In these circumstances the Court held that none of the pictures passed to the purchaser with the house; though in regard to the king's picture the judgments were based on varying and even contradictory grounds.

In cases like the present of inconclusive physical annexation, the considerations generally applicable (otherwise than as between landlord and tenant) to determine whether fittings follow the rule *accessio cedit principali*, are now comparatively well fixed. Apart from the nature of the article, and the destination impressed on it by the owners or person annexing it, they are defined by L.J.-C. Moncreiff in *Dowall* v. *Miln*, 1 R. 1180, to consist in the article being either essential or material for the use of the heritage, or specially adapted for it by construction. Where the fittings are of an ornamental nature, a variation of the last-mentioned course of construction is given in the case of *D'Eyncourt* v. *Gregory*, L.R. 3 Eq. 382, when Romilly, M.R., laid it down that the question depended upon whether the subjects are "strictly and properly part of the architectural design." Applying these considerations to the facts of the present case, the first two pictures presented little difficulty. The physical annexation was slight, and there was neither special adaptability nor harmony of design to betray any intention of annexing them to the heritage. The portrait of Charles II. stood, however, admittedly in a very different position. The frame formed part of the general design of the room, and the place it occupied had been provided for in the original construction of the building, thus affording ground for the contention that it had been annexed *usus perpetui causa*. Accordingly while the Lord President and the Lord Ordinary both neglected the "argument from design," and considered the picture, including frame and canvas, as a separate moveable subject in the same position as the other two portraits, Lord M'Laren admitted that if the picture had stood by itself, he would probably have held it to be incorporated with the tenement, basing his decision, which was to the opposite effect, on the fact of its occupying the same room with other pictures admittedly removable — a somewhat unsatisfactory ground of judgment. Lords Adam and Kinnear, on the other hand, reserved their opinion on the legal position of the mirror frame, but held that the portrait with its stretcher frame was detachable from it, and therefore moveable. The propriety of taking objects of art to pieces in this way to evade a legal maxim seems very doubtful. Suppose the frame, besides being a part of the general scheme of decorations, had also, both in form and colouring, been made specially to suit the picture. *Quid juris?* Must not the "argument from design" be introduced again? And if so, is the want of a due sense of harmony between frame and canvas to be sufficient to divide up a right of property originally united?

So far as the highly circumstantial precedents on this subject go, they seem scarcely to tell in favour of the seller. Thus *Nisbet* v. *Mitchell Innes*, 7 R. 575, decided that certain articles of adornment were to remain

with the seller of a house on the expressed ground that they formed no part of the general design. Again, the leading English case referred to, *Beck* v. *Rebow*, 1 P.W. 94, which gave to the seller of a house hangings and looking-glasses fixed to the wall by nails and screws, though in place of wainscot, is a decision dating from 1706; and though it has since been cited with approval, it is entirely opposed to a series of English cases ending with *D'Eyncourt* v. *Gregory* in 1866, and to the *Murthly Castle Case* in Scotland. We are rather surprised to see that the latter, cited in Brown on "Fixtures," 4th ed., pp. 17, 191, does not seem to have been quoted in the present case. Though but a Sheriff-Court judgment, the opinion subjoined to it is full and instructive. The two last-mentioned cases are indeed open to the objection that they did not arise out of the relation of seller and purchaser. Dealing, however, as they do with that of liferenter and fiar or heir of entail, they are stronger than cases merely between heir and executor; because according to Lord Ellenborough's well known and authoritative *dictum* in *Elwes* v. *Maw*, 3 East. 38, "Between the executors of tenants for life or entail and the remainder man or reversioner, the right to pictures is considered more favourably for executors than in the preceding case" (*i.e.*, the case of heir and executor).

A. H. B. Constable.

Common Employment.—*Johnson* v. *Lindsay*, 7 *Times'* L.R. 715, L.R. (1891) A.C. By this decision the House of Lords has added another to its corrections of the doctrine of common employment as laid down by the Scottish Courts, and marked another epoch in the history of that plea in this country. That history has been a periodic reversion of the Court of Session on appeal.

The plea of common employment, which was entirely unknown in the older books and decisions, was first introduced into Scots law by the House of Lords in 1856, in the *Bartonshill* appeal case. The authorities on which their lordships relied, in reversing the Court of Session in that case, were English and American, in both of which countries the doctrine had been previously enunciated. After the introduction of the new law, however, the Scottish Courts received it reluctantly, and minimised very much the effect of the *Bartonshill* decision by an ungenerous interpretation of the term common employment. "Fellow-servant" was at first held to include only those servants who laboured together with their hands, and not to include a superintendent to whom a master delegated his duties, and who might be described as his *alter ego*. But the House of Lords again overruled the Court of Session, and held that the doctrine was not to be so limited, but was to include servants of every grade in the same employment (*Wilson*, 6 M. (H.L.) 84).

The error of the Scottish Courts seems to have arisen from adopting

the term *collaborateur* in speaking of fellow-servant. This word is not used in America or in England, either in the text-books or the decisions, (except in Scottish appeals), and it appears to have been first used in Scotland by Lord President M'Neill in the *Bartonshill* case. It has been in common use since, however, in spite of its inapplicability. The idea of labour combined with physical effort, which the word contains (literary work is merely a secondary meaning), apparently induced the Courts to take the strict and technical view that it meant a person working with the hands, and thus led them erroneously to limit its legal application to workmen of an inferior grade. It may be remarked, however, that the American Courts have taken the same view, and give to fellow-servant a much more restricted meaning than the English. They hold that a master is liable to his servant for the fault of a "vice-principal," or *alter ego* [contrast *Malone* v. *Hathaway*, 21 Am. Rep. 572 (1876); and *Allen* v. *New Gas Company*, L.R. 1 Ex. Div. 251 (1876)].

Following on the House of Lords' decision in *Wilson's* case, the Scottish Courts went to the other extreme from their former practice, and extended the doctrine to all employed at work in one organisation, under a common head. It was held that the relation of fellow-servant existed between the pursuer and a servant of the defender, although the pursuer was the servant of a contractor employed by the defender, and not in the ordinary sense a servant of the defender (*Woodhead*, 4 R. 469); and ultimately it was held that two workmen employed at different kinds of work with the same common object, as a plumber and mason in building a house, were fellow-servants, although under different masters, so that the master of either could avail himself of the plea (*Maguire*, 12 R. 1071). But these decisions, as was pointed out in the present case, overlooked the very foundation of the doctrine of common employment—that by his contract with his employer a servant undertakes to waive all claims against his employer for the negligence of a fellow-servant—and gave effect to a plea arising out of contract in circumstances where there was absolutely no contractual relation. And it is the more strange that the Courts should have fallen into this error, and that their decision should have remained so long unchallenged, as in two previous Scottish cases it was pointed out that no one but the employer could plead the benefit of the contract (*Gregory*, 8 M. 282; *Adams*, 3 R. 221), and in England it had been decided "that in order to give rise to the exemption, there must be common employment and a common master" (*Swainson*, L.R. 3 Ex. Div. 349).

The effect of the decision is that these mainstays of defenders, *Woodhead* and *Maguire's* cases, are swept away, and that a defender cannot now escape liability merely by showing that the injuring and injured workmen were engaged at a common work, but that he must also show that he was master of both. Many an injured workman will now get to a jury who previously would have had his action cast out on relevancy. But

the precise effect of the decision has still to be worked out. The delicate question of what constitutes service, so as to imply acceptance of the risk of the negligence of a fellow-servant, was not decided, and Lord Watson expressly reserved his opinion on that point. And much controversy may be expected on the question, as a defender may succeed in establishing the plea by showing that the circumstances of the work were such that the pursuer must be held to have been acting in his service. It is not necessary in order to constitute such service that there should be a contract for a definite time, or at fixed wages (*Swainson, supra*), but merely that the pursuer should have put himself under the control of the defender. The test is whether the defender retained the power of controlling the work (*Sadler*, 4 E. and B. 578). If an employer can prove that he did so he will be able to maintain the plea (*Wiggett*, 11 Ex. 832; *Turner*, 33 L.T. N.S. 431; *Murray*, L.R. 6 C.P. 24; *Smith*, L.R. 10 Q.B. 125): where he cannot prove that, the workman will recover (*Abraham*, 5 H. and N. 143; *M'Credie*, 3 M. 539; *Rourke*, L.R. 1 C.P.D. 556; *Warburton*, L.R. 2 Ex. 30; *Wyllie*, 9 M. 466; *Smythe*, 17 R. 877, overruling *Congleton*, 14 R. 309).

This decision was given in an English appeal, but as there is only one principle on which common employment is founded, the case is of equal authority in Scotland, and there is no doubt that if the same facts were presented in a Scottish appeal the same judgment would be given.

A. T. G.

Public Company—Misrepresentation in Prospectus—Fraudulent or merely negligent—Damages.—*Angus* v. *Clifford*, 1891, 2 Ch. 449.—This case is an illustration of the principle given effect to by the House of Lords in *Peek* v. *Derry*, L.R. 14 App. Ca. 337, that an action of damages does not lie for loss caused by negligent, as distinguished from fraudulent, misrepresentations in a prospectus. It may be remembered that in *Peek* v. *Derry* the Chancery Division found directors liable for loss sustained by a shareholder who took shares in a company on the faith of a material statement, untrue in itself, but believed by the directors, though without reasonable grounds, to be true.

In the present case the company is a mining one, and the misrepresentation consisted in the statement that "full reports on the property have been prepared for the directors by the following eminent engineers," four in number: whereas the reports were prepared for and on the employment of the vendors, and not of the directors or company purchasing, though they were afterwards laid before the directors for their information, and to induce them to go into the enterprise. The result of the evidence was that the directors had carelessly adopted the above paragraph of the prospectus, without observing its importance or attaching any definite meaning to it.

Justice Romer found—(1) that the statement meant that the engineers had been instructed by the directors to report to them in the interests of the company; (2) that the statement was not true; (3) that it was relied on by the plaintiff; and (4) that it was material. He thereupon found the directors liable in damages, and directed enquiry as to the amount.

In the Court of Appeal, consisting of Lord Justices Lindley, Bowen, and Kay, the absence of any finding of fraud or dishonesty was at once pointed out; and it was ascertained from the judge that the idea of the honesty or dishonesty of the statement was not present to his mind when he gave judgment. Reviewing the evidence, the Court of Appeal found no grounds for affirming dishonesty. They, however, commented strongly upon the carelessness, gross and culpable, of making and issuing the statement in question; but found that in conformity with the law laid down by the House of Lords in *Peek* v. *Derry*, this was quite insufficient to convict the directors of fraud and subject them in damages.

That decision is fully discussed by the Lord Justices, and, while nothing new is added, the distinction between negligent and fraudulent misrepresentation is made, if possible, more clear. Lord Herschell had declared that there must be proof of fraud, and that "fraud is proved when it is shown that a false representation has been made—(1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false"—the third being an instance of the second. The present case (*Angus* v. *Clifford*) brings out that a false representation which is made merely carelessly, although the carelessness be gross and even culpable, does not satisfy any of these definitions. It has not the characteristic feature of the recklessness or carelessness described in the third head. As Lord Justice Bowen expresses it, "Not caring in that context does not mean not taking care; it means indifference to the truth, the moral obliquity which consists in the wilful disregard of the importance of truth." In short, the grossest possible carelessness in the use of language, even when put forth for others to rely upon, may be consistent with honesty; and so the Court found here.

At the same time, it is to be kept in view, and it is sound doctrine, that the acts or circumstances making up this culpable carelessness are items of evidence which have to be weighed, and from which the inference of indifference to truth—*i.e.*, dishonesty—may be drawn. But carelessness *per se*, however culpable, is not fraud. The same point was brought out in *Peek* v. *Derry*, where the Chancery Division held directors liable, as for fraud, because they had no reasonable grounds to believe the misrepresentation they made; a finding which, Lords Bramwell and Herschell observed, showed a confusion between unreasonableness of belief as evidence of dishonesty, and unreasonableness of belief as of itself constituting dishonesty.

The present judgment is a valuable exposition of the existing common law, which, it is well to remember (for the contrary is sometimes asserted),

was not created by the House of Lords in *Peek* v. *Derry*. As we pointed out when commenting on that decision two years ago (vol. i p. 421), the same law had been enunciated by Lord President Inglis in 1882 (9 R. 853), and Lord Justice Bowen emphasises the point that "*Peek* v. *Derry* certainly did not alter the old law about deceit," by saying that "there is not a lawyer living who has ever heard the law laid down in an action for deceit (that is, for damages for fraudulent misrepresentation) except in one way, and that is the way which *Peek* v. *Derry* has decided" (p. 470): and thereafter he summarises the law as expounded to juries thus:—"The old direction, time out of mind, was this, did he know that the statement was false, was he conscious when he made it that it was false, or if not, did he make it without knowing whether it was false, and without caring?" (p. 471). But Lord Justice Bowen acknowledges the importance of *Peek* v. *Derry* as deciding "that there was no legal duty cast upon persons in such cases to take reasonable care in forming their belief—that is to say, that negligence in forming their belief did not give rise in such cases to a cause of action" (470).

While this is the common law, Lord Herschell hinted in 1889 that any further remedy must come from the Legislature, and the Directors Liability Act, which was passed in 1890, and which applies to prospectuses issued after August 1890, seems to be the product of *Peek* v. *Derry*. Shortly stated, it holds directors and promoters liable for untrue statements, unless it be proved that they had reasonable ground to believe them true; or unless the statements purport to be made on the authority of an expert, in which case liability will still attach if it be proved that the directors had no reasonable ground to believe that the expert was competent.

A subordinate point of some importance occurred in the case of *Angus* v. *Clifford*—viz., the materiality of the misrepresentation. There was no evidence that the reports on the mine were untrue. Was then the misrepresentation that they were prepared *for the directors* of the purchasing company, instead of *for the vendors*, material? The Lords Justices felt the point to be difficult, and formed, or at least expressed, no opinion. If there was not even the exaggeration natural in a seller's 'expert, it is difficult to see that it was of any consequence whether the report was made to the seller or to the buyer.

J. C. L.

Trade Marks.—*In re Apollinaris Company's Trade Marks* (1891), 2 Ch. 186; *Richards* v. *Butcher* (1891), 2 Ch. 522.—It does not appear that wholesale dealing in such sober potations as "Apollinaris" or "Hunyadi Janos" has any tendency to quench the fiery spirit of man, or subdue his fine litigious instincts. The water-dealers in the first of these cases show a healthy vehemence and, figuratively speaking, a tendency to

throw bottles at each other's heads, which is not outdone by the importers of the more heady beverage for which Reims is famous, who figure in the second case. Both deserve the gratitude of the legal profession for helping to throw light on some of the dark places of the Trade Marks Registration Acts. In the first place, an important question of *locus standi* is disposed of, which meets us on the threshold of all these cases. The Act of 1875, sec. 5, and the Act of 1883, sec. 90, provide that any "person aggrieved" may apply to the Court for the rectification of the register. The Court of Appeal has now held that this is intended to prevent the action of common informers, or persons interfering "from merely sentimental motives," but is not to be so read as to make it necessary for the applicant to prove serious damage, before the Court will allow the case to be opened. "A man," says Fry, L.J., "in the same trade as the one who has wrongfully registered a trade mark, and who desires to deal in the article in question, is, *primâ facie*, an 'aggrieved person.'" But a man who objects to be confronted at the corner of every street by the direct question, "Have you used Pears' Soap this morning?" is not legally an "aggrieved person," however much we may sympathise with his resentment. It was further held that the names of well-known springs of mineral waters, such as "Apollinaris," "Hunyadi Janos," and the like, are geographical, and are not "fancy words" or "invented words" in the sense of the Acts. Apollinaris, bishop and martyr, who suffered at Ravenna in the fourth century, little thought that the right to use his name would be the subject of angry contention in England in the year of grace 1891. It appears that when this spring was discovered it was named after the saint, who was patron of a neighbouring church, and after whom a hill had already been called. An analogous case might be figured. If in building the new railway station in Princes Street a mineral spring were to be found, and the water offered to the public as St. Cuthbert's water, we have the authority of the Court of Appeal for saying that this would be a geographical name, and could not therefore be registered as a trade mark.

In the second case the question was whether the words "Monopole" and "Dry Monopole" were properly placed on the register as separate trade marks for different kinds of champagne on the ground of user of these marks before the Act. The objections urged were two. First, that "Monopole" and "Dry Monopole" were not "special and distinctive words," but were, in fact, a mere intimation that Heidsieck & Co. had the exclusive right to sell these brands. But, as every manufacturer has, if he chooses, the exclusive right to sell his own goods, it is hard to see how this could be a "distinctive word." In support of the argument that the words were merely descriptive and could not be registered, the well-known "*Melrose Hair-Restorer*" and "*Nourishing Stout*" cases were referred to. In the latter, as will be remembered, a dealer went so far as to maintain that he had the sole right to call his stout "nourishing," though, as every Londoner knows, it is a pious belief, much encouraged by "the trade,"

that all stout has extraordinary virtue in "bringing up" the constitution. The second argument was that the words had not been used alone, but always in combination with other words, and the cases of *Perry Davis's* "*Vegetable Pain Killer*," 15 App. Cas. 316, and *Palmer's* "*Braided Fixed Stars*," 24 Ch. D. 504, were strongly founded on. The Court did not find it necessary to decide whether "Monopole" was a distinctive word, Lord Esher, M.R., inclining to think that as a foreign word it might fall in that category. Their lordships were, however, unanimous in holding that there had been no sole user of this word or of "Dry Monopole" as trade marks. They had always been used in conjunction with the name of the firm, "Heidsieck & Co.," generally accompanied by an anchor or other device. There was nothing to make a buyer aware that the intention was to make these words alone the trade mark, and they were therefore ordered to be expunged from the register.

F. P. W.

INDIAN AND COLONIAL CASES.

De Mestre v. *West* [1891], App. Ca. 264. The decision of the Judicial Committee in this case—an appeal from the Supreme Court of New South Wales—will probably remove a deep and old-standing *lacuna* from the English law of conveyancing.

Under the statute 27 Eliz. c. 4, a "voluntary" conveyance may be defeated by a subsequent conveyance to a purchaser for value; and it has twice been held by the House of Lords (*Sutton* v. *Chetwynd*, 3 Mer. 249; and *Cormick* v. *Trapaud*, 6 Dow. 60) that this rule is applicable to limitations in favour of volunteers under marriage settlements. In *Newstead* v. *Searles* (1 Atk. 264) and *Clayton* v. *Lord Wilton* (6 M. and S. 67), the English Courts were supposed to have decided generally, and without reference to special circumstances, that a limitation in a marriage settlement to the issue of the settlor—(*a*) By a former marriage: (*b*) by a possible second marriage—was good against a subsequent conveyance for value; and in *Clarke* v. *Wright* (6 H. and N. 849, reported as *Dickenson* v. *Wright* in the Court below, 5 H. and N. 401), the Court of Exchequer Chamber, mainly on the assumed authority of the earlier decisions, supported a limitation in favour of an illegitimate child as against a subsequent conveyance for value. The soundness of *Clarke* v. *Wright* was challenged by Lord St. Leonards in his well-known work on "Vendors and Purchasers," and by the House of Lords in *Mackie* v. *Herbertson* (9 App. Cas. 303). In *De Mestre* v. *West*, which forms the subject of the present note, *Clarke* v. *Wright* has been definitely overruled. The following propositions are thought to express accurately the law as it has now

XUM

been settled — 1. 27 Eliz. c. 4, applies to limitations in favour of "volunteers" under marriage settlements. 2. The marriage consideration does not extend to *collateral*, *remote*, or *illegitimate* relations, so as to except them from the operation of the statute unless—which was the case in *Newstead* v. *Searles* and *Clayton* v. *Lord Wilton*—the order of the limitations is such that the limitations which *are not*, cannot be defeated without also defeating those which *are*, within the marriage consideration.

A. W. R.

[It may be of interest to point out in this connection, that some doubt exists as to the precise effect on the state of the law of Scotland produced by the decision of the House of Lords in *Mackie* v. *Gloag's Trustees*, 11 Rett. p. 10. Lord Selborne decided that case, to some extent, upon the ground that the children of the first marriage existing at the date of the marriage-contract were within the onerous considerations of the contract. Upon the other hand, it appears that Lord Watson, and particularly Lord Rutherfurd-Clark (whose admirable opinion was upheld in the House of Lords) decided the case solely upon the ground that, apart from any question of contract or contractual consideration, the wife had made an irrevocable conveyance in favour of trustees for the benefit of existing beneficiaries, to whom, therefore, an absolute and indefeasible interest had been given. This difference of view receives further importance from the fact that the majority of the judges in the Court of Session held that the gift to the existing children could not be regarded as matter of contract between the spouses. It is true that the opinions of the majority lose almost all the authority which might otherwise have attached to them, because, as pointed out by Lord Rutherfurd-Clark, they deal really with rights in *obligatione* or *destinatione* only, and not with the actual case of an absolute conveyance.

But, while the nature of the conveyance in *Mackie* v. *Gloag's Trustees* — viz., to the children procreated, or to be procreated, giving a joint right to the existing and the future children—rendered this distinction immaterial as regards the decision of that particular case, it may be asked what has the element of contract, or onerosity, to do with the question? Suppose that the rights given, whether contracted for or not, were separate and independent, and given, not to children, but to collaterals, remote relatives, or even illegitimates, is there any reason or authority why the completed and published gift to persons existing should not be held irrevocable in Scots law; and equally irrevocable, whether the subsequent disposition be for value, or gratuitous? The doctrine of *M'Intosh*, F.C., 12th January, 1812, does not appear to be limited to a conveyance in favour of children, but extends to every species of gratuitous conveyance to an existing third party, whose rights the granter has consented shall be secured by infeft-

ment. That doctrine, no doubt, is directly opposed to the rule of the English statute, 27 Eliz. c. 4, which is thus stated by Mr. George Sweet in his edition of the second volume of "Blackstone's Commentaries"—"This Act has been held to avoid in favour of subsequent purchasers for valuable or good consideration (including mortgagees and lessees at rack rent) every prior conveyance of or charge upon lands made *voluntarily*—that is, without consideration." Not only so, but Mr. Sweet adds—"Even though the prior voluntary conveyance is expressly communicated to the purchaser before he makes his bargain or pays his money."

This again seems contrary to the equitable doctrine laid down in such Scottish cases as *Stoddart* v. *Dalzell*, 4 Rett. 236, which cannot be limited to the case of a prior purchaser, but must include every species of *bonâ fide* prior right, including that constituted by a prior irrevocable donation. —Ed. *Jurid. Review.*]

Bishambar Nath and others v. *Nawab Imdad Ali Khan* (1890, L.R. 17 Ind. App. 181).—This case consisted of six consolidated appeals from a judgment of the Judicial Commissioner of Oudh, reversing a decree of the District Judge of Lahore. The question in all these appeals was whether certain moneys payable to the respondents by the Government of India out of the Government Treasury at Lucknow, were "political pensions" within the meaning of the *Civil Procedure Code* of 1882, sec. 266 (*g*) (*a*) and as such not liable to attachment and sale in execution of a decree. The material facts were as follows:—In 1838 Mohammad Ali Shah, then King of Oudh, had advanced 1,700,000 rupees to the Government of India, in pursuance of a formal treaty, whereby the latter undertook to apply the interest of that sum in perpetuity to the maintenance of—(*a*) the royal family and household including Malka Jehan, the king's spouse, and their respective heirs; and (*b*) a mosque selected by the king, in failure of the original "pensioners" (as they were styled in the treaty). In 1842 Mohammad Ali Shah advanced a sum of 1,200,000 rupees to the Indian Government as an additional provision for Malka Jehan and her heirs. With regard to this sum the arrangement was effected by letters between the King and the Governor-General. These letters referred to the treaty of 1838, but contained no provision as to the disposal of the capital on the possible failure of the beneficiaries. The respondent was the grandson of Malka Jehan.

It was argued—(1) that the allowance payable to the respondent was not a pension, but of the nature of a payment made under a private deed

(*a*) Sect. 266 (*g*), provides that "stipends and gratuities allowed to military and civil pensioners of Government and political pensions" shall not be liable as above-mentioned.

XUM

of settlement; and (2) that even if it were a pension it was assuredly not political. The Judicial Committee repelled both contentions, on the authority, and in the terms, of two passages in the judgment of the late Sir Barnes Peacock in *Nawab Sultan Mariam Begum* v. *Nawab Sahib Mirza* (16 Ind. App. 175):—

(1.) "Their Lordships," said Sir Barnes Peacock in that case, "concur with the Judicial Commissioner in the opinion that the king intended in 1842 to provide an additional pension for Malka Jehan of the same nature as that which he had already provided for her in the year 1838." "In a despotic Government," said Lord Watson in the present case (*ubi sup.* at p. 185) "like that of Oudh in 1842, there was really no distinction between State property and private property vested in the sovereign."

(2.) With regard to the words "political pension," their lordships adopted the language of Sir Barnes Peacock in the case above referred to:—"Although a settlement in the terms of the king's letter of 1842 creating pensions in perpetuity could not, under the Mohammedan law, be validly made by a private individual, the arrangement of 1842 takes effect as a contract or treaty between two sovereign powers."

The present decision leaves open the question whether sec. 266 (*g*) covers pensions payable by foreign States when remitted for payment to their pensioner in India.

A. W. R.

NOTE ON "SPECIAL CASES."

For the origin, so far as Scotland is concerned, of the special case strictly so called, we have to look to the provisions of the Court of Session Act, 1868. In England substantially analogous procedure seems to have been familiar in the practice of the Common Law Courts at a much earlier period, and was expressly provided for, on the Chancery side, by the Act 13 & 14 Vict. c. 35. Even in this country the principle involved had been, to some extent, recognised in the option accorded to parties at certain stages of jury trials (*a*), and also in cases under some special statutes (*b*), of embodying facts on which they were agreed in so-called special cases for the consideration of the judge. But even in the limited number of instances in which this embryo special case could be resorted to, the action was, in everything except the mere proof of the facts agreed on, an ordinary action requiring to pass through all the usual stages, and involving all the usual delays and expense incident to such an action.

Even on a casual reading of the section of the Court of Session Act which introduces this method of procedure, one can hardly fail to notice

(*a*) *Cf.* "Court of Session Act, 1868," sec. 32, which seems to be declaratory of an existing practice.

(*b*) *Cf. e.g.*, "The Court of Exchequer Act, 1856."

the extreme generality of its terms. Practically what it provides amounts to this, that when parties can agree on their facts, they may present a special case for the opinion or judgment of the Court on the law applicable. The most ample latitude is left for interpretation alike as to the class of cases in which advantage may be taken of its provisions, and the parties who may or must concur in stating any given special case.

If the Act of Parliament leaves us in doubt on these points, it must be confessed that we get but little help from the labours of the Court of Session in its quasi-legislative capacity—there being only a single Act of Sederunt directly bearing on the subject of special cases. When we turn, however, to the decisions, the case is altered the popularity of the remedy has been such as to secure the consideration of nearly all the most important points likely to arise in its application; so that now the law bearing on special cases, so far from being vague and ill defined, may be said to be about as clearly settled as that regulating any department of procedure.

Before turning to the more important decisions, a word may be said by way of emphasising the object and peculiar nature of the special case. It is "a very expeditious, economical, and satisfactory method of bringing to a decision questions of law *where parties are agreed as to the facts.*" (*a*) It is this agreement as to the facts which is of the essence of the whole matter. The parties may, indeed, be engaged in any current action or proceeding, but it is by no means necessary that they should be so; and in any case, by adopting the procedure under consideration, they cease to deal with each other at arm's length, as do the parties to an ordinary lawsuit, and become, in fact, parties to a mutual contract. For the special case is "necessarily a contract binding the parties to a certain state of facts (*b*)," and, it may be added, binding them also to accept the judgment given in the event of a particular opinion as to the law being delivered by the Court. This conception of the special case as a contract is of first importance, and furnishes the key to some of the most delicate and perplexing points in the decisions. The two questions—that of the circumstances in which a special case is a competent form of procedure, and that of the parties who ought to join in it if competent—although essentially distinct, still tend, in so many cases, to shade off imperceptibly into each other, that it is convenient to treat them together. On referring to the Act, we find that it declares that "*where any parties interested*, whether personally or in some fiduciary or official character, in the decision of a question of law, shall be agreed upon the facts, and shall dispute only as to the law applicable thereto, it shall be competent for them, without raising any action or proceeding, or at any stage of an action or proceeding, to present" a special case.

(*a*) Per Lord President Inglis in *The Parochial Board of Bothwell v. Pearson*, 11 M. 399; 45 J. 264.

(*b*) *Park v. Park's Trustees*, 3 R. 850.

A moment's reflection will show that this provision, if construed literally, would open the door to grave abuse, by rendering it possible to occupy the time of the Court in the consideration of frivolous, or even of supposititous, cases, so that we might expect to find the Divisions not merely supplanting the Juridical Societies in their chosen sphere, but even becoming modern oracles, to which every one who was curious on any point of law would go, to be saved the trouble of thinking for himself, or of paying others to do so for him.

Against such an onerous addition to its *nobile officium* the Court has rightly set its face from the first. Thus, in the early case of *Morton* v. *Gardner* (*a*), we find Lord Deas remarking, with his usual out-spoken directness: "The business of the Court is, in my opinion, to decide actual cases occurring in the real business and discussions of life, and parties are not entitled to occupy judicial time which ought to be devoted to real cases, by getting up fictitious cases;" and again, in the *Parochial Board of Bothwell* v. *Pearson* (*b*), "The question is purely hypothetical, *and we don't sit here to decide hypothetical cases.*"

On the other hand, although we have the authority of a *dictum* of Lord Shand's (*c*) for believing that this form of procedure was originally designed "mainly for the settlement of questions arising on the construction of family settlements, "it would be thwarting, unduly, the good intentions of the Legislature to restrict the procedure to this, or, indeed, to any particular class of cases.

A happy *via media* seems to have been found in the rule adopted by the Court, which may be stated generally as follows:—Wherever there is a question of law which may competently be raised between certain parties by some other procedure known to the law, then, under such circumstances, and only under such circumstances, these parties may, if they are agreed upon the facts, concur in presenting a special case.

This, in a single sentence, seems to be the rule established in the leading case of *The Parochial Board of Bothwell* v. *Pearson* (*d*), in which a Local Authority and a ratepayer, in a special drainage district, concurred in desiring opinion and judgment as to the incidence of an assessment. The Court held the special case to be incompetent, in respect that no assessment having been imposed, or charge threatened, the only form in which the question of law could have been raised practically was by an action of declarator, in which it would have been necessary to call more than a single ratepayer.

That it was entirely on account of the purely hypothetical nature of the question at the moment and between the parties that the case was dismissed, and not because of any general objection to the procedure as a means of dealing with the particular class of question involved is obvious

(*a*) 9 M. 548; 43 J. 266.
(*b*) Cited, *supra*.
(*c*) In *Ross* v. *Tennant's Trustees*, 5 R. 182.
(*d*) Cited, *supra*.

from the opinions given. Thus the Lord President said: "My reading of the 63rd section is, that where there are parties who can come before us in any process known to law, then if they are agreed on the facts, and dispute only as to the point of law, they shall be allowed to bring that point to trial in the shape of a special case."

In point of fact, special cases have since then frequently been sustained on the most varied states of fact—subject only to the rule laid down. One of the most recent cases reported, indeed, *The Greenock Harbour Trustees and others* (*a*), dealt with questions presenting no very remote analogy to those raised in *The Bothwell Parochial Board* v. *Pearson*; but in this instance the competency of the special case, brought to determine the ranking of claimants under various statutes authorising loans, was sustained because the parties to it embraced all those who would have required to be called, had the process been by way of declarator.

The same position had already been taken up in the earlier case of *Morton* v. *Gardner* (*b*), which is, however, chiefly interesting as deciding another point. The parties to it, having ingeniously incorporated in a lease a provision that any breach of the statutory certificate under 25 & 26 Vict. c. 35 should be an offence punishable by annulment of the lease or by interdict, concurred in presenting the special case—the point of law involved being whether certain specified facts constituted such a breach. The object was, of course, to obtain, under the guise of determining a civil right, a judgment by the Court of Session interpreting an Act which was expressly appropriated to the Court of Justiciary. The Court, by a majority, declined to entertain the case, holding that declarator and interdict was not a competent form of judgment in a special case, and that, therefore, as consideration of the question would not lead up to any civil remedy, they could not decide upon an Act appropriated to another Court. The opinions are to the effect that, in dealing with such statutes, the Court will follow the same rule in special cases as in other proceedings, and will only pronounce on them when necessarily incidental to the explanation of its proper civil jurisdiction.

As we have seen, it was the determination of questions arising out of settlements and trusts which was, perhaps, most prominently in view when procedure by way of special case was first introduced, and in practice it has been found a convenient and economical method of dealing with this class of question. There are, however, one or two rather nice points which it is well to keep in view in this connection, and which we may notice briefly.

Thus, in *Low's Trustees* (*c*) it was held that, while it is probably incompetent for a testator to exclude *all* questions which may arise under his trust from the purview of the Courts, it is perfectly permissible for him to

(*a*) 15 R. 343.
(*b*) 9 M. 548; 13 J. 266.
(*c*) 8 S.L.R. 638.

XUM

provide that there shall be no going to law over certain classes of questions, and to arrange for their settlement by making his trustees sole judges as to these. In this event, neither the trustees nor any beneficiary will be allowed to come before the Court, even by way of special case, for an opinion as to these questions.

In *Gray* v. *Gray's Trustees* (*a*), a special case, which was essentially an application for powers to grant certain deeds, was ruled incompetent; but on the trustees granting the deeds, and the case by them and the beneficiaries being amended so as to set forth this fact and crave the opinion of the Court whether they were entitled to grant the deeds and were discharged by doing so, the case was allowed and considered. A special case is not, however, a form in which trustees may actually obtain a discharge (*Ogilvie's Trustees and Others*) (*b*).

The difficulty which crops up in so many departments of legal practice of distinguishing between law and fact is especially serious in dealing with special cases, since the Court is uncompromising in insisting on a separation of these—all matters of fact being required to be embraced by the contract and only questions of law being left for decision. The Court, as Lord Cowan put it in *Wright's Trustees and Others* (*c*), does not decide jury questions, but the legal inference from facts admitted in the case.

Lawson's Trustees v. *Lawson* (*d*) well illustrates the nicety with which the distinction is pressed. The question was one of domicile, the parties being at one as to the facts, but desiring an opinion, *inter alia*, on whether the facts were such as to infer *animus remanendi*. This the Court held to be itself a question of fact, and refused to entertain the case until an amendment was added that "the deceased had no intention to return to his native country," when the question of domicile was taken up and decided.

We have already noticed, in dealing with the *Bothwell* case, how essential it is that all parties should be included in the special case who could claim a hearing were the matter tried in another way; and *Mackie's Trustees* v. *Martins* (*e*) rules that where a special case is brought for the determination of questions raised by a beneficiary under a trust, other beneficiaries having an adverse or contingent interest must themselves be parties, and are not sufficiently represented by the trustees, who, indeed, so far as they represent any one represent *all* the beneficiaries—*i.e.*, *ex hypothesi* opposite and conflicting interests.

Cases which involve the interests of one or more *incapaces* are not devoid of difficulty, and the decisions reported deserve careful consideration.

In the early cases of *Reid and Others* (*f*) and *Christie and Others* (*g*) *curatores ad litem* seem to have been given almost as a matter of course to minor and pupil parties to these special cases, the father in the one instance and the ordinary guardians in the other having interests adverse to the

(*a*) 4 R. 378.
(*b*) 8 M. 428.
(*c*) 8 M. 708; 42 J. 363.
(*d*) 10 R. 1278.
(*e*) 2 R. 621.
(*f*) 9 S.L.R. 156.
(*g*) 1 R. 237.

children. The leading cases are, however, *Park* v. *Park* (*a*) and *Ross* v. *Tennant's Trustees* (*b*), and in these the principles involved are thoroughly thrashed out and explained.

In the former case, which related to certain trust funds, the first parties were the trustees, uncles of the children interested, as their guardians *quoad* the trust-estate. The third parties were the same three uncles as individuals, with interests adverse to those of the pupils, and therefore, of course, incapacitating them from entering into any contract with themselves *qua* guardians relative to the trust-estate. The second party was the father of the pupils with interests adverse at once to them and to their uncles. Thus the only protection which the pupils had was that the special case was prepared by their uncles and their father whose interests were mutually opposed. In these circumstances the Court not only refused to appoint a *curator ad litem*, but declared the special case incompetent, the Lord President observing that a special case being necessarily a contract binding parties to a certain state of facts, it cannot be entertained between parties not entitled to contract.

In *Ross* v. *Tennant's Trustees* the first parties were certain children, the second being the trustees under a settlement, and the third a child *postnatus*, a brother of the first parties. The father, the natural tutor of the children, had no interest adverse to either party. In these circumstances the Court held, differentiating the case from *Park*, that as neither the father nor the trustees, as guardians *quoad* the estate, had interests adverse to those of the pupil children, the case was competent; that the father might represent in the case either the first parties or the third party; but (*diss.* Lord Shand) that he could not represent both, their interests being adverse. The father, however, being at the time abroad, the Court appointed a *curator ad litem* to each party.

The following propositions seem to embody the result of the decisions:—(1.) The particular form of *lis* known as the special case, deriving its origin essentially from contract, cannot come into existence where the parties are incapable of entering into contracts with each other, and there being no *lis*, so neither is there in such cases room for a *curator ad litem*. (2.) Where the parties are not so debarred from contracting, the case is competent, and if the natural guardians have no adverse interest and are not themselves parties to the case, there is no need of a *curator ad litem*, unless indeed certain of their wards have interests adverse to others, when they can only act for one, a *curator ad litem* being appointed for the others. (3.) Where the guardians, though having no adverse interest, are themselves parties to the case, its competency seems unquestionable, but in these circumstances it would seem proper to assign *curatores ad litem* to the *incapaces*. This will, of course, also be done where the usual guardians cannot act.

J. ROBERTON CHRISTIE.

(*a*) 3 R. 850. (*b*) 5 R. 182.

XUM

INDEX TO VOLUME III.

Abduction, Clitheroe Case, ... 156
Actio quanti Minoris, ... 303
Administration of Justice in Levant, . . . 145, 245
Advocacy in France, ... 223, 331
American Patent System, ... 264
Arbitration, Law of, ... 345
Arbiter, rule as to *delectus persona*, ... 63
Archives of Court of Justiciary, ... 197
Assimilation of Law of Sale, ... 297
Australia, Chinese Immigration into, ... 64

Bar, French, ... 223, 331
Bataille de Livres, ... 1, 131
Belgian Law on Hypnotism, ... 61
Bills of Lading, ... 325
Bills, Questions of Foreign Law as to, ... 37
Bracton's Note-Book, ... 15
Building Feus and Leases Bill, ... 158

Chinese Immigration into Australia, ... 64
Codification, Progress of, ... 97
Codification and the Partnership Act, 1890, . . . 44
Colonial Cases, ... 95, 194, 295, 383
Colonial Judges, Removal of, ... 349
Conquest, Feus of, ... 238
Contracts, Recognition of Foreign Law in, . . . 31
Conspiracy, Law of, ... 264
Criminal, The, ... 153

Dutch Controversy as to *Mare Liberum*, ... 5, 131

Early Law, Study of, ... 12
Edict, *Nautæ Caupones, &c.*, ... 306
Feus and Leases Bill, ... 158
Foreign Laws, Recognition of, ... 31
Forgotten Chapter in the History of Law, . . . 238
French Bar, ... 223, 331
French Law of *Saisie Foraine*, ... 155

XUM

PAGE

Germany, Codes in, ... 111
Grotius on *Mare Liberum*, ... 3

Holland and Britain, Controversy in Seventeenth Century, . 3, 131
Hypnotism, Legal Aspects of, ... 51

India, Sedition in, ... 348
Industrial Property, Madrid Conference, ... 65
Inglis, Lord President, ... 344
Innkeepers, see Edict, ... 306
Insanity, as Bar to Trial, ... 261
Insanity, Enquiry into, ... 346
International Law, Private, ... 31

Jackson Case, ... 156
Justiciary Court, Archives of, ... 197

Lading, Bills of, ... 325
Law Early, Study of, ... 12
Law of Conspiracy, ... 264
Law of Riot, ... 138
Legal Aspects of Hypnotism, ... 51
Legislation, Summary of, ... 351
Levant, Administration of Justice in, . . . 145, 245
Licensing Laws, ... 154
Livres, Une Bataille de 1, 131
Lynch, ... 213

Madrid, Conference at, ... 65
Mercantile Law Amendment Act, ... 300
Miller, Mr. Justice, ... 21

Nautæ Caupones, &c., ... 306

Partnership Act, 1890, ... 44
Patent System in America, ... 264
Possession in English Law, ... 121

Reference, Agreement as to, ... 63
Removal of Colonial Judges, ... 349
Riot, Law of, ... 138

Sale, Assimilation of Law of, ... 297
Saisie Foraine, ... 155
Sedition in India, ... 348
Selden's *Mare Clausum*, ... 133
Shipowners. See Bills of Lading, ... 325
Study of Early Law, ... 12
Summary of Legislation, ... 351

Trade-Marks, &c., Conferences on, ... 65
Turkey, Government of, ... 149, 245

PAGE

U.S.A., Supreme Court of, ... 23
Do., Codes in, ... 109
Do., Patent System in, ... 264
Do., Lynch Law in, ... 213

CONTRIBUTORS OF SIGNED ARTICLES.

PAGE

Birnie, J. B. L., ... 138
Brodie-Innes, J. W., ... 51
Brown, Richard, ... 297
Calderwood, Prof., ... 182
Christie, J. Roberson, . . . 386
Daniell, A., ... 77, 178
Demétriades, D., ... 145, 245
Grant, Prof. Sir L. J., ... 279
Grierson, P. J. Hamilton, . . . 274
Hastie, W., ... 267
Hunter, W., ... 170
Irvine, J. M., ... 69
Johnston, J. Carlyle, ... 359
Kennedy, N. J. D., ... 213
Kerly, D. M., ... 44
Kirkpatrick, Prof., 179, 180, 271, 357
Law, George, ... 238
Mackay, Æ. J. G., ... 167
Mackintosh, James, ... 306
M'Ilwraith, M., ... 155
M'Lennan, J. F., ... 276
Maury, W. H., ... 21
Miller, W. Galbraith, ... 31
Neilson, George, ... 12
Nys, Ernest, ... 1, 131
Scott, Charles, . . . 153, 161, 197
Sweet, Charles, ... 121
Stewart, J. Graham, ... 176
Sutherland, J. B., ... 325
Wilson, J. Dove, ... 97
Wilton, G. W., ... 223, 331
Wood, Philip F., ... 173

XUM

BOOKS REVIEWED.

	PAGE
Balfour's Court of Session Practice,	175
Black's Parochial Law,	282
Brown on Consideration,	283
Campbell's Principles of Mercantile Law,	78
Carle's Vita del Diritto,	267
Chalmers' Sale of Goods,	80
Court of Session Annual,	364
Craigie's Conveyancing,	170
Edmunds' Law of Letters Patent,	77
Exchequer Rolls of Scotland,	271
Foote's Private International Law,	78
Frost's Letters Patent,	178
Garofalo's Criminologie,	161
Godefroi's Law of Trusts,	173
Graham's Election Act, 1890,	175
Higgins and Jones on Letters Patent,	178
Hurst and Cecil on Commercial Law,	360
Johnson's Patentee's Manual,	77
Kant's Principles of Politics,	182
Lindley's Partnership Act,	172
Lioy's Philosophy of Right,	180
Lorimer's Studies,	69
Moncreiff on Fraud,	276
Moore on Extradition,	279
Murray's Property of Married Persons,	176
Murray, A. Graham, Digest of Registration Cases,	281
Panzera on the State as *ultimus hæres*,	179
Rankine's Erskine's Principles,	73
Robertson's Handbook of Banker's Law,	363
Roumains Hongrois,	364
Shrader's Sprachvergleichung,	274
Skelton's Public Health Act,	283
Talbot and Fort's Index of Cases Judicially Noticed,	361
Tallack's Penological Principles,	362
Taswell-Langmead's Constitutional History,	74
Tuke on Prichard and Symonds,	359
Wilson's Sheriff Court Practice,	167

SUBJECTS OF CASES REFERRED TO.

Arbiter cannot be Designed merely as Holder of an Office,	63
Assignation of Policy,	41
Assignment of Uncalled Capital,	81
Bankruptcy—Trust,	365
Bills, Acceptance got by Forgery,	192
Bills, Application of Foreign Law to,	38
Chinese—Tax on Immigration,	61
Common Employment,	377
Company—Surrender of Shares,	185
Company — Fraudulent Prospectus,	379
Conditio si sine liberis,	289
Conspiracy, Law of,	264
Contract—Inadequate Consideration,	87
Contributory Negligence,	293
Conversion,	93
Criminal Proceedings as Bar to Civil Action,	371
Deathbed, Law of,	291
Defamation—Privilege,	195
Fixtures as between Seller and Purchaser,	375
Heritable Securities, are they Moveable *quoad* Title?	85, 374
Husband and Wife — Clitheroe Case,	156
Husband and Wife — Loan by Wife to Husband—Ranking,	190
Imprisonment for Debt,	89
Insanity in Bar of Trial,	261
Jurisdiction of Dean of Guild,	83
Jus Relictæ, Exclusion of,	373
Licensing Laws,	154
Locus of Debt,	36
Marriage Settlement, How far Voluntary,	383
Patent—*Scire facias*,	95
Political Pensions, What are,	385
Railway Company—Liability for Traders' Waggons,	189
Real Burdens, Creation of,	284
Title to Sue,	369
Trade Mark,	92, 381
"Special Cases,"	386

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